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SUPREME COURT

Chief Justice

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DEPARTMENT ONE

Presiding Judge

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Associate Justices

JESSE W. CARTER - - - - - - - - - - - - San Francisco
B. REY SCHAUER - - - - - - - - - - - - - Los Angeles

DEPARTMENT TWO

Presiding Justice

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Associate Justices

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JUDGES

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JUDGES

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CALIFORNIA REPORTER

221 PACIFIC REPORTER

SECOND SERIES

35 Cal.2d 796

REDIKER v. REDIKER et al.
L. A. 20704.

Supreme Court of California, In Bank.
Aug. 18, 1950.

Action by Alice Gordillo Rediker against Abraham Sanford Rediker and others for separate maintenance, naming Josefina Valle, also known as Josefina Valle Rediker, as co-respondent, wherein named defendant filed a cross-complaint for annulment of marriage. The Superior Court for Los Angeles County, William J. Palmer, J., entered a judgment annulling the marriage as bigamous and awarding plaintiff $15,000 as putative spouse and plaintiff appealed. The Supreme Court, Traynor, J., held that divorce decree obtained by named defendant's first wife after his marriage to plaintiff was not as to plaintiff res judicata of existence of first marriage until entry of decree, that decree of divorce from first wife obtained by named defendant in Cuba was entitled to full faith and credit and that named defendant was estopped from denying the validity thereof.

Judgment reversed and cause remanded for a new trial.

Prior opinion, 212 P.2d 612.

1. Appeal and error ⇐122, 805

Award of $15,000 to plaintiff as putative spouse for her share of community property was based on decree annulling marriage as bigamous and was inseparable therefrom and appeal therefore had to be taken from the entire judgment and could not be abandoned as to the award.

2. Divorce ⇐172

While a divorce decree as between parties or privies is res judicata not only of their status with relation to each other but also of all issues that were litigated or could have been litigated therein, as to strangers to the action or a stranger and a party thereto, the decree is res judicata only to the extent that it adjudicates the future status of the parties in relation to each other.

3. Divorce ⇐172

A divorce decree is not res judicata of the previous validity of the marriage as against third persons who were not parties to the action and had no right to be heard therein.

4. Constitutional law ⇐315

A decision purporting to bind by the findings of fact in an earlier action, even though it was a proceeding in rem, a person who was not a party thereto and who had no notice or right to a hearing in such action would deprive such person of property without due process of law in violation of Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

5. Divorce ⇐326, 327

Cuban court had jurisdiction of suit for divorce by husband domiciled in Cuba and where divorce decree recited that court had jurisdiction and there was no evidence that absent spouse was not constructively served with process or that decree was obtained through fraud or collusion, divorce decree must be given the same effect by California courts as final judgments rendered in that state or in the courts of a sister state which are entitled to full faith and credit under Constitution of the United States. Code Civ.Proc. § 1915; U.S.C.A. Const. art. 4, § 1.

6. Divorce ⇐78

Where suit for divorce is brought in state of domicile of complainant, personal service on absent spouse is not a jurisdictional requirement and constructive serv-

ice on such spouse gives court jurisdiction of the cause and the parties.

7. Divorce ⇐327

It must be presumed, in absence of competent evidence to the contrary, that a foreign court had jurisdiction of suit for divorce brought in the state of domicile of complainant and that recital of jurisdiction in divorce decree is true.

8. Divorce ⇐81

Failure of complainant domiciled in Cuba to appear personally in suit for divorce in Cuba did not deprive Cuban court of jurisdiction to entertain the action, even though entry of decree under such circumstances may have been error.

9. Judgment ⇐501

A judgment entered in a court having jurisdiction of the action is not subject to collateral attack on ground of error in the exercise of such jurisdiction.

10. Divorce ⇐330

Husband, having instituted suit for divorce in Cuba and remarried in reliance on divorce decree, was estopped from denying its validity in suit by second wife for separate maintenance, even though he had merely employed an attorney to obtain divorce and did not appear personally in Cuban action.

11. Divorce ⇐168

The validity of a divorce decree cannot be contested by a party who has procured the decree or has remarried in reliance thereon or by one who has aided another to procure the decree so that the latter will be free to remarry.

12. Marriage ⇐40(1)

A strong presumption exists as to the validity of a marriage in absence of positive evidence to the contrary.

13. Marriage ⇐58(5)

Where marriage was contracted in reliance on divorce obtained by husband from previous wife, public policy required preservation of second marriage rather than its annulment on ground of invalidity of divorce decree, particularly where first wife had already obtained another divorce decree.

William Ellis Lady, Los Angeles, for appellant.

Hahn, Ross, Goldstone & Saunders and Philip Gordon, all of Los Angeles, for respondents.

TRAYNOR, Justice.

[1] Plaintiff appeals from a judgment annulling as bigamous her marriage to defendant and awarding her $15,000 as a putative spouse for her share of the community property and as compensation for her services to defendant during the purported marriage. She seeks to abandon her appeal from the award of $15,000, but that award is based on the decree of annulment and is inseparable therefrom. The appeal must therefore be taken from the entire judgment. Milo v. Prior, 210 Cal. 569, 571, 292 P. 647; Bailey v. Bailey, 60 Cal.App.2d 291, 293, 140 P.2d 693.

Defendant and Bessie Yalkut were married in New York in 1922. The following year they moved to Havana, Cuba, where defendant entered the manufacturing business and registered with the American consul as a Cuban resident. They lived together in Havana until 1930 when Bessie and their minor daughter returned to the United States. Defendant remained in Havana, and on January 27, 1939, in the Court of First Instance of the Southern District of Havana, he obtained a default divorce decree from Bessie. Bessie was awarded custody of their daughter. On November 28, 1939, defendant married plaintiff and lived with her as her husband until January 26, 1945, when he left plaintiff and came to Los Angeles. She followed him and discovered that he had married Josefina Valle, a former employee in his Havana factory.

Defendant was charged with bigamy because he married Miss Valle while still married to plaintiff. He was convicted of the charge but was granted probation upon payment of a $2,500 fine.

Plaintiff brought this action in the Superior Court of Los Angeles County for separate maintenance on the grounds of adultery and extreme cruelty. Defendant was personally served in the action and

cross-complained for an annulment of their marriage on the ground that at the time of their purported marriage plaintiff was still the wife of one Reinhold Graf. The trial court found that plaintiff was divorced from Graf six years before her marriage to defendant. The court also found, however, that at the time of her marriage to defendant he was still the husband of Bessie Yalkut Rediker and that the marriage of plaintiff and defendant was therefore bigamous and void. It found defendant's Cuban decree invalid for want of jurisdiction in that "said Bessie Rediker was never served with process in any such proceedings or purported proceedings, if any were had, and no trial or hearing was had in connection with any such proceedings or purported proceedings for the purpose of divorcing defendant from Bessie Rediker," and that defendant was lawfully married to Bessie Rediker until she obtained a divorce decree on August 28, 1944 in the Circuit Court of Dade County, Florida.

Defendant introduced the Florida decree over plaintiff's objection for the purpose of establishing that he and Bessie were lawfully married until the entry of the decree dissolved their marriage. The trial court, holding that the decree was conclusive of that fact stated: "Now, the Constitution of the United States specifically places upon this Court the duty to give full faith and credit to that judgment of the Court of the State of Florida. * * * Consequently I am not in a position to ignore it. I have to accept it and as I pointed out in my notice of decision that judgment carried the absolutely necessary implication that up to the time that it was rendered Abraham and Bessie were married and that at the time Abraham married Alicia he was married to Bessie. * * * You say that you were not a party to the divorce action. That is not a fully correct statement because we are all parties to every divorce action because a divorce action is an action in rem and that divorce action was presented in this Court for the purpose of proving not any of the issues that were involved in the case but simply for the purpose of proving itself, namely, that she was given a decree of divorce as of a certain date and in my judgment it was very properly admissible in this case."

The trial court concluded that in "proving itself" the Florida decree proved the "absolutely necessary implication" that defendant and Bessie were married until the date it was entered and that it was *res judicata* on that issue. It therefore found that the marriage of defendant and plaintiff was bigamous and granted the prayer of the cross-complaint for an annulment.

On this appeal plaintiff contends that the Florida decree is *res judicata* in this action only insofar as it adjudicated the parties' lack of marital relationship to each other from then on, that the trial court's finding that the Cuban divorce is invalid is not supported by the evidence, and that defendant, having initiated the Cuban action and having taken advantage of the decree therein by remarrying, is estopped to deny its validity.

Defendant contends that an existing valid marriage is a condition precedent to the entry of a divorce decree under Florida law, Keener v. Keener, 152 Fla. 13, 11 So.2d 180, and that the entry of the decree imports a finding that defendant and Bessie were lawfully married at the time of its entry, five years after the purported marriage of defendant to plaintiff. He urges that, since a divorce decree is a judgment *in rem,* the essential finding that the parties thereto were lawfully married is *res judicata* in this action, and that, since the Florida court had jurisdiction to enter the decree and plaintiff does not contend that it was procured by fraud or collusion, this court must accord full faith and credit to the decree and to the finding of a lawful marriage necessarily implied therein. U.S.Const. Art. IV, § 1; Williams v. State of North Carolina, 317 U.S. 287, 299, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273; Estin v. Estin, 334 U.S. 541, 546–547, 68 S.Ct. 1213, 92 L.Ed. 1561, 1 A.L.R.2d 1412. He alleges that "a judgment in a divorce case must be treated as dealing with status prior to divorce as well as after, and the one independently of the other," and that the *res* in a divorce action

"is not only the subsequent singleness of the parties, but also their prior marital status—a determination which is 'immune from collateral attack'."

[2, 3] That contention, however, is opposed to the prevailing rule in most of the jurisdictions of the United States and to several decisions of this court. It is an oversimplification to state that a divorce proceeding is a proceeding *in rem*, and to proceed from that statement to the assumption that a decree entered therein is *res judicata* in an action between a party and a stranger thereto, not only as to the subsequent status of the parties with relation to each other, but also as to all issues decided or that might have been decided in the proceeding. The weight of authority holds that a decree of divorce is a judgment *in rem* only to the extent that it adjudicates the future status of the parties in relation to each other. Williams v. North Carolina, 317 U.S. 287, 298, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273; Williams v. North Carolina, 325 U.S. 226, 232, 65 S.Ct. 1092, 89 L.Ed. 1557, 157 A.L.R. 1366. As between parties or privies, the decree is *res judicata* not only of their status with relation to each other but also of all issues that were litigated or that could have been litigated therein. Blumenthal v. Blumenthal, 97 Cal.App. 558, 561, 275 P. 987; Petry v. Petry, 47 Cal.App.2d 594, 595, 118 P.2d 498; Borg v. Borg, 25 Cal.App.2d 25, 29, 76 P.2d 218; 2 Freeman, Judgments, § 906, p. 1904. Estate of Lee, 200 Cal. 310, 314, 253 P. 145, on which defendant relies, has been properly interpreted in Blumenthal v. Blumenthal, supra, as stating the rule applicable between parties and their privies. As between strangers or strangers and parties, however, the decree is *res judicata* only in that it conclusively determines that the parties are thereafter free to remarry so far as any relation to each other is concerned. It does not establish the previous validity of their marriage against third persons who were not and had no right to be heard thereon. 2 Freeman, Judgments, § 910, p. 1913; 3 Freeman, Judgments, § 1524, pp. 3131-3132; Restatement, Judgments, § 74, p. 335; Hunter v. Hunter, 111 Cal. 261, 266, 43 P. 756, 31 L. R.A. 411, 52 Am.St.Rep. 180; Estate of James, 99 Cal. 374, 379, 33 P. 1122, 37 Am. St.Rep. 60. "We may lay on one side, then, any argument based on the misleading expression that all the world are parties to a proceeding *in rem*. This does not mean that all the world are entitled to be heard; and, as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the findings of fact, although bound to admit the title or status which the judgment establishes." Holmes, J., in Brigham v. Fayerweather, 140 Mass. 411, 413, 5 N.E. 265, 267; see also, Wilson v. Mitchell, 48 Colo. 454, 469, 111 P. 21, 30 L.R.A.,N.S., 507; Oborn v. State, 143 Wis. 249, 267, 126 N.W. 737, 31 L.R.A.,N.S., 966; Williams v. Williams, 63 Wis. 58, 75, 23 N.W. 110, 53 Am.Rep. 253; Pollard v. Ward, 289 Mo. 275, 284, 233 S.W. 14, 20 A.L.R. 936; American Woolen Co. v. Lesher, 267 Ill. 11, 17–18, 107 N.E. 882; Willey v. Howell, 168 Ky. 466, 470, 182 S.W. 619; Matter of Holmes' Estate, 291 N.Y. 261, 269–270, 271, 52 N. E.2d 424, 150 A.L.R. 447; 44 Col.L.Rev. 442, 444–445; 16 Cal.L.Rev. 146.

The decisions of this court have established that a divorce decree is *res judicata* as to strangers thereto only to the extent that it establishes the future status of the parties. Thus, in Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 31 L.R.A. 411, 52 Am. St.Rep. 180, plaintiff, suing to annul as bigamous his marriage to the defendant, introduced a decree of divorce obtained by her from her first husband twenty-five years after she married plaintiff. He asserted that the entry of the decree dissolving that marriage was *res judicata* of its existence until it was dissolved by the entry of the divorce decree. This court, however, held that as between a party to the divorce action and a stranger thereto the decree was a judgment *in rem* only in that it adjudicated the future status of the parties. "So far, and no farther, the judgment bound him and all the world." 111 Cal. 261, 266, 43 P. 756, 757.

In Estate of James, 99 Cal. 374, 379, 33 P. 1122, 37 Am.St.Rep. 60, and Estate of McNeil, 155 Cal. 333, 343–344, 100 P. 1086, identical questions were presented. In

each case, a first wife challenged the right of decedent's second wife to succeed to his estate. In each case the first wife contended that decedent's second marriage was bigamous for the reason that his divorce from his first wife was invalid. In support of that contention, each first wife offered in evidence a separate maintenance decree obtained by her after the decedent obtained the allegedly invalid divorce, contending that the separate maintenance decree was *res judicata* of the continued existence of the first marriage. In both cases, the court held that the later decree did not, as between a party thereto and a stranger, reinstate the first marriage notwithstanding the intervention of a previous decree.

This court has also held that an order admitting a will to probate, although a judgment *in rem* to that extent, was not *res judicata* of the essential finding that decedent was a California domiciliary, except as between the parties to the probate proceeding. Estate of Bloom, 213 Cal. 575, 578–579, 2 P.2d 753; see also, Estate of Newman, 124 Cal. 688, 692, 57 P. 686, 45 L.R.A. 780; Riley v. New York Trust Co., 315 U.S. 343, 352–353, 62 S.Ct. 608, 86 L. Ed. 885. Although several decisions have held that the findings in a divorce action are *res judicata* as between the parties thereto, they have disclaimed any intention to apply the doctrine to persons not parties to the divorce action. Estate of Hughes, 80 Cal.App.2d 550, 556, 182 P.2d 253; Godfrey v. Godfrey, 30 Cal.App.2d 370, 380, 86 P.2d 357; Borg v. Borg, 25 Cal. App.2d 25, 29, 76 P.2d 218.

Uncertainty as to the validity of migratory divorces created by the recent decisions of the United States Supreme Court, Williams v. State of North Carolina, 317 U.S. 287, 299, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273; Williams v. State of North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366; Rice v. Rice, 336 U.S. 674, 69 S.Ct. 751, 93 L.Ed. 957, has induced many spouses, doubtful of the validity of such a divorce and wishing to insure the validity of a remarriage, to seek a second divorce in the state of their present domicile. See Powell, And Repent at Leisure, 58 Harv.L.Rev. 930, 1004. The possibility that a trial court in a later proceeding may find that the moving spouse was not domiciled in the state in which the decree was entered may induce many spouses to secure a second decree rather than to rely on the first, to avoid the risk that later litigation will prove such reliance misplaced. Williams v. State of North Carolina, 325 U.S. 226, 232, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L. R. 1366; Rice v. Rice, 336 U.S. 674, 69 S. Ct. 751, 93 L.Ed. 957; Crouch v. Crouch, 28 Cal.2d 343, 169 P.2d 897; see Powell, supra.

[4] The rights of an innocent second spouse or the children of a second marriage are not diminished by the findings of fact in a proceeding to which they were not parties and in which they had no right to be heard. Such a holding would be not only unreasonable but constitutionally objectionable. A decision of any court purporting to bind by the findings of fact of an earlier action a person who was not a party thereto and who had no notice or right to a hearing in that action deprives that person of property without due process of law and is prohibited by the Fourteenth Amendment to the United States Constitution. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 656; Hansberry v. Lee, 311 U.S. 32, 40-41, 61 S.Ct. 115, 85 L.Ed. 22, 132 A.L.R. 741; Gratiot County State Bank v. Johnson, 249 U.S. 246, 248-249, 39 S.Ct. 263, 63 L.Ed. 587. A state court cannot dispense with the requirement of notice and hearing by labelling the proceeding "*in rem*" if it seeks to make the findings of fact binding upon a stranger to the earlier action. A state court may no more make its findings of fact binding on a person over whom it has no jurisdiction than it may bind him by a judgment *in personam* when he has not been personally served. Hansberry v. Lee, supra; Pennoyer v. Neff, 95 U.S. 714, 729, 24 L.Ed. 565.

[5] Apart from the Florida decree, there is no evidence to support the finding that "the marriage between said Bessie Rediker and defendant was not dissolved

prior to August 28, 1944 or at all by or as a result of any proceedings conducted" in the Cuban divorce action. The trial court did not find that defendant was not a bona fide Cuban domiciliary; defendant admits that he was. The Cuban court therefore had jurisdiction to enter the decree and, since its procurement was not the result of fraud or collusion, the decree must be given "the same effect as final judgments rendered in this state" or in the court of a sister state to which this court must give full faith and credit. Code of Civil Procedure § 1915; Williams v. State of North Carolina, 317 U.S. 287, 299, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273; Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429, 1 A.L.R.2d 1355; Coe v. Coe, 334 U.S. 378, 68 S.Ct. 1094, 92 L.Ed. 1451, 1 A.L.R.2d 1376; Baldwin v. Baldwin, 28 Cal.2d 406, 410-411, 170 P.2d 670.

[6, 7] The trial court found the Cuban divorce decree invalid for want of jurisdiction in that "said Bessie Rediker was never served with process in any such proceedings." It is undisputed that Bessie was not personally served in the Cuban action, but personal service on an absent spouse is not a jurisdictional requirement, if the action is brought in the state of domicile of the complainant. Williams v. State of North Carolina, supra; Baldwin v. Baldwin, supra; Crouch v. Crouch, 28 Cal.2d 343, 169 P.2d 897; Saul v. Saul, 74 App.D.C. 287, 122 F.2d 64, 69. Constructive service on the absent spouse gives the court of the state of domicile jurisdiction of the cause and the parties, and the record is devoid of any evidence that Bessie was not constructively served in the Cuban action. The only evidence before the trial judge on that issue was the recital of jurisdiction in the Cuban decree. In the absence of competent contrary evidence, it must be presumed that the foreign court had jurisdiction and that its recital thereof is true. De Young v. De Young, 27 Cal.2d 521, 525, 165 P.2d 457; Saul v. Saul, 74 App.D.C. 287, 122 F.2d 64, 69.

[8, 9] Defendant testified by deposition that he did not appear in the Cuban action but that he gave an attorney seventy-five dollars and requested him to procure a divorce, and that he knew nothing further about the matter until his attorney informed him that the divorce was granted. Entry of the decree upon the failure of the complainant to appear personally in the Cuban action may have been error, but his failure to appear did not deprive the Cuban court of jurisdiction to entertain the action. If a court has jurisdiction of an action, a judgment entered therein is not subject to collateral attack on a showing of error in the exercise of that jurisdiction. "Something more than mere error must be shown, in attack upon a foreign judgment, to deprive it of force and effectiveness." Rutledge, J., in Saul v. Saul, 74 App.D.C. 287, 122 F.2d 64, 68; Baldwin v. Baldwin, 28 Cal.2d 406, 410-411, 170 P.2d 670.

[10, 11] Even if the Cuban decree were invalid, defendant cannot contest its validity. The validity of a divorce decree cannot be contested by a party who has procured the decree or a party who has remarried in reliance thereon, or by one who has aided another to procure the decree so that the latter will be free to remarry. Brugiere v. Brugiere, 172 Cal. 199, 203-204, 155 P. 988, Ann.Cas. 1917E, 122; Kelsey v. Miller, 203 Cal. 61, 86, 263 P. 200; Harlan v. Harlan, 70 Cal.App.2d 657, 662, 161 P.2d 490; Estate of Davis, 38 Cal.App. 2d 579, 584-585, 101 P.2d 761, 102 P.2d 545; Hensgen v. Silberman, 87 Cal.App.2d 668, 674, 197 P.2d 356; In re Kyle, 77 Cal.App. 2d 634, 639-640, 176 P.2d 96; Goodloe v. Hawk, 72 App.D.C. 287, 113 F.2d 753, 756, 757; Saul v. Saul, 74 App.D.C. 287, 122 F.2d 64, 70; Margulies v. Margulies, 109 N.J.Eq. 391, 392, 157 A. 676; Van Slyke v. Van Slyke, 186 Mich. 324, 330, 152 N.W. 921; Bowen v. Fink, D.C., 34 F.Supp. 235; Krause v. Krause, 282 N.Y. 355, 360, 26 N. E.2d 290; Brown v. Brown, 242 App.Div. 33, 272 N.Y.S. 877, affirmed 266 N.Y. 532, 195 N.E. 186; Chapman v. Chapman, 224 Mass. 427, 433, 113 N.E. 359, L.R.A. 1916F, 528; Matter of Lindgren's Estate, 293 N.Y. 18, 22-23, 55 N.E.2d 849, 153 A.L.R. 936; Marvin v. Foster, 61 Minn. 154, 160, 63 N.W. 484, 52 Am.St.Rep. 586; Mohler v. Shank's

Estate, 93 Iowa 273, 282, 61 N.W. 981, 34 L.R.A. 161, 57 Am.St.Rep. 274; Rest., Conflict of Laws, § 112, pp. 169-170; Goodrich, Conflict of Laws, 3d Ed., 1949, § 127, pp. 401-402. Thus, in a suit for separate maintenance in which the husband asserted as a defense an earlier Nevada divorce secured by him, this court held that the plaintiff wife was estopped from contesting the validity of the decree by virtue of her remarriage in reliance upon it. Brugiere v. Brugiere, 172 Cal. 199, 203-204, 155 P. 988, Ann.Cas. 1917E, 122. By the same reasoning, it has been held that a wife who consented to a Mexican "mail order divorce" and remarried in reliance upon it was estopped from questioning its validity in an action to determine whether she or her ex-husband's second wife was entitled to his estate. Hensgen v. Silberman, 87 Cal. App.2d 668, 674, 197 P.2d 356; see also Estate of Davis, 38 Cal.App.2d 579, 584-585, 101 P.2d 761, 102 P.2d 545. The doctrine of estoppel has also been held applicable to cases in which a husband sought to assert the invalidity of his or his wife's earlier divorce from another as a defense to her action for divorce and alimony. Margulies v. Margulies, 109 N.J.Eq. 391, 392, 157 A. 676; Van Slyke v. Van Slyke, 186 Mich. 324, 330, 152 N.W. 921.

In Harlan v. Harlan, 70 Cal.App.2d 657, 161 P.2d 490, plaintiff sued his wife for an annulment of their marriage as bigamous, alleging that she secured a Mexican divorce from her first husband but that the divorce was invalid for want of jurisdiction in the Mexican court. The trial court granted an annulment on the finding that the Mexican decree was invalid. The judgment was reversed on appeal. The appellate court held that notwithstanding that the defendant's Mexican decree was invalid, plaintiff was estopped from asserting its invalidity because he had aided and counselled the defendant in procuring it so that she might marry him. "To hold otherwise protects neither the welfare nor morals of society but, on the contrary, such holding is a flagrant invitation to others to attempt tc circumvent the law, cohabit in unlawful state, and when tired of such situation, apply to the courts for a release from the indicia of the marriage status." Harlan v. Harlan, 70 Cal.App.2d 657, 663–664, 161 P.2d 490, 494.

The New York Court of Appeals, in a case similar to the present one, reached the same conclusion as the court in the Harlan case. As a defense to his wife's suit for separate maintenance, the defendant contended that their marriage was bigamous on the ground that he had secured a Nevada divorce from his first wife but that the Nevada court lacked jurisdiction to enter the decree. Although the court regarded the Nevada decree as invalid, it refused to annul the marriage because the defendant, having procured the decree, was estopped from questioning its validity. "We cannot lose sight of the fact that the present defendant was himself the party who had obtained the decree of divorce which he now asserts to be invalid and repudiates in order that he may now disown any legal obligation to support the plaintiff, whom he purported to marry. To refuse to permit this defendant to escape his obligation to support plaintiff does not mean that the courts of this State recognize as valid a judgment of divorce which necessarily is assumed to be invalid in the case at bar, but only that it is not open to defendant in these proceedings to avoid the responsibility which he voluntarily incurred." Krause v. Krause, 282 N.Y. 355, 359–360, 26 N.E. 2d 290, 292; Matter of Lindgren's Estate, 293 N.Y. 18, 22, 55 N.E.2d 849, 153 A.L.R. 936; Guilmain v. Guilmain, Sup., 58 N.Y.S. 2d 662, 666; Picciano v. Picciano, Sup., 65 N.Y.S.2d 410, 411; Goodloe v. Hawk, 72 App.D.C. 287, 113 F.2d 753, 756; Saul v. Saul, 74 App.D.C. 287, 122 F.2d 64, 70; Bowen v. Finke, D.C., 34 F.Supp. 235; Chapman v. Chapman, 224 Mass. 427, 433, 113 N.E. 359, L.R.A.1916F, 528; Mohler v. Shank's Estate, 93 Iowa 273, 282, 61 N.W. 981, 34 L.R.A. 161, 57 Am.St.Rep. 274.

By the same reasoning, it is clear that defendant has estopped himself by his conduct from contesting the suit of his wife for separate maintenance on the ground that they are not lawfully married. He was the moving party in the Cuban action;

he accepted the benefits of the decree therein by remarrying; and he now seeks to assert its invalidity to avoid his obligations to the plaintiff by virtue of that marriage. "One who has invoked the exercise of a jurisdiction within the general powers of the court cannot seek to reverse its orders upon the ground of lack of jurisdiction." Harlan v. Harlan, 70 Cal.App.2d 657, 662, 161 P.2d 490. Defendant seeks to avoid estoppel in this case by reliance on his testimony that he went to a lawyer to get a divorce, that he did not know anything further about the action until he was informed that the divorce had been granted, and that he did not appear in the divorce proceedings. He contends that he was not the moving party in the action so as to be estopped by his conduct therein. This contention overlooks the facts that he initiated the proceedings, paid for the attorney's services in connection therewith, did not disclaim the divorce when informed that it was granted, and took advantage of the decree by marrying the plaintiff ten months later.

[12] Defendant contends, however, that the public policy of the state requires the annulment of bigamous marriages whenever their bigamous character is discovered. We find no basis for such a sweeping application of public policy. There is a strong presumption that the second marriage is valid in the absence of positive evidence to the contrary. Wilcox v. Wilcox, 171 Cal. 770, 774, 155 P. 95; Estate of Pusey, 173 Cal. 141, 143, 159 P. 433; Hamburgh v. Hys, 22 Cal.App.2d 508, 509, 71 P.2d 301; Immel v. Dowd, 6 Cal.App.2d 145, 147, 44 P.2d 373. Defendant does not indicate how any public purpose is served by the annulment of his marriage. The rights of his first wife are not affected thereby; she has already secured a divorce from him in Florida and will not be injured by defendant's remaining married to plaintiff. Moreover, the state has already recognized the validity of defendant's marriage to plaintiff by its prosecution of defendant for bigamy because of his marriage to Miss Valle in 1945. His prosecution could be maintained only on the ground that his 1939 marriage to plaintiff was valid.

[13] "It can no longer be said that public policy requires non-recognition of all irregular foreign divorces. We have recognized that the interest of the state in many situations may lie with recognition of such divorces and preservation of remarriages rather than a dubious attempt to resurrect the original. From a pragmatic viewpoint, judicial invalidation of irregular foreign divorces and attendant remarriages, years after both events, is a less than ineffective sanction against an institution whose charm lies in its immediate respectability. We think it may now be stated that the *general* public policy in this jurisdiction, as judicially interpreted, no longer prevents application in annulment actions of the laches and estoppel doctrines in determining the effect to be given such divorce decrees." Vinson, J., in Goodloe v. Hawk, 72 App.D.C. 287, 113 F.2d 753, 757; Harlan v. Harlan, 70 Cal.App.2d 657, 663–664, 161 P.2d 490; Krause v. Krause, 282 N.Y. 355, 360, 26 N.E.2d 290. We conclude that the public policy of this state requires the preservation of the second marriage and the protection of the rights of the second spouse "rather than a dubious attempt to resurrect the original" marriage.

Since the application of the doctrine of estoppel presupposes the entry of a final decree, cases involving remarriage after the entry of only an interlocutory decree, Sullivan v. Sullivan, 219 Cal. 734, 736, 28 P.2d 914; Estate of Elliott, 165 Cal. 339, 132 P. 439, or with the first marriage unaffected by any decree, Anderson v. Anderson, 7 Cal.2d 265, 60 P.2d 290; Brandt v. Brandt, 32 Cal.App.2d 99, 89 P.2d 171, are not in point.

The trial court erred in entering a judgment of annulment on defendant's cross-complaint. The judgment is reversed and the cause remanded for a new trial on the issues of plaintiff's complaint.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

35 Cal.2d 713

STEINER et ux. v. ROWLEY.

L. A. 21075.

Supreme Court of California, in Bank.

Aug. 11, 1950.

Louis Steiner and Louise J. Steiner, husband and wife, sued Thomas James Rowley to recover a broker's commission paid to defendant. The Superior Court, Los Angeles County, William B. McKesson, J., entered judgment upon an order sustaining defendant's demurrers to the complaint, and plaintiffs appealed. The Supreme Court, Edmonds, J., held that a count alleging that broker was employed by plaintiffs as their agent in the purchase of certain realty, and that broker received a secret profit in consideration of services rendered, sufficiently stated a cause of action to recover secret profits from broker, even though brokerage contract was oral.

Judgment reversed with directions.

Prior opinion 214 P.2d 424.

1. Brokers ⇐82(1)

In action to recover amount of a broker's commission, complaint was unambiguous, certain and intelligible.

2. Pleading ⇐214(1)

A general demurrer admits material allegations of pleading to which it is directed.

3. Principal and agent ⇐69(2)

An agent who received a secret profit must pay it over to principal.

4. Brokers ⇐37

A complaint alleging that broker was employed by plaintiffs for purchase of realty, and that broker received a secret profit in consideration of his services, stated a cause of action to recover secret profits from broker, even though employment contract was oral. Civ.Code, § 1624.

5. Brokers ⇐37

Upon a general allegation of money had and received, a principal may recover a secret profit withheld by a broker upon theory of general assumpsit or common count for money had and received.

6. Brokers ⇐37

Where plaintiffs alleged that their broker received a secret profit and refused to turn same over to them, a common count for money had and received stated a cause of action for recovery of money.

7. Escrows ⇐8(1)

Principals to an escrow are charged with knowledge of its contents.

8. Brokers ⇐37

A complaint alleging that a broker employed by plaintiffs received a secret profit out of an escrow agreement pursuant to instructions given by grantors of property purchased by plaintiffs, stated cause of action for recovery of secret profits.

9. Pleading ⇐53(1)

A complaint may plead inconsistent causes of action, even though it be verified, if there are no contradictory or antagonistic facts.

10. Pleading ⇐54

Averments of one count cannot be amplified by allegations of another separately stated cause of action in same pleading, unless latter are included by special reference or otherwise in portions of complaint under attack.

11. Pleading ⇐53(1)

Unless alternate pleadings contain antagonistic statements, statement of facts sufficient to constitute a cause of action in one count is not a bar to maintenance of a separately stated count in same pleading based upon inconsistent allegations.

12. Pleading ⇐18

It is not necessary to plead with same exactness as required at common law. Code Civ. Proc., §§ 452, 475.

13. Brokers ⇐37

A complaint alleging that principal suffered actual damage in amount of broker's commission plus alleged secret profits sufficiently pleaded that principal sustained damages in a specific amount.

14. Election of remedies ⇐7(1)

Whenever a party entitled to enforce two remedies either institutes an action upon one of such remedies or performs any act in pursuit of such remedy, whereby he has gained an advantage over other

party, he will be held to have made an election of such remedy, and will not be entitled to pursue any other remedy for enforcement of his rights.

15. Election of remedies ⇐3(1)

An action for tort in which exemplary damages are sought is inconsistent with one for money had and received, and therefore plaintiffs are required to make a timely election of remedies. Civ. Code, § 3294.

16. Election of remedies ⇐3(1)
Pleading ⇐369(1, 5)

Pleading two causes of action in the alternative does not constitute an election of remedies because inconsistent counts are permissible, and an election cannot be forced by demurrer.

17. Election of remedies ⇐7(1)
Estoppel ⇐68(6)

Where plaintiffs had one count for money had and received, on ground that broker had received a secret profit out of transaction with plaintiffs, and plaintiffs had obtained a writ of attachment against broker, plaintiff's action was in pursuit of a contractual remedy, and therefore plaintiffs were estopped to allege a cause of action in tort for exemplary damages.

Charles C. Montgomery, Jr., Burbank, for appellants.

Harold A. Fendler and Robert W. Lerner, Beverly Hills, for respondent.

EDMONDS, Justice.

Thomas J. Rowley, a real estate broker, represented Louis Steiner and his wife in connection with their purchase of certain real estate. He is now being sued by them to recover the amount of his commission, an alleged secret profit and exemplary damages. The appeal is from a judgment entered upon an order sustaining Rowley's demurrers to the complaint.

The pleading is in four counts. In the first one, the Steiners allege that Rowley was employed by them as such broker under an oral contract and he owes them $2,000 because it was paid to him for their use and benefit. More specifically, it is said, Ingwold Andersen and George Shubert paid him that amount "as a side payment and secret profit * * * in consideration of receiving from [him] * * * a favorable recommendation for the purchase of certain property * * *." This payment, the pleading asserts, was obtained by Rowley in violation of his duty to deal with plaintiffs honestly and fairly as their real estate broker.

The second count is for money had and received. Rowley is indebted to the Steiners for $2,000 paid to him by Andersen and Shubert, it is alleged, and despite demand by the plaintiffs, that amount remains wholly due, owing and unpaid.

The third count alleges that, in addition to $400 which the Steiners paid Rowley for his services, he received a secret profit of $2,000 out of a certain escrow pursuant to instructions given by Andersen and Shubert, the grantees of the property purchased by the Steiners. The instructions as to such payment, the Steiners plead, were not assented to nor known by them.

In the last count, the plaintiffs assert that because Rowley obtained the $2,000 by fraud, oppression and malice, express or implied, they are entitled to exemplary damages.

Rowley generally demurred to each of the four counts, and also pleaded that they are uncertain, ambiguous and unintelligible. There was also a special demurrer upon the ground of failure separately to state a cause of action for contract and one for tort. The court did not expressly distinguish between the general and special demurrers in its minute order, which reads: "[d]emurrer as to fourth cause of action is sustained without leave to amend. Demurrer as to first, second and third causes of action is sustained; plaintiffs are given twenty days to amend." The Steiners declined to plead further and the judgment of dismissal followed.

[1] The use of the singular rather than plural in the minute order referring to the "demurrer" to each cause of action, and the arguments of the parties upon appeal, show that it was the general demurrer as

to each count which was sustained. In any event, it does not appear that any of the counts is ambiguous, uncertain or unintelligible, or that there was any failure separately to state causes of action in contract and tort in any one of them.

The right of the Steiners to recover against Rowley on count one of their complaint depends upon the applicability of section 1624 of the Civil Code to the transaction which is the basis of the controversy. That statute reads: "An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission * * *" is invalid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent. The first count states, the Steiners contend, a cause of action for the recovery of secret profits made by a fiduciary. The purpose of section 1624 of the Civil Code, they say, is only to prevent a broker from recovering a commission for services performed under an oral contract. As Rowley received his commission and the contract was fully executed, the form of the agreement is immaterial. Finally, they assert that there is a fiduciary relationship between the broker and his employer under either an oral or written contract, and a contrary rule would allow the statute of frauds to be used as a cloak for fraud. Rowley declares that because of the allegation of an oral contract between the parties, count one fails to state a cause of action.

[2, 3] A general demurrer admits the material allegations of the pleading to which it is directed. Hevren v. Reed, 126 Cal. 219, 58 P. 536; Glide v. Dwyer, 83 Cal. 477, 23 P. 706. An agent who receives a secret profit must pay it over to the principal. Blandy v. Bowden, 217 Cal. 61, 16 P.2d 993; Butler v. Solano Land Co., 203 Cal. 231, 263 P. 530; Thompson v. Stoakes, 46 Cal.App.2d 285, 115 P.2d 830; Whiting v. Delozier, 82 Cal.App. 525, 255 P. 861. Count one of the Steiners' complaint therefore states a cause of action unless the fact that Rowley was employed under an oral contract bars a recovery against him.

[4] Section 1624 of the Civil Code is applicable to the collection by the agent or broker of his "* * * compensation or a commission * * *" and the enforcement by the principal of the broker's agreement, Marks v. Walter G. McCarty Corp., 33 Cal.2d 814, 205 P.2d 1025; Le Blond v. Wolfe, 83 Cal.App.2d 282, 188 P.2d 278; see 12 Cal.L.Rev. 328; 5 S.C.L.R. 233, but it has nothing to do with the cause of action pleaded by the Steiners. They are not attempting to "enforce" a contract made by Rowley. The commission has been paid and the contract for Rowley's services fully executed. The cause of action is one to recover from a fiduciary his commission and secret profits, and the general demurrer to it should have been overruled.

[5, 6] As to count two, the Steiners insist that neither a general nor a special demurrer will lie against a common count. Rowley relies upon the rule that a common count may not be maintained as the alternative for specifically pleaded facts which do not in themselves state a cause of action. Orloff v. Metropolitan Trust Co., 17 Cal. 2d 484, 489, 110 P.2d 396; Hays v. Temple, 23 Cal.App.2d 690, 695, 73 P.2d 1248. However, count one states a cause of action, and upon a general allegation of money had and received, a principal may recover a secret profit upon the theory of general assumpsit or the common count for money had and received. Minor v. Baldridge, 123 Cal. 187, 55 P. 783. The general demurrer as to count two, therefore, should have been overruled.

[7] The Steiners defend the sufficiency of count three notwithstanding the specific allegation that the claimed secret commission received by Rowley came to him through an escrow to which they were parties. Although the buyers concede that the principals to an escrow are charged with knowledge of its contents, they say that the rule does not make them cognizant of a broker's fraud "even though that fraud may appear incidentally or inferentially in the papers in the escrow".

Notice of the contents of the escrow agreement is imputed through the escrow holder to the parties. Ryder v. Young, 9 Cal.App.2d 545, 50 P.2d 495; Smith v. Brown, 1 Cal.App.2d 492, 495, 36 P.2d 1081; see Early v. Owens, 109 Cal.App.

489, 494, 293 P. 136. The escrow instructions provided for payment of $2,000 to Rowley, and the Steiners are charged with notice that he would be paid that amount. However, knowledge that such payment would be made does not include notice that the consideration for it was the broker's inducement of his principal to purchase the land. The escrow documents disclosed no illegal purpose for the payment. Rowley might have been entitled to it as reimbursement to him for advances which he had made for the vendor, or in connection with a transaction entirely unrelated to that of the Steiners.

[8, 9] The third count, therefore, states a cause of action. But even if the facts pleaded in this count show knowledge of the secret purpose of the payment, the first count would not fall because of those allegations. Concededly, all of the counts are based upon the same transaction. A complaint may plead inconsistent causes of action, Goldwater v. Oltman, 210 Cal. 408, 292 P. 624, 71 A.L.R. 871; Beatty v. Pacific States Savings & Loan Co., 4 Cal. App.2d 692, 41 P.2d 378; Hocker v. Glover, 113 Cal.App. 152, 298 P. 72; American-La France Fire Engine Co. of California v. Bagge, 98 Cal.App. 291, 276 P. 1066, although it be verified if there are no contradictory or antagonistic facts. Beatty v. Pacific States Savings & Loan Co., supra. Here the allegations in the first count to the effect that the profit was secret at most would be inconsistent with, but not antagonistic to, those of the third count in regard to the payments out of escrow. Upon trial, evidence offered in support of the first count may tend to prove the invalidity of the escrow contract, ambiguity in its terms, or mistake in connection with its execution. If, for any reason, this agreement is invalid, then the Steiners are not by imputation bound through knowledge of its provisions.

[10, 11] In the parallel field of aider by reference, the averments of one count cannot be amplified by the allegations of another separately stated cause of action in the same pleading unless the latter are included by special reference or otherwise in the portion of the complaint under attack. Lord v. Garland, 27 Cal.2d 840, 168 P.2d 5. Similarly, unless the alternate pleadings contain antagonistic statements, the statement of facts sufficient to constitute a cause of action in one count is not a bar to the maintenance of a separately stated count in the same pleading based upon inconsistent allegations.

Rowley attacks count four upon the ground that, under section 3294 of the Civil Code, exemplary damages are recoverable only in a tort action and, by obtaining a writ of attachment, the Steiners elected to sue in contract. It is further argued that the count is defective because exemplary damages may be allowed only upon the allegation of actual damages, Mother Cobb's Chicken Turnovers, Inc., v. Fox, 10 Cal. 2d 203, 205, 73 P.2d 1185; Clark v. McClurg, 215 Cal. 279, 282, 9 P.2d 505, 81 A.L.R. 908 and the Steiners' pleading does not meet this requirement.

[12] But it is not necessary in this state to plead with the exactitude required at common law. Section 452 of the Code of Civil Procedure provides that "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." Section 475 of the Code of Civil Procedure declares that "The court must, in every stage of an action, disregard any error * * * or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties." Many decisions apply this rule. Continental Mtg. Co. v. Eyraud, 208 Cal. 566, 283 P. 65; Mix v. Yoakum, 200 Cal. 681, 254 P. 557; Hayter v. Fulmor, 66 Cal.App.2d 554, 152 P.2d 746; Brooks v. City of Monterey, 106 Cal.App. 649, 290 P. 540; Snyder v. City Bond & Finance Co., 106 Cal.App. 745, 289 P. 859; Roberts v. Griffith Co., 100 Cal.App. 456, 280 P. 199.

[13] In this action, the complaint as a whole clearly shows that any actual damages suffered were in the amount of the agent's commission plus the alleged secret profits. Under the circumstances the fourth

count sufficiently pleads that the Steiners sustained damages in a specific amount. Risco v. Reuss, 45 Cal.App.2d 243, 113 P.2d 914.

[14] Concerning the effect of the writ of attachment obtained by the Steiners, the doctrine of election of remedies is based upon the principle of estoppel. "Whenever a party entitled to enforce two remedies either institutes an action upon one of such remedies or performs any act in pursuit of such remedy, whereby he has gained any advantage over the other party, * * he will be held to have made an election of such remedy, and will not be entitled to pursue any other remedy for the enforcement of his right." De Laval Pac. Co. v. United C. & D. Co., 65 Cal. App. 584, 586, 224 P. 766, 767. The doctrine is well established. Ravizza v. Budd & Queen, Inc., 19 Cal.2d 289, 293, 120 P.2d 865; Holt Manufacturing Co. v. Ewing, 109 Cal. 353, 356, 42 P. 435; Parke & Lacy Co. v. White River L. Co., 101 Cal. 37, 41, 35 P. 442; Smith v. Miller, 5 Cal.App.2d 564, 570, 43 P.2d 347.

[15-17] An action for tort in which exemplary damages are sought is inconsistent with one for money had and received. Civ. Code, sec. 3294. The Steiners were therefore required to make a timely election of remedies. Pleading the two causes of action in the alternative did not constitute an election because inconsistent counts are permissible, Haigler v. Donnelly, 18 Cal. 2d 674, 680, 117 P.2d 331; Goldwater v. Oltman, 210 Cal. 408, 292 P. 624, 71 A.L.R. 871; Beatty v. Pacific States Savings & Loan Co., 4 Cal.App.2d 692, 41 P.2d 378 and an election cannot be forced by demurrer. Wilkerson v. Seib, 20 Cal.2d 556, 563, 127 P.2d 904. But the Steiners also obtained an attachment. This was a positive act of a plaintiff "in pursuit of * * * [the contractual remedy] * * * whereby he has gained * * * advantage over the other party * * *." De Laval Pac. Co. v. United C. & D. Co., 65 Cal.App. 584, 586, 224 P. 766, 767. The Steiners were thereafter estopped to allege a cause of action in tort, and the demurrer as to the fourth count was properly sustained.

The judgment is reversed with directions to the trial court to overrule the demurrers to the first, second, and third counts and allow the defendant to answer.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



35 Cal.2d 819

PEOPLE v. YOUNG.

Cr. 5095.

Supreme Court of California, In Bank.

Aug. 18, 1950.

Lillian Young was convicted in the Superior Court for Los Angeles County, Thomas L. Ambrose, J., of receiving stolen property and from order denying a new trial, she appealed and the People of the State of California moved to dismiss the appeal. The Supreme Court, Gibson, C. J., held that notice of appeal filed on the same day that motion for new trial was denied was timely, though more than ten days had elapsed since the granting of probation, and that motion for new trial made before judgment was timely, though made after the granting of probation.

Motion to dismiss denied.

Prior opinion, 214 P.2d 391.

1. Criminal law ⇐1081

Notice of appeal from order denying a new trial after conviction of receiving stolen property filed on the same day that motion was denied was filed within the time prescribed by law, though more than ten days had elapsed since making of order granting probation. Rules on Appeal, rule 31; Pen. Code, § 496.

2. Criminal law ⇐1081

The normal time for filing notice of appeal is ten days after the making of the order sought to be reviewed, but in the case of orders denying a new trial, the time is extended until ten days after the granting of probation or the rendition of judgment,

whichever shall occur sooner. Rules on Appeal, rule 31.

3. Criminal law ⇐951(2)

Motion for new trial made before judgment was timely, though made after the granting of probation. Pen. Code, § 1182.

4. Criminal law ⇐946

The right to move for a new trial is not deemed waived upon the granting of probation. Pen. Code, § 1182.

Walter L. Gordon, Jr., Los Angeles, for appellant.

Fred N. Howser, Attorney General, and Dan Kaufmann, Deputy Attorney General, for respondent.

GIBSON, Chief Justice.

The People seek dismissal of this appeal from an order denying a new trial on the ground that the notice of appeal was too late because it was filed more than ten days after the granting of probation, and on the further ground that the motion for a new trial was not timely.

Defendant was granted probation on April 26, 1949, after having been found guilty of receiving stolen property in violation of section 496 of the Penal Code. On July 1 she filed a notice of motion for a new trial. The motion was subsequently ordered off calendar but was renewed on July 29 and was denied August 2. On the same day that the motion was denied, defendant filed her notice of appeal.

[1] Rule 31 of the Rules on Appeal, relating to criminal cases, provides that an appeal may be taken by filing a notice of appeal "within 10 days after the rendition of the judgment or the making of the order, except that an appeal from an order denying a new trial shall not be taken until after the granting of probation or the rendition of judgment. Notice of appeal from an order denying a new trial shall be filed within 10 days after the making of an order granting probation or the rendition of judgment, whichever shall occur sooner." Notwithstanding the fact that the notice of appeal herein was filed at the earliest possible time, i.e., on the same day that the new trial was denied, the People contend that the notice was too late because it was not filed "within 10 days after the making of an order granting probation." We cannot agree with this construction of the rule.

[2] The normal time for filing notice of appeal is ten days after the making of the order sought to be reviewed, but in the case of orders denying a new trial the time is extended until ten days after the granting of probation or the rendition of judgment, whichever shall occur sooner. This intent on the part of the framers of the rule is clearly shown by the Draftsman's article which states the purpose of the rule. See Witkin, New Rules on Appeal; 17 So.Cal. L.Rev. 79, 271. In criminal procedure, a motion for new trial is made before judgment, and frequently it is made in connection with an application for probation. If a defendant were compelled to give notice of appeal within ten days after denial of his motion, he would often be forced to give it before determination of his application for probation, with the result that an unnecessary record would be prepared in cases where probation was granted and defendant elected to abandon his appeal. To avoid this wasteful action, Rule 31 provides for an extension of the time to appeal from the denial of a new trial.

Since the purpose of the rule relating to new trial orders was to give an extension of the normal period of ten days from the making of an order, it should be construed as an extension and not as a limitation on the normal period. Moreover, a contrary construction would result in a denial of the right to appeal whenever the court failed to act on the new trial motion within ten days after the granting of probation. Accordingly, the proper construction of the rule is that a defendant has ten days after the denial of a new trial in which to appeal and that this period is extended where the denial occurs prior to the granting of probation.

[3, 4] As a further ground for dismissal of the appeal the People contend that the motion for a new trial was not timely. It is argued that section 1182 of the Penal Code, which provides that an "application

for a new trial must be made before judgment," should be construed along with the provisions dealing with probation and in the light of the legislative intention to have speedy determination of criminal actions, and that when so construed section 1182 must be read as providing that a motion for new trial must be made before the pronouncing of judgment or the granting of probation. The only limitation in section 1182, however, is that the application for a new trial must be made before judgment, and something must be read into the section before it can be construed as advocated by the People. See Pen. Code, § 1450, similar provision as to inferior courts. Moreover, such a construction would deprive a defendant of the right to attack the terms of probation by motion for a new trial or appeal from a denial thereof, and he would be left without adequate remedy since the probation order is not appealable. Although it has been held that the right to the pronouncement of judgment is waived where probation is requested and accepted, see In re DeVoe, 114 Cal.App. 730, 300 P. 874; People v. Noone, 132 Cal.App. 89, 22 P.2d 284, it does not follow that the right to move for a new trial should likewise be deemed waived upon the granting of probation in the absence of express statutory provision to that effect.

The motion to dismiss is denied.

SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



35 Cal.2d 809

STOCK v. MEEK et ux.
L. A. 20921.

Supreme Court of California, in Bank.
Aug. 18, 1950.

Edna Harriet Stock brought action against Glenn L. Meek and Prudence J. Meek to rescind purchase of an apartment unit in a hotel and to recover amount paid therefor, and the defendants filed a counterclaim for interest paid plaintiff on a usurious loan. The Superior Court of Los Angeles County, Thomas J. Cunningham, J., rendered a judgment for the defendants and an order denying motion of plaintiff for a new trial, and the plaintiff appealed. The Supreme Court, Traynor, J., held that exclusion of testimony as to alleged misrepresentations by defendants was reversible error, but that recovery of usurious interest on counterclaim was proper.

Judgment reversed in part and affirmed in part, and appeal from order denying motion for new trial dismissed.

Prior opinion 214 P.2d 23.

1. Appeal and error ⇐110

Order denying motion for new trial was not appealable. Code Civ.Proc. § 963.

2. Appeal and error ⇐781(4)

Where vendor induced purchaser to purchase apartment unit in hotel for $9,000 by alleged misrepresentations, but purchaser later discovered alleged misrepresentations, and sued in rescission action to recover $9,000, and vendor counterclaimed for $10,000 overpaid purchaser on a usurious note, and judgment was rendered for vendor on cause of action to rescind and for vendor on counterclaim for $10,000, and vendor caused execution to be levied on apartment unit, and vendor twice acquired a portion of the apartment unit at public sales and finally disposed of it to a third party, purchaser's appeal would not be dismissed because purchaser could no longer restore to vendor all of the apartment unit.

3. Appeal and error ⇐161

Where vendor induced purchaser to purchase apartment unit in hotel for $9,000 by alleged misrepresentations, but purchaser later discovered alleged misrepresentations, and sued in rescission action to recover $9,000, and vendor counterclaimed for $10,000 overpaid purchaser on a usurious note, and judgment was rendered for vendor on cause of action to rescind and for vendor on counterclaim for $10,000, and vendor caused execution to be levied on apartment unit, purchaser did not lose her right to appeal because

she had received a homestead exemption at time part of apartment unit was sold on execution. Civ.Code, §§ 1245, 1257.

4. Vendor and purchaser ⇐123

Complaint alleging that defendants, in conversations leading up to sale of apartment unit in hotel to plaintiff, had represented that a portion of the apartment unit could be used and owned exclusively by plaintiff if she purchased the unit, that plaintiff relied on such representation and purchased the unit, that thereafter she learned that building and fire regulations precluded her from obtaining exclusive occupancy of that portion of the unit, and that she gave prompt and proper notice of rescission, offering to restore to defendants everything of value received from them, stated a valid cause of action for rescission because of mutual mistake of law.

5. Evidence ⇐433(1), 434(1)

Extrinsic evidence is admissible to show fraud or mistake.

6. Evidence ⇐429, 432, 433(1), 434(1), 435

Agreements prior to or contemporaneous with an integration are admissible to prove facts rendering agreement void or voidable for illegality, fraud, duress, mistake or insufficiency of consideration.

7. Evidence ⇐433(1), 434(1)

Where an instrument is sought to be avoided for fraud or mistake in law or in fact, evidence is admissible as to what the grantor intended to do or to convey.

8. Appeal and error ⇐1056(1)

Where testimony offered by plaintiff should not have been excluded either as a variance from the pleadings or under the parol evidence rule, and such exclusion precluded plaintiff from presenting her case for recovery, error in exclusion of such testimony required reversal.

9. Usury ⇐102(1), 104

Where there was no attempt by borrower to insert secretly a usurious rate of interest in order to avoid payment of any interest or to take advantage of treble damage provisions of the Usury Law, borrower was not precluded from recovering usurious interest either on ground that borrower and lender were in pari delicto or that usury laws were waived by voluntary payment of excessive interest. Gen. Laws, Act 3757.

10. Usury ⇐89

Section of the Usury Law providing that any person who pays interest at a usurious rate may recover treble the amount paid if action is brought within one year after such payment or delivery does not abrogate any common-law rights of borrowers as parties to an illegal contract, but merely adds a statutory remedy to aid the borrower and penalize the lender. Gen.Laws, Act 3757, § 3.

11. Usury ⇐102(6)

Borrowers may bring an action for money had and received to recover usurious interest paid if suit is brought within two years. Code Civ.Proc. § 339, subd. 1.

12. Limitation of actions ⇐41

Where overpayment of interest occurred on January 12, 1946, and complaint was filed March 26, 1947, defendants were not barred by two-year limitations from setting up counterclaim to recover overpayment. Code Civ.Proc. § 339, subd. 1.

Desmond & Desmond and Walter Desmond, Jr., all of Long Beach, for appellant.

Newton M. Todd, Fred A. Watkins and James J. Baker, all of Long Beach, for respondents.

TRAYNOR, Justice.

Plaintiff brought this action to rescind the purchase from defendants, husband and wife, of space in a cooperatively-owned apartment house and to recover the amount she had paid defendants therefor. Defendants counter-claimed for interest that they had paid plaintiff on a usurious loan.

Early in 1945 defendants purchased the Palace Apartment Hotel in Long Beach. They intended to sell the forty-six apartments to purchasers on an "own-your-own" plan. An escrow and trust were set up to convey title to purchasers, to pay expenses, and to distribute any profits.

Defendants consulted counsel about obtaining a permit from the Commissioner of Corporations to sell units to the public. Counsel advised that it was desirable to pay off a $20,000 second mortgage on the property before applying for the permit. Defendants raised $10,000 by selling 30% of the venture to friends. One of these investors suggested that plaintiff might furnish the remaining funds, and introduced defendant Glenn L. Meek to her. Defendant offered to give plaintiff a promissory note for $20,000, payable 365 days from date, in return for a loan of $10,000. Plaintiff wished to consult an attorney and accompanied defendant to his attorney. Plaintiff testified that she intended to buy an interest in the venture, not to lend money to defendant, and that the attorney had advised her that such a purchase would not be illegal but had disapproved of the investment as a gamble. Defendant and the intermediary who introduced the parties testified that the arrangement was always considered a loan and that the lawyer had specifically warned plaintiff that the transaction was therefore usurious. Plaintiff furnished the funds to defendants and was eventually paid $20,000 from the proceeds of the sales of apartments.

In a separate transaction, plaintiff purchased a non-residential part of the same apartment house, called "Space 101" by the parties. She paid defendant Glenn L. Meek $9,000 for the "exclusive and permanent right of occupancy," as described in the Certificate of Beneficial Ownership issued by the trustee, Security-First National Bank of Los Angeles. The record does not disclose what use plaintiff intended to make of the space. Plaintiff alleged, however, that defendant had represented to her that the space could be "used and owned exclusively" after the lobby of the building had been completed, and that she had purchased the space in reliance on this representation. Plaintiff alleged that when the work on the lobby was completed, she discovered that no one could obtain the exclusive and permanent occupancy of the space because of the building and fire regulations of the City of Long Beach. Plaintiff thereafter gave prompt notice of rescission; she seeks in this action to recover the $9,000 paid. Her complaint also included a common count for $9,000 had and received by defendants for her use and benefit.

Defendants denied the allegations of the complaint and counter-claimed for the interest or bonus paid on the note.

At the trial without a jury, the court excluded testimony by plaintiff concerning oral misrepresentations by defendant. Her counsel made the following offer of proof: "[that] a conversation took place in August, 1945 in which conversation the defendants Meeks stated and represented to the plaintiff in this action, Mrs. Stock, that that part of Space 101 described as B in Exhibit 1 could be closed off and locked and that that part, the doorway at A, in Plaintiff's Exhibit 1, could be closed off and locked, and all space in 101 could be private and no one could enter. In October, 1945, we also are able to introduce a conversation between plaintiff and defendant Meeks, a similar statement, and assurance, and on November 7, 1945 a similar conversation took place and likewise in November, 1945 a similar conversation took place and thereafter various conversations took place between the plaintiff and the Meeks to the effect that the space I have referred to could be cut off, the door placed thereon, and Space 101 will be entirely a private property and no one else will be permitted to enter. * * * that the plaintiff had confidence and trusted in the defendant, in making those statements and otherwise she would not have purchased the property and after she purchased or determined, and was advised by the Fire Department, and it was pointed out to her that she could not do so, because of the fire restrictions. * * *"

[1] The trial court gave judgment for defendants in the rescission action on the basis of the evidence before it. The trial court also held that the earlier transaction between the parties was a usurious loan. Judgment for the bonus amount, $10,000, and interest was awarded defendants on their counterclaim. Plaintiff appealed from the judgment and from an order denying the motion for new trial. The latter

order is not appealable and the appeal therefrom is dismissed. Gray v. Cotton, 174 Cal. 256, 162 P. 1019; Code Civ.Proc. § 963.

Defendants have moved to dismiss the appeal from the judgment in the light of the following events occurring after entry of judgment. Plaintiff gave notice of appeal on June 23, 1948. Plaintiff did not, however, file a bond for stay of execution. Defendants levied execution on property of plaintiff, including her interest in the Palace Apartment Hotel trust representing Space 101 and Apartment 702. Before entry of judgment, plaintiff had filed and recorded a declaration of homestead as a single person upon Apartment 702. On or about August 6, 1948, defendants applied to the superior court pursuant to Civil Code, section 1245 for the appointment of appraisers to appraise plaintiff's homestead and requested that the court order the sale of Apartment 702. On September 28, 1948, the superior court ordered the sale after due notice to the judgment debtor, hearing, and appraisal. On or about October 28, 1948, both Space 101 and Apartment 702 were sold by the sheriff at public auction to the highest bidders. Space 101 was purchased by defendant Glenn Meek for $3,000, credited as a partial satisfaction of the judgment. Apartment 702 was purchased by one Watkins for $4,000, of which the sheriff paid plaintiff $3,000, her homestead exemption. On or about April 21, 1949, plaintiff transferred her power of redemption and property in Apartment 702 to Abel L. McConnell and Ila M. McConnell. On April 22, 1949, the McConnells redeemed Apartment 702 from the execution purchaser.

After the sale of Space 101 to defendant Glenn Meek on execution, the maintenance charges required of plaintiff by the trust became delinquent. The trustee sold Space 101 at public auction on June 3, 1949, under a power of sale provided by the declaration of trust. Space 101 was again purchased by defendants, who paid a cash consideration not exceeding $1,000. On June 22, 1949, defendants made a bona fide sale of Space 101 for $4,050 to a third person or persons who are now the owners of the space.

Defendants move to dismiss the appeal on the ground that the questions involved have become moot. Their claim is not, however, that the outcome of the appeal is a matter of indifference to the parties or that consideration and disposition of the case on the merits cannot affect the substantial rights of the parties. They contend that plaintiff has destroyed her cause of action for rescission by her loss of Space 101, which she had offered to restore to defendants at the time she gave notice of rescission. The cases relied on by defendants, e. g., Lupton v. Domestic Utilities Mfg. Co., 173 Cal. 415, 160 P. 241; Taylor v. Hammel, 39 Cal.App. 205, 178 P. 547, are cases where plaintiff either made no offer to restore or else made the offer after an undue lapse of time from the notice of rescission, so that no cause of action for rescission ever arose.

[2] Plaintiff complied with Civil Code, section 1691 by her offer of restoration, the bona fides of which is not questioned. Thereafter defendants twice acquired Space 101 at public sales, and finally disposed of it to a third party. In the light of these facts, the plaintiff's cause of action did not become "moot" when defendants reacquired the property. Hillman v. Gordon, 126 Wash. 614, 219 P. 46, 51; Vodicka v. Sette, Mo.Sup., 223 S.W. 578.

[3] Defendants' second ground for their motion to dismiss the appeal is based upon plaintiff's acceptance of her homestead exemption at the time Apartment 702 was sold upon execution. Defendants contend that plaintiff thus accepted benefits from the judgment. Defendants rely on Turner v. Markham, 152 Cal. 246, 92 P. 485, but the case does not support their position. In that case, the appeal was from the order subjecting the homestead to execution, and not from the judgment that was being enforced by execution. In fact, that judgment was appealed, the appeal was heard and the judgment reversed. 155 Cal. 562, 102 P. 272.

In order to benefit from the homestead, the proceeds of the sale under section 1245 of the Civil Code must be accepted by the judgment debtor within six months since they are protected from legal process for only that length of time. Civ.Code, § 1257. Thus, the exemption usually must be accepted before the appeal can be completed. It may be proper to hold, as did the Turner case, that a judgment debtor, by accepting his homestead exemption, loses the right to challenge the order subjecting the homestead to sale. It is quite another matter to deprive him of his appeal from the original judgment.

In the Turner case, the potential liability of the judgment creditor to the purchaser at the execution sale[1] after reversal of the judgment on appeal and the possibility that the exemption proceeds could not be recovered from an insolvent judgment debtor, caused the court to dismiss the appeal. Under the facts of the present case, the judgment creditor cannot be liable to the present owners of the property sold on execution, the McConnells, who have redeemed the property as successors in interest to plaintiff, the judgment debtor, since they will retain Apartment 702 regardless of the outcome of the appeal. Redemption, even by a successor in interest of the debtor, terminates the effect of the sale. Code Civ.Proc. § 703; Calkins v. Steinbach, 66 Cal. 117, 120–121, 4 P. 1103. Thus, the Turner case is distinguishable not only because of the type of judgment appealed from, but also by virtue of the factual situations of the parties.

The motion to dismiss the appeal must be denied. It is therefore proper for this court to consider the merits of the case.

The Exclusion of Evidence in the Rescission Action

[4] It is contended that the trial court erred in excluding plaintiff's testimony concerning the conversations between the parties before plaintiff purchased Space 101. Defendant objected to the evidence, on the ground that it constituted a variance from the issues raised by the pleadings. Plaintiff pleaded the common counts for money had and received. Plaintiff also pleaded, as a second cause of action, (1) that defendants had represented to her that Space 101 could be used and owned exclusively by its purchaser; (2) that plaintiff relied on this representation in buying her share of the beneficial interest in the trust; (3) that plaintiff learned thereafter that the building and fire regulations precluded any owner of Space 101 from obtaining exclusive occupancy; (4) that plaintiff gave prompt and proper notice of rescission, offering to restore to defendants everything of value received from them. This complaint states a valid cause of action for rescission because of mutual mistake of law. Hannah v. Steinman, 159 Cal. 142, 112 P. 1094; Adams v. Heinsch, 89 Cal.App.2d 300, 200 P.2d 796; Civil Code, §§ 1576, 1578. Plaintiff offered to prove the substance of these allegations, but the trial judge excluded the evidence. Even if the offered proof had constituted a variance, we cannot say that defendants were "misled * * * to [their] prejudice in maintaining [their] action or defense upon the merits." Code Civ.Proc. § 469; cf. Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 716, 128 P.2d 522, 141 A.L.R. 1358.

[5-8] Defendants contend also that plaintiff's testimony is an attempt to vary or modify the terms of a written agreement. The Certificate of Beneficial Ownership issued by the Security-First National Bank to plaintiff is said to embody the agreement of plaintiff and defendants in the words, "such holder [plaintiff] * * * has the exclusive and permanent right of occupancy during the continuance of said Trust, of Space No. 101." Code Civ.Proc. § 1856. Extrinsic evidence to show mistake or fraud is admissible. Section 238 of the Restatement of Contracts states the gener-

1. Code Civ.Proc. § 708 provides: "If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. * * *"

al rule: "agreements prior to or contemporaneous with an integration are admissible in evidence: (b) to prove facts rendering the agreement void or voidable for illegality, fraud, duress, mistake or insufficiency of consideration." This court has approved the admission of extrinsic evidence to show a mistake of law by the grantor of a quitclaim deed, taken advantage of by the grantee. Jersey Farm Co. v. Atlanta Realty Company, 164 Cal. 412, 129 P. 593. "It is, of course, true that, where an instrument is sought to be avoided for fraud or for mistake in law or in fact, evidence is admissible as to what the grantor intended to do or to convey." 164 Cal. 412, 418, 129 P. 593, 595. Cf. Mooney v. Cyriacks, 185 Cal. 70, 195 P. 922; Code Civ.Proc. §§ 1856, 1860. Since the testimony by plaintiff should not have been excluded either as a variance or under the parol evidence rule, the trial court erred in its ruling. This error precluded plaintiff from presenting her case for recovery and requires reversal of the judgment for defendants in plaintiff's action for rescission.

Defendants' Counterclaim For Interest Paid

[9] Plaintiff does not deny that the $10,000 "bonus" for the loan of $10,000 was usurious interest under the Usury Law. Act 3757, Deering's Gen.Laws. She contends, however, that defendants were *in pari delicto* and cannot invoke the aid of the courts to recover the usurious bonus. Plaintiff also contends that the protection of the usury laws can be waived by the voluntary payment of excessive interest by the borrower. Neither proposition is tenable.

[10-12] The Usury Law provides that any person who pays interest at a usurious rate may recover treble the amount paid, "providing such action shall be brought within one year after such payment or delivery." Section 3. It is settled that this section did not abrogate any common law rights of borrowers as parties to an illegal contract, but merely added a statutory remedy to aid the borrower and penalize the lender. Westman v. Dye, 214 Cal. 28, 4 P.2d 134; Taylor v. Budd, 217 Cal. 262, 18 P.2d 333. Borrowers may therefore bring an action for money had and received to recover usurious interest paid within two years of the suit. Babcock v. Olhasso, 109 Cal.App. 534, 293 P. 141; Code Civ. Proc. § 339(1). Since the overpayment occurred on January 12, 1946, and the complaint was filed March 26, 1947, defendants are not barred from setting up a counterclaim to recover the interest. Jones v. Mortimer, 28 Cal.2d 627, 633, 170 P.2d 893.

Plaintiff relies principally on the dictum in Matthews v. Ormerd, 140 Cal. 578, 581, 74 P. 136, that the protection of usury laws can be waived by the voluntary payment of excessive interest by the borrower. The Matthews case and the cases it relied on, Harralson v. Barrett, 99 Cal. 607, 34 P. 342; London & S. F. Bank v. Bandmann, 120 Cal. 220, 52 P. 583, 65 Am.St.Rep. 179, are not in point. They involved a constitutional provision of limited applicability, which did not penalize the lender with treble damages and criminal sanctions as does the Usury Law, but merely invalidated mortgage provisions requiring a mortgagor to pay taxes assessed against the interest of the mortgagee. Moreover, the party seeking to recover the interest paid in the Matthews case was not the original borrower of the funds, but a third party who had purchased the mortgagor's interest.

If the dictum of the Matthews case were accepted, the protection of borrowers provided by the Usury Law would be vitiated. The theory of that law is that society benefits by the prohibition of loans at excessive interest rates, even though both parties are willing to negotiate them. Accordingly, "voluntary" payments of interest do not waive the rights of the payors. "Payments of usury are not considered voluntary, but are deemed to be made under restraint." Taylor v. Budd, 217 Cal. 262, 266, 18 P.2d 333, 334. If no loophole is provided for lenders, and all borrowers save fraudulent ones are protected, usurious transactions will be discouraged.

The cases interpreting the Usury Law have discarded the Matthews dictum. Moreover, they have refused to apply the

allied doctrine urged by plaintiff that the parties are *in pari delicto*. An early case under the Usury Law, Douglas v. Klopper, 107 Cal.App.Supp. 765, 288 P. 36, permitted the recovery of the amount paid in excess of the legal interest charged. In Babcock v. Olhasso, 109 Cal.App. 534, 293 P. 141 (petition for hearing denied), the borrower sought both treble interest under the Law and the recovery of additional interest paid more than one year before the action. Both elements of recovery were sustained. In Westman v. Dye, 214 Cal. 28, 4 P.2d 134, the defendant was permitted to set off all interest paid against the principal obligation. The provisions of the Usury Law permitting recovery of treble interest and making usury a crime on the part of the lender indicated to the court that the borrower is not to be treated as equally culpable with the lender. "The parties to a usurious transaction are not to be regarded as *in pari delicto*." 214 Cal. 28, 35, 4 P.2d 134, 137. The limitation of the borrower's recovery to the amount charged in excess of the legal rate in Douglas v. Klopper, supra, 107 Cal.App.Supp. 765, 288 P. 36, was expressly overruled in Taylor v. Budd, 217 Cal. 262, 267, 18 P.2d 333, and recovery was allowed of treble the interest paid within the last year and the full amount of interest paid during the year before that. The law in California is thus settled, although the authorities in other jurisdictions do not form a consistent pattern. E. g., Plitt v. Kaufman, 1947, 188 Md. 606, 53 A.2d 673 (borrower not *in pari delicto*); but see, Wright v. First National Bank, 297 Mich. 315, 297 N.W. 505 (recovery denied); 55 Am.Jur. §§ 111–112.

Proper enforcement of the law of usury precludes the blanket application of the *in pari delicto* doctrine. One method of preventing usury is to permit the recovery of usurious interest paid. During the first year after payment, the right of borrowers to recover treble the interest paid is enforced. It would be glaringly inconsistent to deny their right to recover the actual interest paid after the passage of one year.

It has been suggested that if the borrower was a "corrupt, collusive confidant who fraudulently inserted a usurious rate of interest for the purpose of defeating an action for interest on the note," he might be estopped from urging the defense of usury. Paillet v. Vroman, 52 Cal.App. 2d 297, 306, 126 P.2d 419, 424 (petition for hearing denied). In Ryan v. Motor Credit Co., 130 N.J.Eq. 531, 23 A.2d 607, 611, (N. J.Chancery 1941) affirmed in 132 N.J.Eq. 398, 28 A.2d 181 (N.J.Err.App.1942) (8-5 decision), cited by plaintiff, the borrower had obtained nearly 500 small loans from the same lender by using the names of nominees, which were often fictitious, forged, or "selected at random from telephone directories, from tombstones or taken from the thin air." These frauds enabled the parties to circumvent the New Jersey Small Loan Act, N.J.S.A. 17:10–1 et seq. The borrower was denied "a reward of $50,000 to $63,000 for his fraud on the statute." 23 A.2d 607, 624.

Defendants were not fraudulent here; plaintiff had ample warning of the usurious nature of the loan but persisted in making it. Defendants did not attempt to recover the interest paid until sued by plaintiff in regard to another matter. There was no attempt to insert secretly a usurious rate of interest in order to avoid the payment of any interest or to take advantage of the treble damage provisions of the Usury Law. The trial court therefore did not err in permitting recovery of the interest paid.

The part of the judgment ordering that plaintiff take nothing by her action for rescission is reversed. The part of the judgment that defendants recover judgment against plaintiff upon defendants' counterclaim is affirmed. The appeal from the order denying the motion for new trial is dismissed. Each party is to bear his own costs on this appeal.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

35 Cal.2d 721

PEOPLE v. GUTIERREZ.

Cr. 5082.

Supreme Court of California, in Bank.

Aug. 11, 1950.

Rehearing Denied Sept. 7, 1950.

Paul Gutierrez was convicted in the Superior Court, Fresno County, Arthur C. Shepard, J., of murder in the first degree and he appealed. The Supreme Court, Carter, J., held that the evidence sustained conviction on the theory that defendant killed baby girl 17 months of age in the perpetration of or attempt to perpetuate rape.

Judgment affirmed.

1. Homicide ⇐329

Where the evidence sustained conviction of first degree murder on theory that homicide was committed in the perpetration of or attempt to perpetrate rape, Supreme Court need not determine whether the evidence was sufficient to sustain contentions that defendant was guilty of murder in the first degree because the killing was premeditated and because it was perpetrated by means of torture. Pen. Code, § 189.

2. Homicide ⇐235

Circumstantial evidence sustained conviction of murder in the first degree on theory that defendant killed baby girl 17 months of age in the perpetration of or attempt to perpetrate rape, notwithstanding absence of evidence of sexual penetration, and even though death resulted from rupture of liver when defendant fell upon child after having formed an intent to rape her. Pen.Code, § 189.

3. Homicide ⇐332(2)

If the record affords substantial support for conclusion that homicide was committed in the perpetration of or attempt to perpetrate rape, conviction of murder in the first degree must be affirmed. Pen. Code, § 189.

4. Criminal law ⇐1159(2)

After conviction all intendments are in favor of the judgment and a verdict will not be set aside unless the record clearly shows that upon no hypothesis is there sufficient substantial evidence to support it.

Margolis & McTernan, Ben Margolis, William B. Murrish, all of Los Angeles, Lawrence Kennedy, Wm. C. Meux and John J. Gallagher, all of Fresno, for appellant.

Fred N. Howser, Attorney General, and Walter L. Bowers, Assistant Attorney General, for respondent.

CARTER, Justice.

The defendant, Paul Gutierrez, having waived a jury, was tried by the court, found guilty of murder in the first degree and was given the death sentence. The defendant was charged with having murdered one Josephine Yanez, a human being, to which charge he pleaded not guilty and not guilty by reason of insanity.

On the evening of November 19, 1949, Mr. and Mrs. Jose Yanez and their two children, one a baby of about three months and the other, Josephine, an infant of seventeen months, went to dinner at a restaurant in Huron. Some time after dinner (the testimony as to the exact time is conflicting), the couple stopped at a drugstore to call for Mrs. Yanez' sister who worked there. At approximately 11:30 that same evening these three adults and the two children arrived at a dance hall in Huron where they parked the car. It appears that Mrs. Yanez' sister went into the hall where she stayed until the dance was over, but that either Mr. or Mrs. Yanez stayed in the car with the children with the exception of two occasions. On one of these occasions the parents went into the hall and some friends stayed with the children. On the second occasion, which apparently was at about ten minutes of 1 o'clock, Mr. Yanez went to look for Mrs. Yanez who had taken the youngest child into the dance hall with her, leaving Josephine unattended in the car. When the parents came out of the hall at approximately 1 o'clock, Josephine was not in the car. She had been asleep when Yanez left her and was lying on the back seat fully dressed in diapers, shirt, dress, shoes, socks, coat and bonnet. The car was parked about 45 to 50 feet from the door of the dance hall. At about noon the next day, the father of the child reported to the constable of Coal-

inga Township, Fresno County, that the child was missing and that the family and their friends had searched for her. On the same day, November 20th, the constable and others engaged in the search found part of the child's clothing about 100 yards from the dance hall. *The clothes found in this spot* consisted of the diapers, the coat, a shoe and a man's jacket. The man's jacket was identified as that with which she had been covered. Later that day, at about 5:15 or 5:30, the body of the child was discovered about 200 yards from the dance hall. It was lying in a small irrigating furrow in a field. The child's bonnet was still attached to it by the string around its neck; under the baby were the shirt and dress, and it was wearing a shoe and sock on one foot.

Witnesses testified that approximately six to eight feet from the place where the clothing was found, there were recognizable footprints in the mud and that these footprints led out across the field. Photographs and casts made of these footprints showed the words "Bilt Rite" clearly imprinted on the mark made by the heel of the shoe. These casts and photographs were compared with shoes identified by the defendant as the ones worn by him that night and were found to be identical. About half way between the spot where the body was found and the first footprint, was a place where the mud had been disturbed. The witnesses testified that they believed that the person whose tracks they had been following had slipped and fallen there. Clearly visible in the mud were marks that had been made by cloth or heavy woven material, the imprint of three buttons and fine indentations such as would have been made by the hair on a person's arm or head. Photographs and casts were also made of these imprints and indentations and later compared and identified with the weave, markings and buttons on a jacket admittedly owned and worn by the defendant on the night in question. At the place where the body was found, more tracks and imprints were found. Mr. Nevins, deputy sheriff of the county, testified as follows: "Q. Were there any more tracks or imprints found where the body was found? A. Yes. Alongside the body and in front—I would say in front of the body. In front of the head, the way the body was lying, we found the same print that we found where the person had fallen * * *

"Q. You mean the cloth prints, Mr. Nevins? A. The cloth prints. I refer to those. We found those shortly after we arrived there the night the body was discovered, and made casts of them at that time.

"Q. Were there any depressions of any kind out where the baby's body was found? A. There was five depressions in the mud. They were—it appeared that they were round, probably five inches across, and one or two of them was three inches deep.

"Q. All right. And did you see any marks within those depressions? A. In one we made a cast of a mark as cloth marks, and there was a seam as would appear on a person's trousers that had been sewn on trousers." (The depressions just referred to were later identified as knee marks and the impressions made by the fibers in the cloth identified with that in the trousers worn by the defendant on the night of November 19th.) A witness testified that he had seen the defendant with mud on his face and the knees of his trousers.

Dr. C. D. Newel, a licensed physician and a specialist in pathology, performed the autopsy on the body of the child and testified to the condition he found. This description is far from pleasant, but in view of the arguments made by the three attorneys for the defendant, it seems advisable here to set it forth in some little detail. He testified first that the child's body was unclothed, except for the bonnet and one shoe, and that it was covered with mud; that the mouth, the nose, the trachea, larger bronchi and the lungs were filled with mud. "A. (Dr. Newel): From there, with—we noticed that there was round circular marks on the baby's body. They were on the—just above the left nipple on the chest, there appeared to be at least two or three circular marks, that we measured about one and three

quarters inches in diameter. There was one over the upper abdomen on the anterior surface. There was one on the right groin. There was one, or maybe two overlapping in the region of the vulva. That is right above the vagina." The doctor stated that in his opinion these marks were "bite marks" made during the lifetime of the child and would have caused "considerable pain", and that he found the same marks on the child's mouth. In response to a question as to any further examination, he testified: "Next the examination was made of the vagina and rectum. The place where normally the vagina should be consisted of a torn, lacerated hole which would admit one finger easily for a depth of about two inches. The rectum did not appear to be torn, although it would also admit one finger readily. This hole was outside the rectum. The vagina itself was unrecognizable due to the extensive tearing." He stated that in any female child of that age, the rectum might be the same size but that the vagina would not have been, and that he thought that "something" had been inserted in the vagina of the dead child. The doctor testified that there was very little hemorrhage at this point at the time of his observation and no indication that there had been a great deal of hemorrhage. The conclusion drawn by him from this fact was that this particular injury to the child had probably occurred after her death. Further testimony by the doctor showed that there was hemorrhage in the *pericardial* (obviously an error on either the part of the court reporter or the doctor since the pericardium is the conical sac of serous membrane which encloses the *heart*. This assumption of error is based on the fact that he then uses the word "or") *or* abdominal cavity (peritoneal cavity is correct for abdominal cavity) caused by multiple lacerations and tearing of the liver and that he thought "this was (caused) probably through trauma; outside trauma, or great body on the body or jackknifing of the body * * *" His testimony showed that there were multiple bruises and hemorrhage into the tissues about the face and forehead and hemorrhages over the surface of the brain. He testified as follows: "So the cause of death could be one of several; there was enough hemorrhage within the brain to cause death. The mouth and nose were plugged with mud, which would cause suffocation. The lacerations and contusions about the vagina, if unattended would undoubtedly cause fatal hemorrhage * * *" He stated that in his opinion at the time the baby's face was in the mud that it was undoubtedly alive; that the hemorrhages about the head and brain occurred after death; that the rupture of the liver could have been caused "if the child had been grasped about the abdomen and in falling, undue pressure had been put on the abdomen with displacement of the liver"; that a fall or blow that caused the liver to rupture would have brought about unconsciousness; that the ruptured liver occurred before death and that he "would say that a person would live (thereafter) only a matter of 15 to 30 minutes * * *" He testified that tests had been made and that no spermatozoa had been found in the region of the vagina.

The defendant's account of his activities on the night in question as he testified to them at the trial (admittedly having lied when first questioned by the authorities) is that he and a friend, Manuel Gutierrez (who was not related to the defendant) went to the China Cafe where he consumed about eight bottles of beer, three drinks of whiskey from a bottle belonging to another friend, and after eating dinner, smoked one marijuana cigarette. These events occurred before and up to a little after 10 o'clock. He then went to the Huron dance hall, arriving there, he thinks, about 11 o'clock. He remembers asking different girls to dance and that they refused to do so. He testified that he stayed half an hour or an hour and that when he went outside he heard a baby crying. He says that he opened the car door, that the baby was lying down on the back seat, that he picked her up and spanked her a little bit and that "I couldn't remember what happened then". He later said that the baby cried about ten minutes and that he remembers walking away with her. He adhered to his lack of memory of any event

after that until he woke up the next morning and maintains that he did not know what his friends were talking about when they spoke of the baby that had disappeared and that he did not know that the baby was dead until he heard of it Monday morning. He admitted that there was mud and blood on the clothing he had worn that night.

The defendant was examined by three court-appointed psychiatrists with respect to the use of marijuana in conjunction with the use of alcoholic beverages to determine whether he could have had the requisite intent to commit the crime with which he was charged, and to determine whether or not the two, either singly or together, could have caused a temporary loss of memory. These three psychiatrists, after extensive examinations of the defendant, each testified that, in his opinion, the accused could, if he chose to do so, remember and relate his actions on the night in question after he took the baby from the automobile.

The People contend that defendant is guilty of murder in the first degree because (1) the killing was premeditated; (2) it was perpetrated by means of torture (Penal Code, Sec. 189); and (3) it was committed in the perpetration or attempt to perpetrate rape (Penal Code, Sec. 189).

[1] The third contention of the People must be sustained, and we are not, therefore, called upon to consider or pass upon the sufficiency of the evidence on the issues of premeditation or torture.

[2] While the evidence is circumstantial, it is clearly sufficient to support the inference that the child's death resulted in the perpetration of or attempt to perpetrate the crime of rape. The record discloses that defendant partially disrobed the child before he started to carry her off across the field. His footprints were found in the same place where the baby's diaper and coat were found and from this the inference is strong that he had then formed an intent to rape her. The instant case is, in its physical aspects, much like that of People v. Fountain, 170 Cal. 460, 150 P. 341, 342, where a ten-year old girl was found "strangled to death with a rope which was found tightly tied around her neck. Upon her body were found bruises and marks of violence, and her sexual organ was lacerated in a shocking manner by the hands of defendant. This was admitted by the defendant and a confession which he made, introduced in evidence, showed that the killing of the child was committed by him in connection with a lecherous and brutal attack which he had made upon her for the purpose of arousing and gratifying an unnatural passion." This court held that although there was no evidence in the record to show that the child had been raped, it did show that she had died because of a violent and brutal attack upon her person in an unnatural gratification of the passions of the defendant, and that her death under such circumstances warranted the jury in finding him guilty of murder of the first degree.

The medical testimony here shows that the child had been treated so brutally that it was impossible, because of lacerations, to state with certainty whether or not there had been any sexual penetration. The evidence, as just pointed out, is sufficient to show that the defendant intended to gratify his desires when he disrobed the child. This evidence, together with that showing the bruised and torn condition of the body, is ample to sustain a conclusion that the homicide, within the meaning of the statute, had been perpetrated in an attempt to commit rape. The absence of any evidence of rape in the vaginal tract does not establish that rape was not intended or attempted. People v. Brown, 22 Cal.2d 752, 141 P.2d 1; People v. Diaz, 26 Cal.2d 318, 158 P.2d 194; People v. Lindley, 26 Cal.2d 780, 161 P.2d 227.

[3, 4] Section 189 of the Penal Code provides that all murder which is committed in the perpetration or attempt to perpetrate rape is murder of the first degree. If the record affords substantial support for the conclusion that one of the enumerated felonies was perpetrated or attempted, and the killing was committed in such perpetration, or attempt, the judgment must be affirmed. People v. Lindley, supra, and cases there cited. After conviction all intendments are in favor of the judgment and a verdict will not be set aside unless the

record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it. People v. Latona, 2 Cal.2d 714, 43 P.2d 260; People v. Green, 13 Cal.2d 37, 87 P.2d 821; People v. De La Roi, 36 Cal.App.2d 287, 97 P.2d 836.

If the child died as a result of the ruptured liver sustained when defendant fell upon her, the conclusion is still inescapable that her death occurred in an attempt to perpetrate one of the felonies enumerated in the statute and it is unavailing to argue that the shocking acts performed upon her body took place after her death.

Dr. Toller, one of the court-appointed psychiatrists, testified that he was of the opinion that the effect of the beer, liquor and marijuana cigarette would have disappeared by the time the crime was committed and that the defendant would be able to form an intent at that time. He stated, too, that amnesia seldom occurs in the form in which it was alleged to have occurred in this case, that is, that the defendant would be able to remember everything up to a certain time and then have a complete "black-out" until the next morning. Dr. Adams and Dr. Briden, the other psychiatrists, testified to substantially the same effect, and stated that they, too, considered the defendant fully capable of forming an intent at all times on the night in question. They were also of the opinion that he did not suffer any loss of memory.

The defendant, through his attorneys, sought to withdraw his plea of not guilty by reason of insanity but the court refused to permit the withdrawal. The trial proceeded and upon the testimony of the three psychiatrists, based upon their examinations of the defendant, the court found him sane.

A reading of the record in this case discloses that defendant's rights and interests were fully protected by his counsel and by the court, and that he was accorded a fair trial in all respects.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

MAYERS et al. v. LOEW'S Inc.

No. L. A. 21480.

Supreme Court of California, in Bank.

Aug. 25, 1950.

Rehearing Denied Sept. 21, 1950.

Action by C. Mayers and others against Loew's Incorporated to recover bonus payments for work on graveyard shift allegedly due under collective bargaining agreement. The Superior Court for Los Angeles County, Leo Freund, Judge Assigned by Chairman of Judicial Council, entered a judgment for plaintiffs, and defendant appealed. The Supreme Court, Traynor, J., held that refusal to consider letter executed and delivered at the same time as formal agreement and bulletins referred to in letter as part of agreement and exclusion of evidence as to negotiations of the parties and surrounding circumstances constituted reversible error in view of ambiguity of agreement and nature of such evidence.

Judgment reversed.

Prior opinion 215 P.2d 82.

1. Contracts ⇐164

Where two or more written instruments are executed contemporaneously, with reference to the other, for the purpose of attaining a preconceived object, they must all be construed together and effect given, if possible, to the purpose intended to be accomplished. Civ. Code, § 1642.

2. Master and servant ⇐3(2)

Where formal collective bargaining agreement and letter relating to the same subject matter, referring to specified bulletins, were executed and delivered at same time with express purpose of incorporating the effective dates of specified bulletins into the provisions of the formal agreement the letter and specified bulletins must be considered as part of agreement. Civ.Code, § 1642.

3. Evidence ⇐442(1)

In construing formal collective bargaining agreement consideration of letter, which was executed and delivered by union representative at the same time and provided that the effective dates of working conditions in wage agreements should be subject to specified bulletins, was not objectionable on ground that letter tended to

vary, modify or contradict terms of agreement, since such terms were established by formal contract and letter construed together. Civ. Code, §§ 1642, 1647; Code Civ. Proc. § 1860.

4. Evidence ⇐450(5)

Formal collective bargaining agreement as modified by contemporaneously executed letter was ambiguous as to meaning attributable to provision for effective date of new starting time of graveyard shift in relation to provisions for payment of bonus for work on graveyard shift and retroactive payment of wage increases, and therefore evidence as to negotiations of the parties and surrounding circumstances was admissible under parol evidence rule for the purpose of determining the meaning of contractual provisions. Code Civ. Proc. § 1860; Civ. Code, § 1647.

5. Appeal and error ⇐1056(1)

Erroneous exclusion of evidence of negotiations of the parties and surrounding circumstances which would have supported a construction of collective bargaining agreement favorable to employer constituted prejudicial error.

Loeb & Loeb, Keating Coffey, all of Los Angeles, Adrian A. Kragen, San Francisco, and Herman F. Selvin, Los Angeles, for appellant.

Mohr & Borstein and Alfred J. Borstein, all of Los Angeles, for respondents.

TRAYNOR, Justice.

Plaintiffs brought this action to recover a bonus of one-half their regular daily wage allegedly due them for the period July 1, 1941 to August 30, 1942 under the terms of a collective bargaining agreement between Local 728, International Alliance of Theatrical Stage Employees and defendant motion picture studio. Defendant appeals from a judgment entered for plaintiffs.

Plaintiffs are members of Local 728. During the period for which compensation is sought they were employed by defendant on its night rigging crew. With minor exceptions not here material, their work shift began at nine P. M. During the fall and winter of 1941 negotiations for a new collective bargaining agreement covering all the major studios in Hollywood, including defendant, were conducted between IATSE through its international representative and the business agents of the various Hollywood locals, and the studios through Fred Pelton as Producers' Labor Administrator and Pat Casey as chairman of the Motion Picture Producers' Association. They resulted in a tentative agreement in January, 1942, providing for a general ten percent wage increase for employees in all classifications. That increase was paid by the studios during 1942. Paragraph 6 of the agreement also provided:

"6. *Shifts*—The Work Day shall be divided into four shifts of six hours each. First shift may start between six a. m. and eight a. m. Men called to start work two or more hours after the start of the third regular shift shall be considered as performing work on the fourth (graveyard) shift.

"The first three shifts shall be paid for at straight time; the fourth (graveyard) shift at straight time plus a bonus of ½ time."

Paragraph 53 of the agreement provided for the payment of wage increases retroactive to July 1, 1941.

The bonus specified in paragraph 6 was retroactively payable only to employees whose shifts began two or more hours after the starting time of the third shift. Since defendant's third shift began at eight P.M., plaintiffs, who came to work at nine P. M. during that period, were not "considered as performing work on the fourth (graveyard) shift," and consequently were not entitled to the bonus.

Following the circulation of the tentative agreement the parties continued negotiations for a final agreement. From time to time as modifications in the tentative agreement were agreed upon, they were announced in bulletins issued by the producers' representatives. During the negotiations the parties agreed to establish a standard starting time for the graveyard shift to replace the variable time dependent on the starting time of the third shift then provided by paragraph 6 of the tentative agreement. The new starting time was an-

nounced by a bulletin issued over Pelton's signature:

"August 24, 1942

"Notice To All Studios

"Subject: Standard Starting Time of *'Graveyard Shift.'*

"Re: Wage Scales and Working Conditions for the following I.A.T.S.E. Unions.

"Q.–Local No. 80—Grips
"R.–Local No. 728—Lamp Operators
"T.–Local No. 44—Property Craftsmen
"V.–Local No. 727—Laborers
"X.–Local No. 165—Projectionists
"Y.–Local No. 695—Sound Technicians

"Effective August 30, 1942, the first paragraph of Section 6 in the above references will be replaced and superseded by the following:

"6. *Shifts*—The Work Day shall be divided into four shifts of six hours each. First shift may start between six a.m. and eight a.m. Men called to start work at nine p.m. or later shall be considered as performing work on the fourth (graveyard) shift

"F. E. Pelton"

Workers reporting to work at nine P. M. were thus newly classified as graveyard shift workers, and the effective date of the change was August 30, 1942. There was no reference to paragraph 53 providing that wage increases such as the graveyard shift bonus were to be paid retroactively to July 1, 1941.

The tentative agreement and the modifying bulletins were sent to the printer for the printing of the formal contract. The printed copies of the formal contract were delivered to the union in January 1943, and were signed by the business agents of the locals. They were thereupon delivered to Pelton's office for the approval and signature of the representatives of the studios. Paragraph 6 of the formal contract provided a nine P. M. starting hour for the graveyard shift but did not provide an August 30, 1942, effective date as provided in the bulletin of August 24th. Paragraph 57 of the contract contained the same provision for retroactive payment of the wage increases as paragraph 53 of the tentative agreement.

Before the agreement was signed by the studio representatives or delivered to the union, Pelton dictated the following letter for signature by the business agents of the locals, including A. J. Moran, business agent of Local 728:

"Hollywood, California
"February 1, 1943

"Mr. Pat Casey, Chairman
"Producers' Committee
"5504 Hollywood Boulevard
"Hollywood, California
"Dear Mr. Casey:

"Notwithstanding the provisions of Section 3 of the wage agreements dated February 15, 1942, between the various Motion Picture Producers whom you represent, and the undersigned, the effective dates of the 'working conditions' in such wage agreements shall be subject to the following bulletins issued by your office:

Date	Subject
May 22, 1942	Meal Periods
Aug. 24, 1942	Standard Starting Time of Graveyard Shift
Aug. 25, 1942	Golden Hours
Aug. 27, 1942	'On Call' Employees Split Week between Studio and Distant Location
Aug. 28, 1942	Distant Location Definitions and Working Conditions

"Yours very truly,
"Studio Electrical Technicians Local 728 of the I.A.T.S.E.
"By A. J. Moran"

The provisions of section 3 referred to in the letter are as follows: "3. Wage scales, hours and working conditions for Local 728 shall be set forth in the 'Wage Scales and Working Conditions' attached hereto and shall be effective as of February 15, 1942, subject to the retroactive adjustments specified in said 'Wage Sales and Working Conditions.'"

Sometime between February 5 and February 8, 1943, Moran went to Pelton's office

to get his union's copies of the formal contract and received them after signing certain copies of the contract and the letter set forth above.

Plaintiffs contend that they are entitled to retroactive compensation from July 1, 1941 for work performed on the nine P. M. shift from that date under the terms of the formal contract. Defendant agrees that they are entitled to the bonus provided in paragraph 6 for all days worked after the August 30, 1942 effective date but contends that they are not entitled to the bonus for days worked beginning at nine P.M. before that date for the reason that they were not "considered as performing work on the fourth (graveyard) shift" until nine P. M. became the starting time of that shift on August 30th. In defendant's view, the formal agreement and the letter of February 1, 1943 incorporating the effective date of the August 24th bulletin therein must be read and construed together as a single integrated contract under Civil Code, section 1642.[1] It is urged that the contract and the letter construed together provide for bonus payments to employees starting work at nine P. M. or later after August 30, 1942, and that before that date the bonus payments are payable only to employees starting work two or more hours after the start of the regular third shift, in this case, at ten P. M. or later.

The trial court refused to consider the letter or the bulletin of August 24th in its interpretation of the agreement because it concluded "that said letter and the bulletin to which it referred purported to change, contradict, modify, vary and alter the provisions of the formal collective bargaining agreement above mentioned with respect to retroactive pay," and that "said letter was not a part of the formal collective bargaining agreement but was extrinsic and collateral thereto." Relying solely on paragraphs 6 and 57 of the formal contract, the trial court ordered judgment for plaintiffs for bonus payments retroactively to July 1, 1941.

[1, 2] The conclusion of the trial court that the letter and the bulletin were not part of the formal contract is clearly contrary to the undisputed evidence before it. That evidence demonstrates conclusively that the formal contract and the letter of February 1st were executed and delivered at the same time. They related to the same subject matter, wages and working conditions of IATSE members employed by the studios. They were delivered at the same time with the express purpose of incorporating the effective dates of the specified bulletins into the provisions of the formal contract. "Where two or more written instruments are executed contemporaneously, with reference to the other, for the purpose of attaining a preconceived object, they must all be construed together, and effect given, if possible, to the purpose intended to be accomplished." People v. Ganahl Lumber Co., 10 Cal.2d 501, 507, 75 P.2d 1067, 1070; Symonds v. Sherman, 219 Cal. 249, 253, 26 P.2d 293; Tuso v. Green, 194 Cal. 574, 581, 229 P. 327; Burr v. Western States Life Ins. Co., 211 Cal. 568, 575, 296 P. 273; Shattuck v. Chase, 86 Cal.App.2d 810, 813, 195 P.2d 475; Reid v. Johnson, 85 Cal.App. 2d 112, 115-116, 192 P.2d 106; Holbrook v. Fazio, 84 Cal.App.2d 700, 701, 191 P.2d 123; Body-Steffner Co. v. Flotill Products, 63 Cal.App.2d 555, 560, 147 P.2d 84; Lynch v. Bank of America, 2 Cal.App.2d 214, 223, 37 P.2d 716; Basile v. Cal. Packing Co., 9 Cir., 25 F.2d 576, 577; 1 Restatement, Contracts, § 235, pp. 319, 322–323. Since the purpose of the agreements may be ascertained only by reference to each of the documents executed to accomplish that purpose, it was error to exclude any of those documents from consideration.

[3] The consideration of the letter of February 1st in the interpretation of the formal contract is not objectionable on the ground that it tends to vary, modify, or contradict the terms of that contract. Those terms are established by the contract and the letter and not by one to the exclusion of the other. By the express provision of the

1. "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

letter the contract must be read as if it specifically provided that the provisions of paragraph 6 with respect to the starting time of the graveyard shift became effective August 30, 1942. It must therefore be determined whether the parties meant that the payment of retroactive compensation based on paragraph 6 should be governed by the effective date thereof or by the earlier date of July 1, 1941 established by paragraph 57.

The trial court, on plaintiffs' objection, excluded evidence of the negotiations of the parties offered by defendant for the purpose of establishing the meaning that the union and the studios attributed to the effective date of the new starting time. Defendant contends that the excluded evidence would establish that the parties meant that the new starting time would be effective August 30th and that this date would govern the payment of retroactive compensation under the contract.

[4, 5] The agreements in the present case are ambiguous and internally inconsistent. Paragraph 57 of the formal contract provides for the retroactive payment of wage increases to July 1, 1941. Paragraph 6 as modified by the letter of February 1st provides that the graveyard shift shall start at nine P. M. and that a bonus shall be paid to all employees starting work at that hour or later, but by its terms it is not effective until August 30, 1942. Is the payment of retroactive compensation to graveyard shift employees governed by paragraph 57 and thus payable to employees who were not considered as performing work on the graveyard shift at the time the work was performed? Or is the payment of retroactive compensation limited by the provision that the new starting time is effective August 30, 1942 so that before that date the graveyard bonus is payable only to persons considered as performing work on the graveyard shift at the time the work was performed, that is, those starting work two or more hours after the start of the third regular shift? Paragraph 3 of the formal contract provides that wage scales and working conditions therein provided are effective February 15, 1942, subject to the retroactive adjustments specified in paragraph 57. The letter of February 1st provides that, "notwithstanding the provisions of Section 3," the effective date of the new starting time of the graveyard shift shall be August 30, 1942. Did the parties thereby intend to supplant only the effective date specified in paragraph 3, February 15, 1942, or did they intend to supplant the whole of paragraph 3, including the provision that wage scales and working conditions are "subject to the retroactive adjustments specified" in paragraph 57? The terms of the agreement furnish no clear answer to these questions. It is thus apparent that the contract is not clear on its face, and under the theory of the parol evidence rule that has been accepted by the majority of this court, evidence of the negotiations of the parties and of surrounding circumstances was admissible for the purpose of determining the meaning of the contractual provisions. Universal Sales Corp. v. Cal. Press Mfg. Co., 20 Cal.2d 751, 761-762, 128 P.2d 665; California Canning Peach Growers v. Williams, 11 Cal.2d 221, 228-229, 78 P.2d 1154; Merkeley v. Fisk, 179 Cal. 748, 757, 178 P. 945; see Union Oil Co. v. Union Sugar Co., 31 Cal.2d 300, 306, 307, 188 P.2d 470; Body-Steffner Co. v. Flotill Products, 63 Cal.App. 2d 555, 561-562, 147 P.2d 84; Torrey v. Shea, 29 Cal.App. 313, 316-317, 155 P. 820; Code of Civil Procedure, § 1860; Civil Code, § 1647. That evidence would have supported a construction of the contract favorable to defendant and it should have been considered by the trial court in its interpretation of the terms of the contract. Exclusion of that evidence was therefore prejudicial error.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

35 Cal.2d 729

CEDARS OF LEBANON HOSPITAL v. LOS ANGELES COUNTY et al. (and five other cases).

L. A. 20610, 20611, 20613–20616.

Supreme Court of California, in Bank.

Aug. 18, 1950.

Cedars of Lebanon Hospital, a nonprofit corporation, and others, sued the County of Los Angeles and City of Los Angeles, a municipal corporation, to recover taxes and assessments paid under protest. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., rendered judgments from which both plaintiffs and defendants appealed. The Supreme Court, Spence, J., held that specified uses of hospital property were uses exclusively for hospital purposes within statute exempting from taxation under specified circumstances property used exclusively for hospital purposes, and that exemption from taxation granted by the statute does not extend to a levy imposed under authority of the Los Angeles County Flood Control Act.

Judgment in accordance with opinion.

Shenk, J., dissented in part.

Prior opinion 206 P.2d 915.

1. Taxation ⇐204(2)

Constitutional provisions and statutes granting exemption from taxation are strictly construed to end that such concession will be neither enlarged nor extended beyond plain meaning of language employed.

2. Taxation ⇐241(2)

In determining whether hospital comes within statute exempting from taxation under specified circumstances property used exclusively for hospital purposes, it is immaterial that hospital in question may contribute to public welfare and serve interests of state. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

3. Taxation ⇐251

Hospitals have burden of showing that they clearly come within statute exempting from taxation under specified circumstances property used exclusively for hospital purposes. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

4. Taxation ⇐111.21

Exemption provisions in social security and unemployment compensation acts will be liberally construed so as to effectuate their beneficent purpose to encourage and promote organizations seeking classification within broad scope of statutory language.

5. Taxation ⇐204(2)

The rule that constitutional provisions and statutes granting exemptions from taxation are strictly construed to end that such concession will be neither enlarged nor extended beyond plain meaning of language employed does not require that narrowest possible meaning be given to words descriptive of exemption.

6. Statutes ⇐181(2)

A fair and reasonable interpretation must be made of all laws, with due regard for ordinary acceptation of language employed and object sought to be accomplished thereby.

7. Statutes ⇐235

A strict construction of statutes must still be a reasonable construction.

8. Taxation ⇐241(2)

In enacting statute exempting from taxation under specified circumstances property used exclusively for hospital purposes, and constitutional provision authorizing enactment of such statute, people and Legislature had in mind a complete, modern hospital plant rather than one consisting only of minimum indispensable facilities. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

9. Taxation ⇐241(2)

The phrase "property used exclusively for hospital purposes" within statute exempting from taxation under specified circumstances property used exclusively for hospital purposes, includes any property which is used for any facility which is incidental to and reasonably necessary for accomplishment of hospital purposes. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Property Used Exclusively for Hospital Purposes".

10. Taxation ⇐241(2)

Use of property by hospital as a nursing school and as a nurses' home as an incident to operation of hospital was used "exclusively for hospital purposes" within statute exempting from taxation under specified circumstances property used exclusively for hospital purposes. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Exclusively for Hospital Purposes".

11. Evidence ⇐20(1)

It is common konwledge that in many, if not most, hospitals, nurses and student nurses sleep in hospital building or in premises nearby which have been acquired by hospital for furnishing such accommodations.

12. Taxation ⇐241(2)

Hospital property used to provide housing facilities for interns, resident doctors, superintendents, and other members of the hospital staff, was used "exclusively for hospital purposes" within statute exempting from taxation under specified circumstances property used exclusively for hospital purposes. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

13. Taxation ⇐241(2)

A building under construction on day of determination of its tax status was on such day not being "used exclusively for hospital purposes" within statute exempting from taxation under specified circumstances property used exclusively for hospital purposes. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Used Exclusively for Hospital Purposes".

14. Taxation ⇐241(2)

Property used by hospital for maintenance of tennis court as a limited recreational facility for hospital employees, student nurses, interns and residents was being used "exclusively for hospital purposes" within statute exempting from taxation under specified circumstances property used exclusively for hospital purposes. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

15. Taxation ⇐241(2)

Where so-called "thrift shop" located on hospital property was place where donated clothing and furnishings were sold, and proceeds were devoted to maintenance of the free children's clinic maintained jointly by hospital and a Community Chest agency, such hospital property was not used "exclusively for hospital purposes" within statute exempting from taxation under specified circumstances property used exclusively for hospital purposes. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

16. Taxation ⇐246

The exemption from taxation granted by Welfare Exemption Law does not extend to a levy imposed under authority of Los Angeles County Flood Control Act. Gen.Laws, Act 4463.

17. Taxation ⇐246

Exemptions of private property from taxation do not extend to special assessments, levied upon basis of equivalent benefit, unless specifically so provided.

18. Taxation ⇐246

The rule that exemptions of private property from taxation do not extend to special assessments, levied upon basis of equivalent benefit, unless specifically so provided, is generally applied to charitable institutions.

Harold W. Kennedy, County Counsel, Andrew O. Porter, Deputy County Counsel, Ray L. Chesebro, City Attorney, Hugh H. MacDonald and Louis A. Babior, Deputy City Attorneys, all of Los Angeles, for appellants.

Faries & McDowell, Wayne R. Hackett, Musick, Burrell & Ingebretsen, Philip C. Jones, James E. Ludlam, Leonard G. Ratner, Beverly Hills, Joseph Scott, J. Howard Ziemann, Gibson, Dunn & Crutcher, Bert A. Lewis, all of Los Angeles, for respondents.

SPENCE, Justice.

These are appeals by both plaintiffs and defendants from judgments entered after rulings on demurrers in six separate actions, each of which was brought by one of plaintiff hospitals to recover certain taxes and assessments paid under protest in view of the recently enacted welfare exemption. Cal.Const. art. XIII, § 1c; Rev. & Tax. Code, § 214.

The California welfare exemption was operative for the first time in the tax year 1946-1947, and each of the plaintiffs duly filed its exemption claim. Rev. & Tax. Code, §§ 254, 254.5. Such exemption was granted by the taxing authorities in each case as to 90 to 95 per cent of the property of the respective hospitals, but denied as to the remaining 5 to 10 per cent on the ground that such portions were not being used for exempt purposes. Accordingly, a tax was levied upon such unexempted portions and, in addition, a Los Angeles County Flood Control District assessment was made in every case against all of the respective hospitals' real property. The hospitals paid the taxes and assessments under protest, and then commenced these actions to recover such portions of those payments as the respective plaintiffs deemed contrary to the provisions of the welfare exemption law. The complaint in each case was divided into several causes of action, each of which causes presented a phase of the numerous points in dispute. A general demurrer as to each cause of action was filed in each case, and all of the cases were consolidated for the purpose of hearing.

The major portion of the property which plaintiffs claimed to be tax exempt, despite the adverse rulings of the taxing authorities, was that devoted to the housing of essential hospital personnel and to the conduct of nurses' training schools operated in connection with the hospital. The trial court agreed with plaintiffs' contentions as to these matters and overruled defendants' demurrer to the causes of action relating to the hospital property as thus used by plaintiffs. Likewise the trial court sustained the contentions of those plaintiffs herein who sought exemption of their real property from the flood control district assessments, and overruled the demurrer to the causes of action so premised. From the portions of the judgments entered in accordance with these rulings, defendants have appealed.

The following pieces of hospital property, however, were not deemed to be tax exempt by the trial court, and it sustained demurrers without leave to amend as to the causes of action relating thereto: buildings under construction to furnish housing for student nurses (counts two and four of the complaint in action L.A. No. 20615, involving the Hollywood Presbyterian Hospital); a tennis court maintained as a recreational facility for hospital employees, and a "thrift shop" operated for the sale of donated clothing, with the proceeds therefrom devoted to the upkeep of a free children's clinic (counts four and seven of the complaint in action L.A. No. 20616, involving plaintiff Lutheran Hospital Society of Southern California). Plaintiffs have filed appeals from the portions of the judgments accordingly entered. Also sustained without leave to amend was the demurrer to the fourth, sixth and eighth causes of action of plaintiff Monte Sano Foundation (action L.A. No. 20614) relating to portions of a building leased for use as an X-ray laboratory or doctor's office, but said plaintiff has not filed an appeal from such adverse rulings.

Defendants do not dispute the status of any of these plaintiffs as an institution qualifying for the welfare exemption, so that the parties' opposing arguments center on these two main considerations: (1) the particular uses to which certain portions of the hospital property were put as determining the status—exempt or non-exempt—of such portions; and (2) the extension of the claimed exemption to include flood control district assessments levied on the real property of the several hospitals. Upon an analysis of the welfare exemption law, it appears (1) that except for its rulings on the tax status of the tennis court, the trial court was correct in its allowance or disallowance of exemption claims as to the several plaintiffs' *tax payments*, but (2) that it erred in construing the tax exemption to embrace the *assessment levies*.

Adopted at the general election of November 7, 1944, the relevant constitutional provision—article XIII, § 1c—reads as follows: "In addition to such exemptions as are now provided in this Constitution, the Legislature may exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes and owned by community chests, funds, foundations or corporations organized and operated for religious, hospital or charitable purposes, not conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."

Pursuant to the authority thus granted, the legislature in 1945 enacted § 214 of the Revenue and Taxation Code, providing as follows:

"Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

"(1) The owner is not organized or operated for profit;

"(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual;

"(3) The property is not used or operated by the owner or by any other person for profit regardless of the purposes to which the profit is devoted;

"(4) The property is not used or operated by the owner or by any other person so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession;

"(5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary religious, hospital, scientific, or charitable purpose;

"(6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes. * * *

"The exemption provided for herein shall be known as the 'welfare exemption.' This exemption shall be in addition to any other exemption now provided by law. This section shall not be construed to enlarge the college exemption or to extend an exemption to property held by or used as an educational institution of less than collegiate grade." Stats. 1945, ch. 241, § 1.

[1-4] Constitutional provisions and statutes granting exemption from taxation are strictly construed to the end that such concession will be neither enlarged nor extended beyond the plain meaning of the language employed. Cypress Lawn Cemetery Association v. City and County of San Francisco, 211 Cal. 387, 390, 295 P. 813; City and County of San Francisco v. San Mateo County, 17 Cal.2d 814, 817, 112 P.2d 595. In this regard, it is immaterial that the institutions in question may contribute to the public welfare and serve the interests of the state, for they, like other private owners of property, have the burden of showing that they clearly come within the terms of the exemption. 51 Am.Jur. § 633, p. 606; Corporation of Sisters of Mercy v. Lane County, 123 Or. 144, 261 P. 694, 697. This rule has been expressly recognized in this state in the application of the orphanage exemption. Cal.Const. art. XIII, § 1½a; Helping Hand Home v. San Diego County, 26 Cal.App.2d 452, 458-459, 79 P.2d 778. Such rule of strict construction governing property tax exemptions is distinguished from the rule of liberal construction applying in the determination of exemption qualifications under social security and unemployment compensation acts. Scripps Memorial Hospital v. California Employment Comm., 24 Cal.2d 669, 676-677, 151 P.2d 109, 155 A.L.R. 360; Seaside Memorial Hospital v. California Employ-

ment Comm., 24 Cal.2d 681, 682, 151 P.2d 116. Exemption provisions in statutes of the latter character will be liberally construed so as to effectuate their beneficent purpose to encourage and promote organizations seeking classification within the broad scope of the statutory language. 61 C.J. § 396, p. 394; see Santa Fe Lodge No. 460 v. Employment Security Comm., 49 N.M. 149, 159 P.2d 312, 314-315. This is not, however, the rule to be applied where exemption is claimed from general property taxation as provided in our State Constitution. Art. XIII, § 1; Watchtower Bible & Tract Soc., Inc. v. County of Los Angeles, 30 Cal.2d 426, 429, 182 P.2d 178.

[5-7] But the rule of strict construction does not require that the narrowest possible meaning be given to words descriptive of the exemption, for a fair and reasonable interpretation must be made of all laws, with due regard for the ordinary acceptation of the language employed and the object sought to be accomplished thereby. Cooley on Taxation, Fourth Ed., vol. 2, ch. 13, § 674, p. 1415; 51 Am.Jur. § 528, p. 531; State ex rel. Spillers v. Johnston, 214 Mo. 656, 113 S.W. 1083, 1084-1085, 21 L.R.A.,N.S., 171; Trustees of Phillips Exeter Academy v. Exeter, N.H., 11 A.2d 569, 590-591. As was said in the Spillers case, supra: "* * * strict construction must still be a reasonable construction * * *." On the basis then of a strict but reasonable construction of the welfare exemption law, the several points of dispute between the parties will be determined.

In determining what constitutes "property used exclusively for * * * hospital * * * purposes", it is appropriate first to note generally the nature of a "hospital." A fair and unchallenged description of the nature of such an institution is set forth in plaintiffs' combined brief as follows: "A hospital is primarily a service organization. It serves three groups: the patients, its doctors, and the public. It furnishes a place where the patient, whether poor or rich, can be treated under ideal conditions. It makes available room, special diet, X-ray, laboratory, surgery, and a multitude of other services and equipment now available through the advances of medical science. Essential to the administration of these techniques is the corps of highly-trained nurses and student nurses who are on duty twenty-four hours per day. In the large hospitals there are the interns and residents whose presence makes it possible for the hospital to do a better job. In addition, the hospital * * * must have administration to see that its services function properly and are coordinated, and that patients are received and cared for regardless of the hour or the patient's condition. Nothing can be left to chance because a slip may mean a life or many lives. These facilities also stand ready to serve the community in times of epidemic or disaster."

[8] This description expresses in general terms the nature, functions, and purposes of a complete, modern hospital plant, which functions and purposes are more fully and more specifically alleged in the complaints on file herein and are admitted by the demurrers thereto. And as the constitutional amendment and statute under consideration were adopted and enacted in 1944 and 1945, respectively, it is entirely clear that the people and the legislature had in mind such a complete, modern hospital plant rather than one consisting only of the minimum and indispensable facilities found in earlier hospitals which inadequately served their purposes many years ago.

[9] It thus appears that under the rule of strict but reasonable construction, the phrase "property used exclusively for * * hospital * * * purposes" should be held to include any property which is used exclusively for any facility which is incidental to and reasonably necessary for the accomplishment of hospital purposes; or, in other words, for any facility which is reasonably necessary for the fulfillment of a generally recognized function of a complete modern hospital. This test is fully supported by reason and the weight of authority, as evidenced by the cases hereinbefore and hereinafter cited. St. should be recalled, however, that under the statute here in question, there are other conditions which must be met in order to

entitle the property, or the particular portion thereof, to tax exemption. Such other conditions will be discussed as the occasion may require, but one of the main disputes between the parties concerns the question of whether certain portions of plaintiffs' properties met the requirement of being used exclusively for hospital purposes. Having thus declared in general terms the test to be used in determining that question, we shall proceed to apply that test, as well as any other conditions of the statute upon which defendants rely, to the particular portions of the hospitals' properties which are the subject of dispute.

The first question presented is whether the use of property by plaintiff hospitals for a nurses' training school and to provide housing for hospital interns, resident doctors, student nurses, and certain other alleged essential employees required to be readily available in their effective operation constitutes a use exclusively for hospital purposes and so brings the property within the scope of the welfare tax exemption.

Unquestionably the maintenance of a school for training nurses is an important phase of the functions of a complete modern hospital. If the major hospitals did not so provide, no student nurses would be available and resort would have to be made to registered nurses at much greater expense to the patients. Moreover, if hospitals did not train nurses in the requirements of the profession, eventually there would be no registered nurses, and obviously trained nurses are just as necessary as any other factor in the effective conduct of the general hospital facilities. Recognizing that the greater part of a nurse's training is in actual work with patients and ministering to their needs, our state law requires that "an accredited school of nursing" must be "affiliated or conducted in connection with one or more hospitals." Bus. & Prof. Code, § 2786. The character of such a school was considered in the case of Luthern Hospital Society v. County of Los Angeles, 25 Cal.2d 254, 153 P.2d 341, where tax exemption of the school was sought on the ground that it was an "educational institution of collegiate grade." Cal.Const. art. XIII, § 1a. In denying the exemption claim as the test therefor was defined by appropriate enactment, Rev. & Tax. Code, § 203, this court said, 25 Cal. 2d at pages 257-258, 153 P.2d at page 343: "Under our Constitution * * * the words 'educational institution,' used in the ordinary and commonly accepted sense, do not include a general hospital which has, as an incident to its main purpose and usefulness, an educational feature. Furthermore, it is apparent that in the ordinary acceptation of the term, a hospital is not considered as an 'educational institution of collegiate grade' or as a 'college or seminary of learning.' In this field of legislation *the Legislature may well have concluded that the training of women as nurses is mainly in connection with and for the benefit of the hospital* (see article 2, ch. 6, div. II of the Business and Professions Code, as added by St.1937, p. 1377), *and that the property used for such purposes is entitled only to the classification accorded general hospital property devoted to nonprofit or charitable uses.* The record indicates that upon application to the Board of Equalization and a presentation of facts showing its use exclusively for charitable and nonprofit purposes, the plaintiff received a 50 per cent reduction in the assessed valuation of all of its property including Larson Hall [where the nursing school was conducted]. Total exemption of the property of such institutions was rejected by the electors of the state in November, 1930, when it was proposed to add section 1⅝ to article XIII of the Constitution to accomplish that purpose. However, at the November, 1944, election, proposed section 1c of article XIII was added, making it permissive for the Legislature to exempt all or a portion of the properties of nonprofit hospital corporations. That section is, of course, prospective only." (Emphasis added.)

It is therefore apparent that there is no merit in defendants' argument that the allowance of the exemption claim on the nursing school property would involve the enlargement of the exemption in favor of an "educational institution" contrary to the express language of the statute extend-

ing the welfare exemption. Rev. & Tax. Code, § 214. Maintained as an integral part of the hospital operations, a nurses' training school has generally been regarded as a facility which is incidental to and reasonably necessary for the accomplishment of hospital purposes, and therefore entitled to exemption. Hot Springs School Dist. v. Sisters of Mercy, 84 Ark. 497, 106 S.W. 954; Lutheran Hospital Ass'n of South Dakota v. Baker, 40 S.D. 226, 167 N.W. 148, 151; Nuns of Third Order of St. Dominic v. Younkin, 118 Kan. 554, 235 P. 869, 870; see, also, Reynolds Memorial Hosp. v. Marshall County Court, 78 W.Va. 685, 90 S.E. 238, 240; Corporation of Sisters of Mercy v. Lane County, supra, 123 Or. 144, 261 P. 694, 697; Calais Hospital v. City of Calais, 138 Me. 234, 24 A.2d 489, 490. Though necessarily serving the private educational interest of the student nurses in attendance, property so used for a nurses' training school does not thereby lose its character as property "used exclusively for * * * hospital * * * purposes" within the scope of the welfare exemption law. Ibid; Sisters of Third Order of St. Francis v. Board of Review, 231 Ill. 317, 83 N.E. 272, 274; Board of Review of Cook County v. Provident Hospital & Training School Ass'n, 233 Ill. 242, 84 N.E. 216, 217-218. Rather, it is to be regarded simply as "an educational feature" of the hospital—"an incident to [the latter's] main purpose and usefulness". Lutheran Hospital Society v. County of Los Angeles, supra, 25 Cal.2d 254, 257, 153 P. 2d 341, 344.

[10, 11] The same reasoning applies with respect to the exemption of property used to provide a nurses' home as an incident to the operation of the hospital. It is a matter of common knowledge that in many, if not most, hospitals, nurses and student nurses sleep in the hospital building or on premises near by which have been acquired by the hospital for furnishing such accommodations. Manifestly, emergencies may arise from time to time during the night requiring immediate attention and which make it necessary to have more nursing personnel available than is actually on nighttime duty. Such situation can be met, as alleged by plaintiffs, only by providing housing facilities upon the hospital grounds for nurses, student nurses, and kindred aids. Typical of such living quarters were those furnished by plaintiff Cedars of Lebanon Hospital in "a building known as Lebanon Hall * * * attached to the main building of the hospital" and for which "each of the nurses" so accommodated "makes a payment of $10.00 per month" to the hospital. As set forth in the pleadings in these cases, the use of such property for such purposes is a use for a facility which is incidental to and reasonably necessary for the accomplishment of hospital purposes, and the property so used should be held to be tax exempt. Such conclusion seems to be clearly in accord with the weight of authority. Annos. 34 A.L.R. 674, 62 A.L.R. 336, 108 A.L.R. 295, Nuns of Third Order of St. Dominic v. Younkin, supra, 118 Kan. 554, 235 P. 869, 870; Aultman Hospital Ass'n v. Evatt, 140 Ohio St. 114, 42 N.E.2d 646, 647; see, also, Corporation of Sisters of Mercy v. Lane County, supra, 123 Or. 144, 261 P. 694, 697; Appeal of Parmentier, 139 Pa. Super. 27, 11 A.2d 690, 693; Dougherty v. City of Philadelphia, 139 Pa.Super. 37, 11 A.2d 695, 697.

Defendants argue that a building which serves as a residence for nurses should not be deemed property "used *exclusively* for * * * hospital * * * purposes." Johnson v. Mississippi Baptist Hospital, 140 Miss. 485, 106 So. 1. The cited case did take such narrow view of the statute there involved and the tax exemption was denied. This is the only case, insofar as citation by counsel or independent research has disclosed, where a like decision has been reached in distinguishing the tax status of such portion of hospital property. Moreover, it no longer is the law even in Mississippi since the express amendment of the pertinent exemption statute to include "nurses' homes." Board of Supervisors v. Vicksburg Hospital, 173 Miss. 805, 163 So. 382, 384; Board of Sup'rs v. Jackson Hospital Benev. Ass'n, 180 Miss. 129, 177 So. 27, 28; Rush Hospital Benev. Ass'n v. Board of Sup'rs, 187 Miss. 204, 192 So. 829, 831. Defendants' single reference in

this regard requires no further discussion as it is wholly contrary to the prevailing view. See anno. 62 A.L.R. 336.

It is of no importance here that the legislature in 1947, upon enacting a new body of law dealing with hospital survey and construction, Health and Safety Code, ch. 3, §§ 430–435.7, Stats.1947, ch. 327, § 2, p. 882, defined a hospital to include "related facilities such as * * * nurses' home and training facilities". Health and Safety Code, § 430.4. Defendants urge that since the legislature there deemed it proper to so define the scope of the term, the word "hospital" would not otherwise have such broad meaning. But aside from the fact that wholly unrelated, subsequent legislation would have no particular bearing on the questions before us, the cited definition simply accords with the commonly accepted understanding of the word "hospital" as used in the ordinary, and not broad sense. See Lutheran Hospital Society v. County of Los Angeles, supra, 25 Cal.2d 254, 257, 153 P.2d 341. It has been so construed here. Accordingly, plaintiffs' claims are well taken with respect to the nature of the facilities of a nursing school and nurses' home as constituting property "used exclusively for * * * hospital * * * purposes" within the contemplation of the welfare exemption law.

[12] The same considerations apply with respect to the exemption of hospital property used to provide housing facilities for interns, resident doctors, superintendents, and other members of the hospital staff—that the administration of the affairs of the institution requires that certain personnel and employees be located on or near its grounds to the end that its operation may be efficiently conducted and supervised, and that emergency cases may be effectively handled as they arise. Since it is commonly expected by the public that admittance to a hospital may be had at any hour of the day or night, such twenty-four hour service necessarily involves the presence at all time of adequate help and trained personnel. In this connection, reference need only be made to the pertinent allegations of the complaint filed by plaintiff Lutheran Hospital Society of Southern California (L.A. No. 20616), relative to its two hospital plants, the "California Hospital" and the "Santa Monica Hospital," and admitted by defendants' demurrer:

"That plaintiff receives patients at all hours of the day or night and in connection therewith must have available employees to receive these patients, enter them in the hospital record, make up their rooms, attend to their personal effects, clean up after emergency operations, do the clean-up and maintenance work around the hospital at such times that it will not interfere with the essential services of the hospital. To do part of this work, The California Hospital employs 48 housekeeping employees, including porters and orderlies, of whom 26 are housed by it, and The Santa Monica Hospital employs 30 housekeeping employees, including porters and orderlies, of whom 2 are housed by it. In addition plaintiff employs a large body of employees doing what it classifies administration work, which group includes clerks, bookkeepers, stenographers, telephone operators, engineers and the like. Of these The California Hospital employs 263 and houses 26, and The Santa Monica Hospital employs 104 and houses 5.

"That plaintiff operates its dietary department upon a split-shift (four hours' service during the day and four hours during the night). That if plaintiff operated its said personnel on straight eight-hour shifts, the unions to which such personnel belong would require plaintiff to hire more personnel than are required under the split-shift plan. That plaintiff thereby effects a substantial saving by employing the said personnel on a split-shift basis. That it is difficult to obtain competent personnel to work on a split-shift basis unless they are actually housed in the immediate vicinity since a split-shift requires them to be at the hospital for two different periods during each 24 hours. That the morning shift in the dietary department starts at between 4:00 o'clock and 6:00 o'clock at a time when public transportation is not readily available. That plaintiff houses 57 of its 67 dietary employees employed at The California Hospital and

2 of its 54 employees employed at The Santa Monica Hospital.

"That plaintiff does not employ a night-shift engineer at The Santa Monica Hospital, but furnishes its two daytime engineers with housing on its premises so that they will be readily available in case of emergency to service the pressure boiler maintained by plaintiff to furnish steam to its sterilizers as well as general heating service."

As the welfare exemption law has been heretofore discussed "property used exclusively for * * * hospital * * * purposes" would comprehend not only the buildings and grounds actually used for housing the patients in their treatment and care, but also such adjacent or nearby buildings used for housing such persons as may be essential for the efficient operation of the hospital. Here again, as appears from plaintiffs' allegations, the facilities were incidental to and reasonably necessary for the accomplishment of hospital purposes and were therefore tax exempt. See County of Hennepin v. Brotherhood of Gethsemane, 27 Minn. 460, 8 N.W. 595, 596, 38 Am.Rep. 298; Corporation of Sisters of Mercy v. Lane County, supra, 123 Or. 144, 261 P. 694, 700; Appeal of Parmentier, supra, 139 Pa.Super. 27, 11 A.2d 690, 693; Calais Hospital v. City of Calais, supra, 138 Me. 234, 24 A.2d 489, 490.

[13] The next question to be determined is whether buildings under construction on the tax date and intended for use in the housing of student nurses are within the welfare exemption. This issue relates to counts two and four of the complaint in action L.A. No. 20615, relating to the Hollywood Presbyterian Hospital. It appears from the pleading that "on the first Monday of March, 1946," the building on each of the two pieces of property involved "was approximately eighty-five percent (85%) completed," was "designed to be used exclusively as a dormitory and residence for student nurses attending [the hospital's School of Nursing," was "placed in use" for the designated purposes "on or about July 1, 1946," and "has been so used ever since said date." The trial court sustained defendants' demurrer to these two counts, thus distinguishing between (1) buildings completed and "used exclusively for * * * hospital * * * purposes" and (2) buildings so intended for use but still in the construction stage on the day determinative of their tax status. Such distinction appears to have been properly made.

As above quoted, the pertinent constitutional provision, Art. XIII, § 1c, and the implementing statute, Rev. & Tax. Code, § 214, unequivocally require that the property be "used" for the enumerated purposes. Such express limitation, making *use* the focal point of consideration, contemplates *actual use* as differentiated from an *intention to use* the property in a designated manner. It has been generally so held in the construction of kindred exemption laws in other jurisdictions, see Annos. 34 A.L.R. 671, 62 A.L.R. 335, 108 A.L.R. 294, although, as indicated in the cited annotations, there are cases to the contrary. This point of interpretation has been adjudicated in this state in Southern California Telephone Co. v. Los Angeles County, 212 Cal. 121, 298 P. 9, 11, concerning the taxation of a building under construction belonging to the telephone company which if "used exclusively in the operation of their business" was subject to assessment by the state board of equalization as "operative property," and immune from county taxation. It was there held that under no construction of the language—whether strictly construed as in cases "dealing with tax exemptions" where the courts have "interpreted the words 'used exclusively' to require an actual use" or liberally construed as in the instant situation of a gross receipts tax "which is not an exemption"—could it "possibly include property which is neither used nor available for use in such business." 212 Cal. at page 126, 298 P. at page 11. The same observation may well be made in this case for regardless of the rule of strict construction here applicable, it would appear that under no theory of construction could a building in the course of erection be viewed as being used for any purpose.

It is argued that some effect should be given to these factors: that the exemption here is sought for property on which considerable progress had already been made with the building, that the work was being diligently prosecuted, and upon its completion it was in fact used pursuant to its design for an exempt purpose—as distinguished from a claim made with respect to vacant land on which it is the intention to start construction at some future date. But these considerations attesting to the exercise of the institution's good faith in carrying out its building program are wholly immaterial under the welfare exemption law, where the language plainly makes use of the property the basis of the exemption, and manifestly an incompleted building cannot meet that condition. Such matters of bona fide intention as well as acts on the part of the qualifying institution have been recognized in decisions by courts which are committed to the doctrine of liberal construction of tax exemption statutes. El. Jebel Shrine Ass'n v. McGlone, 93 Colo. 334, 26 P.2d 108, 109; McGlone v. First Baptist Church of Denver, 97 Colo. 427, 50 P.2d 547, 548-549; Trustees of Property of Protestant Episcopal Church in New Mexico v. State Tax Commission, 39 N.M. 419, 48 P.2d 786, 787. But the reasoning of such decisions is without force under the rule of strict construction followed in this state and in most of the other states. This is not a case involving repairs, restoration or enlargement of a hospital or essential hospital facilities where the construction project assumes the character which had previously attached to the property for exemption purposes pursuant to its actual use, but rather here the problem concerns new buildings on property which had not yet acquired a definite character, and would not until completed and used for the designated hospital purposes. Dougherty v. City of Philadelphia, 112 Pa.Super. 570, 172 A. 177, 180. Accordingly, the trial court properly denied the exemption on the buildings here under construction on the determinative tax date.

[14] The next matter to be considered is whether property used for the maintenance of a tennis court as a limited recreational facility for hospital employees—student nurses, interns and residents—comes within the scope of the welfare exemption law. This issue relates to count four of the complaint in action L.A. No. 20616, involving plaintiff Lutheran Hospital Society of Southern California. The trial court denied the exemption upon sustaining defendants' demurrer to said count. That ruling cannot be sustained.

The tennis court is located on the hospital grounds and is used as an outdoor recreational facility for the hospital personnel as above mentioned. In its complaint plaintiff alleged that "To qualify for the training of interns or residents under the rules of the American Medical Association Council on Medical Education and Hospitals, a hospital must provide for the health, care, housing, recreation and food for its residents and interns." There is no dispute of the fact that the nature and type of this recreational facility is of a reasonable character both as to cost and size in relationship to the cost and size of the hospital.

It appears that the exempt status of recreational facilities maintained by a hospital has been considered in but two cases, and in each instance the exemption was sustained: (1) Corporation of Sisters of Mercy v. Lane County, supra, 123 Or. 144, 261 P. 694, 697, wherein a tennis court used "to afford recreation for the pupil nurses and employees of the hospital, and sometimes the patients" was held tax exempt as part of the hospital property; and (2) State v. Academy of Our Lady of Lourdes, 221 Minn. 227, 21 N.W.2d 617, 618, wherein the property of a hospital, including a "swimming pool [and] recreation hall," was likewise held tax exempt. Defendants argue that these adjudications should be distinguished because in the first case the tennis court was "sometimes used by patients," and in the second case "it is not shown that [the recreational facilities] were not maintained primarily for the use of patients and they were not considered separately from the rest of the hospital." But these considerations have no force here under the facts presented and the

test above set forth, as such use of the property was for a facility which was incidental to and reasonably necessary for the accomplishment of hospital purposes, regardless of whether it was used to meet the recreational needs of patients or of essential personnel, or both. In other words, the tennis court was reasonably necessary for the fulfillment of a generally recognized function of a complete, modern hospital. Perhaps it may not be said that such recreational facility, in its use by either patients or essential personnel, is indispensable to the accomplishment of hospital purposes; but absolute indispensability does not commend itself as an appropriate test, and it finds no support in the authorities. Accordingly, we conclude that the trial court erred in denying the exemption claim with respect to the tennis court as a reasonable recreational facility on the hospital grounds.

[15] But hospital property used to house a "thrift shop," as that project in count seven of the complaint in action L.A. No. 20616, involving plaintiff Lutheran Hospital Society of Southern California, is not entitled to the benefit of the tax exemption, and the trial court correctly so held in sustaining defendants' demurrer to that count. It appears that the "thrift shop" is located on the lower floor of the hospital building, "where donated clothing and furnishings are sold" and the "entire proceeds * * * are devoted to the maintenance of the Free Children's Clinic maintained jointly by the [hospital] and [a Community Chest] agency * * * deemed by the [hospital's] board of directors to be a charitable use." But such enterprise, laudable as its purpose manifests it to be, cannot escape classification as an independent undertaking to raise revenue, and it cannot be said to have been incidental to and reasonably necessary for the accomplishment of hospital purposes. In truth it was conducted soley for revenue purposes as distinguished from hospital purposes. While the profit or gain derived from the operation of the thrift shop benefited the hospital in providing support for its clinic, such consideration must be viewed in the light of the welfare exemption law's express proviso that "property used exclusively for * * * hospital * * * or charitable purposes is exempt from taxation if * * * the property is not used or operated by the owner or by any other person for *profit* regardless of the purposes to which the profit is devoted." Rev. & Tax.Code, § 214, subd. (3). (Emphasis added.) Such plain language prohibits the allowance of the exemption claim here in question.

The quoted profit proviso emphasizes the fundamental condition of the welfare exemption as premised upon *use of the property* for an exempt purpose. As defendants state, such qualifying limitation is well illustrated in Cypress Lawn Cemetery Association v. City and County of San Francisco, supra, 211 Cal. 387, 295 P. 813, involving the construction of the exemption allowed (1) "all property used or held exclusively" for burial grounds or (2) "for the care, maintenance or upkeep" thereof, "except as used or held for profit." Const. art. XIII, § 1b. Plaintiff, a cemetery association, had invested certain trust moneys in a hotel, which it then operated. It claimed that the hotel came within the second provision in classification of the exempt property because "the entire income derived from the hotel [was] devoted exclusively to the care and maintenance of" the cemetery. 211 Cal. at page 390, 295 P. at page 814. In rejecting this claim, the court stated, 211 Cal. at page 391, 295 P. at page 814: "While the application of the income derived from the operation of the hotel undoubtedly assists, and perhaps materially so, in the proper maintenance of the nontaxable burial grounds, and lends value thereto, this alone should not work an exemption of the hotel proper. (Citing authority.) *Had it been the intention to grant the exemption upon the basis of the use of the income from property rather than upon the use of the property itself,* such intention could, and probably would, have been directly and positively expressed." (Emphasis added.) So here the use of the *income* from the "thrift shop" for "hospital * * * or charitable purposes" is of no significance when the de-

terminative prerequisite is "the use of the property itself"—a condition made doubly certain under the terms of the statute's exception expressly denying exemption to the property if "used or operated * * * for profit regardless of the purposes to which the profit is devoted." Rev. & Tax. Code, § 214, subd. (3). The case of San Gabriel Cemetery Association v. County of Los Angeles, 49 Cal.App.2d 624, 122 P.2d 330, 332, cited by the hospital as supporting its exemption claim, is not in point, for there the alleged profit or gain, used for the upkeep of the cemetery, arose from "the sale of burial space at a price in excess of its cost"—the very activity constituting the basis of the cemetery exemption and so not regarded as an operation for "profit" within the meaning of the exemption qualification.

[16] There now remains for consideration the final question of whether the exemption from taxation granted by the welfare exemption law extends to a levy imposed under authority of the Los Angeles County Flood Control Act. Stats. 1915, ch. 755, p. 1502; Deering's General Laws, Act 4463. The trial court held that it did, and overruled defendants' demurrers to the causes of action presented by the respective plaintiff hospitals claiming the benefits of such exemption. Such ruling cannot be sustained.

The constitutionality of the above-mentioned flood control statute was assailed in the case of Los Angeles County Flood Control District v. Hamilton, 177 Cal. 119, 169 P. 1028, and in sustaining its validity, this court declared that though the act used the expression "tax," it in fact conferred authority merely to levy an assessment against the real property of the district on the basis of benefits to be received and the legislature itself had determined the question of these benefits when it authorized the imposition of such levy on the basis of the assessed valuation of the real property for general taxation purposes. Following this decision that the flood control district levy is a special assessment, and not a tax, is a long line of additional cases: City of Inglewood v. County of Los Angeles, 207 Cal. 697, 702–703, 280 P. 360; Los Angeles County Flood Control Dist. v. Wright, 213 Cal. 335, 338, 2 P.2d 168; City of Los Angeles v. Los Angeles County Flood Control Dist., 11 Cal.2d 395, 404, 80 P.2d 479; Los Angeles Ry. Corp. v. Los Angeles County Flood Control Dist., 78 Cal.App. 173, 180–181, 248 P. 532; Southern Pacific R. R. Co. v. Stibbens, 103 Cal.App. 664, 676, 285 P. 374; Northwestern Mutual Life Ins. Co. v. State Board of Equalization, 73 Cal.App.2d 548, 553, 166 P.2d 917; see, also, Cheseboro v. Los Angeles County Flood Control Dist., 306 U.S. 459, 465–466, 59 S.Ct. 622, 83 L.Ed. 921.

[17, 18] It is well settled that exemptions of private property from taxation do not extend to special assessments, levied upon the basis of equivalent benefit, unless specifically so provided. Cooley on Taxation, Fourth Ed., vol. 2, ch. 13, § 689, p. 1444; 48 Am.Jur. § 80, p. 636; 24 Cal.Jur. § 80, p. 97; Hollywood Cemetery Ass'n v. Powell, 210 Cal. 121, 135, 291 P. 397, 71 A.L.R. 310, and cases there cited. This rule is generally applied to charitable institutions. 48 Am.Jur. § 97, p. 647; Anno. 34 A.L.R. 687. To avoid application of this rule here, plaintiff hospitals urge that the flood control district levy is an ad valorem rather than a specific lien type of special assessment, and as thus distinguished in type, the method prescribed for its collection is so much like that followed in the collection of a tax that it should be treated as a tax within the meaning of the welfare exemption law. But such asserted distinction is not a determinative factor, for the character of a levy as a tax or an assessment depends upon whether it is exacted in compensation for a benefit to the property upon which it is made a charge, and its classification is not affected by the method adopted for collection. If the welfare exemption law were intended to include special assessments, provision therefor should have been made in explicit terms, pursuant to the rule of strict construction as generally held applicable in tax exemption cases. Moreover, many years before the adoption of the welfare exemption law, the flood control district levy had been construed as a special assessment, Los Angeles County Flood Control

Dist. v. Hamilton, 1917, supra, 177 Cal. 119, 129, 169 P. 1028, and not covered by a general exemption from taxes, Los Angeles Ry. Corp. v. Los Angeles County Flood Control Dist., 1926, supra, 78 Cal.App. 173, 181, 248 P. 532; Southern Pacific R. R. Co. v. Stibbens, 1930, supra, 103 Cal.App. 664, 676–677, 285 P. 374. In view of such judicial construction as to the character of the levy in question and its exclusion from the scope of a tax exemption, the conclusion inescapably follows that the benefit of the "exemption from taxation" accorded by the welfare exemption law was intended to apply within the limits of the cited decisions rather than in any enlarged sense. In re Nowak, 184 Cal. 701, 705, 195 P. 402; City of Long Beach v. Payne, 3 Cal. 2d 184, 191, 44 P.2d 305. Accordingly, the exemption claims as to the flood control district assessments cannot here prevail.

The only hospital which did not seek recovery of the flood control district assessment was plaintiff Queen of Angels Hospital in action L.A. No. 20611. The trial court correctly disposed of all issues presented in that case, and the judgment should be affirmed. In all the other cases the trial court correctly disposed of some of the issues and incorrectly disposed of others, as above indicated. It therefore appears appropriate to reverse with directions the judgments in these other cases, which judgments made certain all-inclusive adjudications regarding exemptions and also awarded recoveries in a single sum as against each defendant.

The judgment in Queen of Angels Hospital v. County of Los Angeles, L.A. No. 20611, is affirmed. The judgments which are the subjects of the other appeals are, and each of them is, reversed with directions to the trial court to proceed in accordance with the views herein expressed. Plaintiff in Queen of Angels Hospital v. County of Los Angeles, L.A. No. 20611, will recover its costs therein, but the parties will bear their own costs on the other appeals.

GIBSON, C. J., and EDMONDS, CARTER and TRAYNOR, JJ., concur.

SCHAUER, Justice (concurring).

In concurring I call special attention to the fact that in each of these cases the complaint alleges and defendants, solely for the purposes of their demurrers, admit that the property is not used or operated for profit or to benefit any person in the more advantageous pursuit of his business or profession.

Section 214 of the Revenue and Taxation Code provides that "Property used exclusively for * * * hospital * * * purposes owned and operated by * * * corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if: * * * (3) The property is not used or operated *by the owner or by any other person for profit regardless of the purposes to which the profit is devoted;* (4) The property is not used or operated by the owner or by any other person *so as to benefit any officer* * * *, member, employee * * * *or any other person, through* the distribution of profits, payment of excessive charges or compensations or *the more advantageous pursuit of their business or profession.*" (Italics added.)

There are no allegations in the complaints which would show that any of the hospitals charges paying patients more per day for the room, board and services furnished those patients than the cost to the hospital of furnishing such room, board and services. If some rooms are intentionally and consistently rented to paying patients at more than cost this operation, in my view, comes within the express language of the above quoted statute (use or operation "or profit regardless of the purposes to which the profit is devoted") and, hence, the hospital property so used does not qualify for exemption from taxation.

It is also to be noted that there are no allegations in the complaints here which would show that, with respect to the admission of patients who are charged fees by their doctors, the hospitals selectively admit only the patients of staff doctors. If the hospitals have such an admission policy, it would seem that they are being operated "so as to benefit" the staff doctors

in the "more advantageous pursuit of their * * * profession" (Rev. & Tax.Code, § 214, par. (4)), and hence, by the express standard set by the Legislature such hospitals would not qualify for the exemption.

It may be noted that a view similar to that which I here express was taken by the trial court in the Monte Sano Foundation case (L.A. 20614) with reference to an area in its hospital building which is leased to a physician who uses it exclusively for essential hospital purposes but who is also benefited in his practice by the lease arrangement. The physician, a roentgenologist, furnishes the hospital's patients with X-ray services and charges them for such services. It would appear that plaintiff Monte Sano agrees with the view that this leased area is being used for "the more advantageous pursuit" of the lessee-doctor's profession and, therefore, does not come within the tax exemption of section 214, for the plaintiff did not appeal from the portion of the judgment against it, after demurrer sustained without leave to amend, on the cause of action (fourth) involving such leased area.

SHENK, Justice (concurring and dissenting).

I concur in the opinion and judgment as to the Los Angeles County Flood Control District Tax; and as to the general tax insofar as the result is tax exemption. But I am not in agreement with those portions of the opinion which lead to non-exemption from the general tax. In the latter are included the thrift shop and the buildings under construction. In my opinion the proper application of the law should result in tax exemption of these items from the general tax.

The rule of construction to discover a tax exemption applies only until the meaning of the language makes it clear that an exemption was expressed. When that meaning is found in the language employed the rule is of no further use. Since the electorate and the legislature used express words of exemption, section 1c, Art. XIII Const., sec. 214, Rev. & Tax. Code, there is here no need for the rule of construction to discover whether an exemption was intended. The task from that point is to apply the express language of exemption in accordance with the intent appearing from the constitutional and statutory provisions and other relevant factors.

It is obvious that the welfare exemption is designed to serve both social and economic ends. The electors of the state must be deemed to have been aware of the need of the services afforded by the designated organizations when carried on impartially and without self-interest. Implicit in the legislation is the knowledge that the maintenance of the facilities and the dispensation of the services as a result of private contributions of funds and personal effort become less of a burden on the taxpaying public than would be the cost under public ownership and control. The lessened cost of operation by the relief from taxation of such organizations also renders the services more widely available to those for whom they are intended. The resulting cost reduction must have been considered a greater benefit to the people than decreased taxes if the properties were not exempt.

As the majority opinion points out, many operations involved are incidental to a hospital use but are important and necessary to the conduct of each organization and without which its function as a hospital would be severely handicapped. Considering the social and economic ends to be served, the governing policy should be to so apply the express exemption as to bring about fully the legislative objectives. To do so requires that the words "use" and "purposes" be given their separate meanings. The exemption could have been afforded only when the property was devoted solely to a hospital *use*. But the wider compass in the expression of use for hospital *purposes* should include every purpose deemed essential to operation as a hospital. In this aspect the determination of necessity by the owners and operators should be given proper weight. Therefore, although a property might not be devoted to a hospital use, if it is essential for a hospital or other exempt purpose as distinguished from a use foreign to such purpose, it should be considered to be used exclu-

sively for the exempt purpose within the meaning of the constitutional and legislative provisions. The majority opinion appropriately includes within the use for hospital purposes a training school for nurses, residence facilities for nurses, doctors and employees, and health and recreational facilities. But there has been omitted the thrift shop conducted by one of the hospitals and the buildings under construction intended for use as housing for student nurses attending the school of nursing.

The "Thrift Shop"

The so-called "thrift shop" is located in a portion of a hospital building otherwise exempt. Here donations of personal property are received and where not usable as donated they are converted into cash and used on behalf of the Free Children's Clinic maintained jointly by the hospital and the Los Angeles Community Chest. Nothing is purchased for resale. It is not a commercial enterprise, and there is no true profit-making objective involved. These charitable activities are common and are plainly distinguishable on the facts from Cypress Lawn Cemetery Association v. City and County of San Francisco, 211 Cal. 387, 295 P. 813. There property of the plaintiff "except as used or held for profit" was tax exempt. A hotel, the proceeds from the operation of which were devoted to the upkeep of the cemetery property, was owned and operated by the plaintiff. It was decided that the hotel property was not exempt from taxation. The case suggests a fair test of when property is used or operated for profit "regardless of the purposes to which the profit is devoted" under the statute here involved. If, as in the cemetery case, the propetry is held primarily as investment property to derive a profit and has no connection with the hospital or charitable use, it is not used for hospital or charitable purposes although the profit therefrom is applied to maintain the facilities devoted to those purposes. It was such investment property as was intended to be omitted from the exemption provisions. The legislature no doubt considered the possibility that, in the absence of language of express exclusion, the courts might conclude that investment property was exempted when all the proceeds from its operation were devoted to the hospital or other designated purpose. But the thrift shop is not held as investment property nor is it pursued as a commercial venture. There is here a direct connection with the charitable purpose of receiving contributions for distribution in the same or converted form to the children applying for free assistance at the clinic. Cf. Missouri Goodwill Industries v. Gruner, 357 Mo. 647, 210 S.W.2d 38. Every case obviously must be determined on its own facts. And in this instance it seems to me that the alleged charitable use of the property far outweighs any possible attribute of commerce for the reason that contributions are necessarily converted to usable liquid assets in their charitable application. Here the result should be the same as though money contributions had been offered and accepted in the first instance.

Buildings under Construction

As to the lots and the buildings thereon under construction for use as student nurse housing it is necessary to consider whether during construction they were "property used exclusively for * * * hospital * * * purposes." I do not agree with the conclusion that the question has been determined in this state adversely to the claim of exemption by the case of Southern California Telephone Co. v. Los Angeles County, 212 Cal. 121, 298 P. 9. There was no question of exemption from taxation in that case. The court pointed out that public utilities were not exempt from property taxes. If the property in question was "operative" property it fell under the substituted state tax on gross receipts. If non-operative it was subject to taxation by the county. It was decided that the property was non-operative and therefore taxable by the county. The conclusion has no bearing on the present question of the application of provisions for tax exemption. In arriving at the holding that the exemption

does not apply to property under construction it is conceded that there are cases to the contrary. The reasoning of those cases to me is persuasive. In the application of such exemptions, construction for a proper hospital purpose is a use for such purpose. Expansion is necessary to keep abreast of increased public need due to population and other changes. Under modern conditions, neither a hospital nor any other welfare service can remain static. If the trust funds, contributions and earnings are tax-exempt, no good reason requires a denial of exemption because of the temporary use of the assets to construction purposes, where the property in its converted state is also exempt. In El Jebel Shrine Ass'n v. McGlone, 93 Colo. 334, 26 P.2d 108, the constitution and statute exempted lots and buildings thereon if used solely and exclusively for religious or charitable purposes. It was held that a lot with the foundation thereon for a building to be used for charitable purposes was exempt. Among other cases the court followed New England Hospital v. Boston, 113 Mass. 518. There vacant lots were held exempt where construction plans were diligently being pursued in good faith. See to similar effect McGlone v. First Baptist Church of Denver, 97 Colo. 427, 50 P.2d 547; Trinity Church v. Boston, 118 Mass. 164, 166. In a case holding to the contrary, Boston Society v. Boston, 129 Mass. 178, vacant land was held taxable because the only intent appearing was that at some indefinite time in the future it was to be improved for the required purpose. In re Miriam Osborn Memorial Home Ass'n, Sup., 140 N.Y.S. 786, also involved real property not yet in actual use but suitable buildings were in good faith contemplated, plans discussed, and funds in existence for the purpose. Since the property was shown to be essential to the comprehensive plan of development for charitable purposes, it was held to be exempt. In re Children's Hospital, 1923, 82 Pa.Super. 196, the exemption statute provided that the entire revenue of the charity should be used among other things for the necessary increase of grounds and buildings thereon. It was held that an addition in the course of construction was exempt. Dougherty v. City of Philadelphia, 1934, 112 Pa.Super. 570, 172 A. 177, involved two properties, neither of which was in actual use. One school building was being demolished, while the replacement building was still under construction. The exemption was applied to the former. The court held the property entitled to one exemption. Neither property was then in condition for actual use, but the exemption was nevertheless applied.

The statement in 26 R.C.L., Taxation, Sec. 283, was accepted as the general rule in Trustees of Property of Protestant Episcopal Church in New Mexico v. State Tax Comm., 39 N.M. 419, 48 P.2d 786, 787, namely: "When a religious society has bought a lot for the purpose of erecting a church thereon, and has begun and is prosecuting with all reasonable diligence the erection of the building, the lot is generally held to be exempt from taxation." See also Osteopathic Hospital of Maine v. Portland, 139 Me. 24, 26 A.2d 641, 644; Foresee v. Board of Directors of Bergman Special School Dist., 1948, 213 Ark. 569, 211 S.W.2d 432; State v. Second Church of Christ, Scientist, 185 Minn. 242, 240 N.W. 532; Village of Hibbing v. Commissioner of Taxation, 1944, 217 Minn. 528, 14 N.W. 2d 923, 156 A.L.R. 1294; Commonwealth v. First Christian Church of Louisville, 169 Ky. 410, 183 S.W. 943, Ann.Cas.1918B, 525.

It is no answer to say that in such cases the policy was one of liberal construction. Under the "strict but reasonable" formula announced the result should be the same. When an exemption appears under that rule of construction, the "reasonable" application of the exemption language in my opinion requires a result in conformity with the general rule accepted in the foregoing cases.

35 Cal.2d 760

YOUNG MEN'S CHRISTIAN ASS'N OF LOS ANGELES v. LOS ANGELES COUNTY et al.

L. A. 21208.

Supreme Court of California, in Bank.

Aug. 18, 1950.

The Young Men's Christian Association of Los Angeles sued the County of Los Angeles and the City of Los Angeles to recover taxes and assessments paid by plaintiff under protest for the taxable years 1946–1947. The Superior Court, Los Angeles County, W. Turney Fox, J., allowed plaintiff a refund of tax payments and disallowed recovery of flood control district assessments, and defendants appealed and plaintiff cross-appealed. The Supreme Court, Spence, J., held that plaintiff's property which was devoted to dormitory rooms was exempt from taxation under statute exempting from taxation under specified circumstances property used exclusively for charitable purposes, and that property of plaintiff used for a restaurant, tailor shop, barber shop, and store, and property of plaintiff rented to the Selective Service Board, was not entitled to tax exemption under statute.

Judgment reversed and cause remanded with instructions.

Shenk, J., dissented in part.

1. Taxation ⇐204(2)

The statute exempting from taxation under specified circumstances property used exclusively for charitable and other specified purposes must be strictly construed, but the construction must also be reasonable. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

2. Taxation ⇐241(1)

Property used "exclusively for charitable purposes" within statute exempting from taxation under specified circumstances property used exclusively for charitable purposes includes property used exclusively for any facility which is incidental to and reasonably necessary for the accomplishment of such purposes. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Exclusively for Charitable Purposes".

3. Taxation ⇐241(1)

Y.M.C.A. property devoted to dormitory rooms was used "exclusively for charitable purposes" within statute exempting from taxation under specified circumstances property used exclusively for charitable purposes, and such property was exempt under statute notwithstanding the dormitory rooms were rented and returned income. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

4. Taxation ⇐241(1)

Under statute exempting from taxation property used exclusively for charitable and other specified purposes, but precluding exemption if property is used or operated for profit, reference to "profit" covers income derived from a facility which is not correlated with exempt purposes, and does not cover income from a facility which is incidental to and reasonably necessary for accomplishment of exempt purposes. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Profit".

5. Taxation ⇐241(1)

A restaurant, barber shop and tailor shop operated in Y.M.C.A. branch, and available to public as well as to Y.M.C.A. members, and charging standard prices for their respective services in competition with like enterprises in community, were not property used "exclusively for charitable purposes" within statute exempting from taxation under specified circumstances property used exclusively for charitable purposes, notwithstanding money derived therefrom was used exclusively for operational upkeep of Y.M.C.A. and notwithstanding facilities were desirable in promotion of general service plan of Y.M.C.A. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

6. Taxation ⇐241(1)

A store operated in Y.M.C.A. branch, begun as a "gym store" for sale of athletic equipment and clothing pursuant to uniform policy of Y.M.C.A. to provide such merchandise for use in athletics at branches having physical training facilities, was not property used "exclusively for charitable

purposes" when store temporarily stocked other items of merchandise as convenience to servicemen who visited branch during wartime, within statute exempting from taxation under specified circumstances property used exclusively for charitable purposes. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

7. Taxation ⇐241(1)

Space in Y.M.C.A. building rented to Selective Service Board was not used "exclusively for charitable purposes" within statute exempting from taxation under specified circumstances property used exclusively for charitable purposes. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

8. Taxation ⇐246

The exemption from taxation granted by Welfare Exemption Law does not extend to a levy imposed under authority of Los Angeles County Flood Control Act. General Laws, Act 4463; Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

Brady & Nossaman and Walter L. Nossaman, all of Los Angeles, for plaintiff-appellant.

Henry C. Clausen, San Francisco, as amici curiae on behalf of plaintiff-appellant.

Harold W. Kennedy, County Counsel, Andrew O. Porter, Deputy County Counsel, Ray L. Chesebro, City Attorney, and Louis A. Babior, Deputy City Attorney, all of Los Angeles, for defendants-appellants.

SPENCE, Justice.

Plaintiff, the Young Men's Christian Association of Los Angeles, brought this action to recover certain taxes and assessments paid under protest for the taxable year 1946–1947. The controversy involves the application of the recently enacted welfare exemption law, Cal.Const. art. XIII, § 1c; Rev. & Tax. Code, § 214, to five buildings owned by plaintiff and used in carrying on its work. The county assessor refused to exempt from taxation such portions of plaintiff's buildings as were used for dormitories, restaurant and dining-room accommodations, barber shops, valet shops, a particular type of merchandise store, and office space rented to a Government agency; and, in addition, he deemed each of plaintiff's pieces of property liable for a Los Angeles County Flood Control District assessment.

The cause was tried upon an agreed statement of facts, and by the judgment thereupon entered plaintiff's exemption claims were sustained as to the *tax* payments made on the disputed portions of its buildings but denied as to the flood control district *assessments* made against its property. The judgment is assailed by both parties, defendants having appealed from that portion allowing plaintiff a refund of the *tax* payments, and plaintiff having appealed from that portion disallowing recovery of the flood control district *assessments*.

Various aspects of the scope of the welfare exemption law in relation to particular claimants seeking the benefits thereof have been discussed in the case of Cedars of Lebanon Hospital v. County of Los Angeles, Cal.Sup., 221 P.2d 31, and reference is made to such opinion for such bearing as it may have on the consideration of the general problem. The parties have resolved their controversy here to turn principally on these points: (1) whether the portions of the buildings in question, as property belonging to plaintiff, concededly a nonprofit corporation, were "used exclusively for religious * * * or charitable purposes" as a basic prerequisite, Const. art. XIII, § 1c; Rev. & Tax. Code, § 214, and (2) the effect of the further proviso that the "property [be] not used or operated by the owner * * * for profit regardless of the purposes to which the profit is devoted." Rev. & Tax. Code, § 214, subd. (3). Upon an analysis of the agreed factual basis of plaintiff's several exemption claims, it appears that plaintiff (1) properly invoked the "welfare exemption" with respect to the *tax* levy made on the dormitory facilities it furnished in its respective buildings but (2) was not entitled to such exemption with respect to (a) *tax* levies made on the restaurant and dining-room accommodations, barber shops, valet shops, the particular mechandise store involved, and the office space rented to the

Government agency; or (b) flood control district *assessments* made against its property.

The record identifies the five buildings owned by plaintiff as the Downtown Branch, San Pedro Branch, Hollywood Branch, 28th Street Branch, and East Los Angeles Branch. In each instance exemption was accorded generally to the portions of these buildings devoted to locker rooms, swimming pools, gymnasiums, club rooms, social rooms, classrooms, storage and maintenance rooms; and the parties are in dispute only as to the tax status of the following physical facilities in their respective locations:

(1) Downtown Branch, an eleven-story structure, with basement and sub-basement, and situated in the central business section of Los Angeles: *dormitory rooms* provided on the sixth to tenth floors; a small *barber shop;* and a *valet shop.* These two shops are located in a small adjoining structure, each having entrances from the street and through a court from the lobby of the main building. The valet shop maintains a small room on the basement level in the main building for the performance of its cleaning and pressing services. Both shops serve the public, as well as dormitory residents and Y. M. C. A. members generally. The barber shop is operated by Y. M. C. A. employees, who are paid by plaintiff on the basis of an agreed percentage of the gross receipts. The valet shop is operated by an independent contractor, who pays plaintiff a monthly rental of $100. The charges made by both shops for their services are equivalent to standard commercial prices in the community.

(2) San Pedro Branch, a five-story structure, with a basement, and situated close to the business center and harbor channel of San Pedro: *dormitory rooms* provided on the third to fifth floors, and also a portion of the second floor; a *restaurant* on the first floor, a room approximately 1600 square feet in area, with counters and seats accommodating 38 persons and 7 tables serving 28 persons—66 persons in all; *Cluverius Hall,* a special meeting room on the second floor containing an area of 1800 square feet and used by non-Y.M.C.A. groups, where meals are served to a maximum of 100 people in conjunction with scheduled meetings; a *barber shop* and a *valet shop,* each located at the rear of a small court in the interior of the building and reached only through the main lobby; and a small *store* located in the rear of the first floor, and without a direct street entrance.

The restaurant is operated by Y.M.C.A. employees, and meals are served to the general public, as well as to resident and non-resident Y.M.C.A. members, with a price range of 45¢ to 95¢ for breakfast, and 70¢ to $1.05 for lunch and dinner. In Cluverius Hall meals are served to various civic groups at a charge varying from $1.00 to $1.50 per person, according to the choice of menu. Both the barber shop and the valet shop are open to the public, as well as to dormitory residents and Y.M.C.A. members generally. The barber shop is operated by an independent contractor, who pays plaintiff a weekly rental of $10. The valet shop is operated by a Y.M.C.A. employee, a tailor, whose compensation consists in a fixed percentage of the gross receipts. In both shops standard prices prevail. The small store was started as a "gym store" for the sale of athletic equipment and clothing pursuant to plaintiff's uniform policy to provide such merchandise for use in athletics at all branches having gymnasium, swimming or similar physical training facilities. This particular store was so operated since the opening of the present building in 1926, but during World War II as a convenience to the large number of servicemen visiting the San Pedro Branch, the store began to stock various other items of merchandise, principally toilet articles, drugs, and various kinds of trinkets and curios. This augmented line of purchasable articles was still being offered in the store during 1946, the tax year in question, but apparently was allowed to dwindle in 1947 and 1948, at which time the stock of the store returned to its prewar status as a true "gym store."

(3) Hollywood Branch, a four-story structure and situated in the center of Hollywood: *dormitory rooms* provided mainly

on the third and fourth floors, with a few accommodations on the second floor.

(4) 28th Street Branch, a four-story structure, with a basement, and situated near Central Avenue in a district in Los Angeles populated largely by Negroes: *dormitory rooms* provided mainly on the third and fourth floors, with some rooms also on the second floor.

(5) East Los Angeles Branch, a two-story structure, with a separate gymnasium building in the rear, and situated in the eastern part of Los Angeles: *dormitory rooms* provided on the second floor; three *office rooms* on the first floor, having a total area of 1122 square feet and rented to the Selective Service Board, originally at a rental beginning in 1943 of $25 per month but increased in December, 1945, to $100 per month and so continued until the occupancy of the board was terminated in December, 1946.

Plaintiff follows a general pattern in the operation of the dormitory facilities in its respective branches: In each instance the dormitory area is under the supervision and management of a trained Y. M. C. A. secretary, who also has the additional responsibility of acting as a counsellor and advisor to the branch's residents. Applicants for living quarters are required to fill out a written form of questionnaire giving information as to background, experience, and character of the individual and declaring his agreement with the fundamental purposes of the Y. M. C. A. Each applicant is interviewed by the supervising secretary at the branch and told about the organizational policy of the Y. M. C. A., its general objectives in making available various facilities and activities as part of its regular program, and the prevailing standard of good conduct and moral behavior that must be followed. All accepted applicants for residence are required to become members of the Y. M. C. A. An effort is made to confine dormitory residence to men under forty years of age, but exceptions are made on occasions. Loans are made to those who are without funds, coincident with arrangements for their stay at the branch for a reasonable period of time on credit and until they can get established. The rooms are rented at moderately low rates, consistent with their modest furnishings and limited size, ranging according to the branch from $4.50 to $7.00 per week for singles; $4.50 to $6.50 per week, two in a room; and $3.50 to $5.50 per week, three in a room.

Plaintiff's financial records appear to make no breakdown or allocation of general and administrative overhead expenses pursuant to the various activities or facilities provided at each branch, but the total expenditures thereof are lumped together as against total operating expense. Such accounting procedure shows that plaintiff during its entire existence has functioned at an overall loss, and that the aggregate deficit is discharged yearly by individual contributions and an allowance from the Community Chest. All the original cost of plaintiff's buildings and the furnishings thereof was met by voluntary contributions, and without resort to operating income or receipts. Plaintiff's annual budget makes no allowance for the depreciation of buildings, fixtures or equipment. In view of these accounting practices, and particularly the failure to segregate income and expense items as to specific facilities, it is impossible to determine precisely from the standpoint of profit or loss the financial results of dormitory, restaurant or other designated departmental operations considered separately. However, it is clear that the revenues derived from plaintiff's dormitory facilities as provided at each branch constitute a substantial source of operating income. Furthermore, the most significant of plaintiff's exemption claims involves the dormitory areas in that at least 90% of the total disputed tax assessment in each case is attributable to such residential facilities.

Plaintiff's general object and purpose, as stated in its articles of incorporation, is to promote "the spiritual, moral, mental and physical condition of youth and adults"—to bring them under moral and religious influences, to improve their characters, and to stimulate in them higher ideals of life and conduct. From the agreed statement of facts it appears that plaintiff's "activities include physical education, sports, recreation, teaching of skills, informal educational

activities, social and cultural activities, religious and moral instruction and guidance, worship and inspirational occasions." In addition, plaintiff cites certain specialized functions of its respective branches determined in large part by their particular location: Downtown Branch, with its metropolitan administration and facilities for individuals and groups in the central business area who would not be served by any particular outlying Y. M. C. A. branch; San Pedro Branch, with its focus upon the needs and activities of members of the Armed Forces stationed temporarily or permanently in the Harbor district—in fact, known as the "Army and Navy Branch"; Hollywood Branch, with its emphasis upon service and assistance to young men brought to that area in quest of employment with the motion picture and radio industries; 28th Street Branch, with its activities gauged to serve members of the Negro race settled in that locale; and East Los Angeles Branch, with its facilities used primarily in serving members of several minority racial groups located in that area. Plaintiff's general policy is established by a board of directors, and the administrative operations thereunder are supervised by a board of managers functioning at each branch. The members of these respective boards are citizens of the community who serve without compensation. Salaries, of course, are paid to plaintiff's staff of trained secretaries and their assistants in the administration of plaintiff's policies, as well as to the personnel employed by plaintiff in maintaining the various branches and supplying the services there rendered.

Plaintiff contends that the above-mentioned facilities on which it seeks the welfare exemption are all being used for the purpose of carrying on its broad, diversified program as a religious and charitable institution, organized on a non-profit basis to serve the moral, mental, and physical needs of young men and aid in the development of their characters for the general benefit of society, and that as integral parts of the single, overall Y. M. C. A. program in the advancement of its fundamental objectives, all such operations qualify within the law's requirement of "property used exclusively for religious * * * or charitable purposes." Defendants, on the other hand, maintain that the disputed facilities are used for commercial revenue-producing purposes, and the fact that "plaintiff is a charitable corporation and devotes the profit, if any, from [its] business operations to charitable purposes * * * is not sufficient to entitle it to tax exemption on * * * purely commercial enterprises." As heretofore stated, we have concluded that plaintiff's position is well taken with respect to the portions of its buildings devoted to dormitory accommodations as constituting facilities which are incidental to and reasonably necessary for the accomplishment of its charitable and religious purposes, but that the other disputed facilities and undertakings by plaintiff, while undoubtedly valuable in its general operational plan, do not appear to meet the conditions set forth in the welfare exemption law.

[1, 2] As discussed in the opinion this day filed in the case of Cedars of Lebanon Hospital v. County of Los Angeles, Cal. Sup., 221 P.2d 31, in connection with the claims of certain hospitals seeking the benefits of the welfare exemption, the rule of strict construction generally applicable to tax exemption laws must prevail here, but adherence to such legal principle does not require that the narrowest possible meaning be given to the exempting language if it would establish too severe a standard and defeat the apparent object of the law. Rather the construction of the law, though strict, must also be reasonable. To this end it would appear that the exemption of property "used exclusively for * * * charitable purposes", like the exemption of property "used exclusively for religious [or] hospital * * * purposes," should be held to include property used exclusively for any facility which is incidental to and reasonably necessary for the accomplishment of such purposes. Accordingly, plaintiff's respective facilities and activities must be examined as a whole, as well as separately, in determining the qualification of each portion of its properties for a tax exempt status.

[3] The dormitory accommodations furnished at plaintiff's respective branches

appear to be a reasonably necessary facility in carrying out plaintiff's general program and to constitute a base of operations from which radiate its commonly recognized influences and teachings directed to the elevation and betterment of young men and boys. Through operation of its dormitories, plaintiff makes available safe, clean, wholesome living quarters and environment —particularly for young men who are away from home and in need of low-cost housing within their means while they endeavor to establish themselves in the community—and likewise provides complete recreational facilities as well as opportunities to participate in activities intended to promote moral and spiritual well-being. Functioning as a non-sectarian institution and rendering its services without discrimination as to creed or race in line with its endeavors to inculcate Christian standards of character and conduct in the young men coming within its benevolent influences, plaintiff summarizes its activities to include "physical education, sports, recreation, teaching of skills, informal educational activities, social and cultural activities, religious and moral instruction and guidance, worship and inspirational occasions." All applicants for lodging in any of plaintiff's branches are required to complete a questionnaire setting forth their background and experience, and declaring the desire to "become a member and support [the] aims and purposes" of the Young Men's Christian Association as a worldwide Christian Fellowship, dedicated to developing and improving the spiritual, social, mental and physical life of youth and adults in accordance with [Christian] spirit and teachings."

Defendants argue that even though plaintiff's maintenance of dormitory facilities be regarded as aiding in the accomplishment of its fundamental purposes, such property also serves in another capacity through satisfying a housing need for the residents at a prescribed rental, a consideration which is not only commercial in character as opposed to an extension of charity, but which likewise precludes classification as property "used *exclusively* for * * * charitable purposes." As authority for their argument defendants rely heavily on the decision reached in Young Men's Christian Ass'n of Germantown v. City of Philadelphia, 1936, 323 Pa. 401, 187 A. 204, 207. In that case the tax exemption applied to "all * * * associations and institutions of learning, benevolence, or charity, with the grounds thereto annexed and *necessary for the occupancy and enjoyment of the same,* founded, endowed, and maintained by public or private charity". (Emphasis added.) The Supreme Court of Pennsylvania analyzed the dormitory accommodations as there provided at moderate rental rates to constitute no more than the operation of a competitive hotel or residential facility, and as such commercial enterprise, not entitled to the tax exemption. However, these precise factors are to be noted as influencing that decision: (1) the concept of charity as confined solely to the relief of the needy and destitute, 187 A. 209, rather than comprehending as well activities which are humanitarian in nature and rendered for the general improvement and betterment of mankind, though the recipients of such benefits may be able to pay at least in part therefor, In re Estate of Henderson, 1941, 17 Cal.2d 853, 857–858, 112 P.2d 605; Scripps Memorial Hospital, Inc., v. California Employment Comm., 1944, 24 Cal.2d 669, 676, 151 P.2d 109, 155 A.L.R. 360; also Y.M.C.A. of City of Lincoln v. Lancaster County, 1921, 106 Neb. 105, 182 N.W. 593, 595, 34 A.L.R. 1060; Springfield Y.M.C.A. v. Board of Assessors, 1933, 284 Mass. 1, 187 N.E. 104, 106; People v. Y.M.C.A. of Chicago, 1936, 365 Ill. 118, 6 N.E.2d 166, 169; Miami Battlecreek v. Lummus, 1939, 140 Fla. 718, 192 So. 211, 218; Missouri Goodwill Industries v. Gruner, 1948, 357 Mo. 647, 210 S.W.2d 38, 40; People ex rel. Provident Loan Society v. Chambers, 1949, 196 Misc. 367, 88 N.Y.S.2d 459, 467; (2) the exemption qualification premised on the narrow consideration of whether the maintenance and operation of the dormitory rooms were clearly "necessary for the occupancy and enjoyment" of that part of the Y.M.C.A. building "in which its work of charity or benevolence [was] carried on", 187 A. 214, rather than focused on the *use* of such dormitory facilities as a reasonably necessary and integrated factor in fur-

therance of the declared corporate purposes of the association; and (3) the reliance placed on certain Missouri cases, State ex rel. St. Louis Young Men's Christian Ass'n v. Gehner, 1928, 320 Mo. 1172, 11 S.W.2d 30, 38; St. Louis Y.M.C.A. v. Gehner, 1932, 329 Mo. 1007, 47 S.W.2d 776, 81 A.L.R. 1449, where under a constitutional provision exempting from taxation buildings "used exclusively for religious worship * * * or for purposes purely charitable", dormitory accommodations provided in Y.M.C.A. buildings were held taxable because serving a commercial purpose rather than used *exclusively* for charitable purposes within the purport of the exemption, 11 S.W.2d 37–38; 47 S.W.2d 778, a construction of the exempting language which has been expressly disapproved in later Missouri cases as too rigid in principle and inconsistent with the policy of the law. Salvation Army v. Hoehn, 1945, 354 Mo. 107, 188 S.W.2d 826, 830–831; Missouri Goodwill Industries v. Gruner, 1948, supra, 357 Mo. 647, 210 S.W.2d 38, 40.

It is manifest from the record here that plaintiff's conduct of dormitory facilities at its respective branches correlates wholly with its purpose of providing for the welfare of young men and boys of moderate earning capacity and income, through the maintenance of lodging quarters at a minimum cost so that they may have a place of study, recreation and abode, under wholesome and decent influences and with proper protection and guidance designed to foster good citizenship and inculcate Christian ideals and character. Plaintiff's method of operating the dormitory sections of its buildings indicates the close interrelation between dormitory residence and plaintiff's basic purpose to furnish clean and elevated surroundings for young men and boys—and a lapse from the prescribed standards constitutes cause for expulsion. Such circumstances effectively serve to distinguish plaintiff's dormitory operations from a commercial hotel enterprise and indicate them to be properly classifiable in the light of plaintiff's practical charity work through serving the public welfare—in a sense dovetailing with and rounding out plaintiff's fundamental religious and charitable purposes. As so analyzed, the fact that plaintiff's dormitories, as a secondary consideration, also serve the residential purposes of the occupants does not destroy the effect of their dominant purpose as property "used exclusively for religious * * * or charitable purposes" within the contemplation of the welfare tax exemption law.

Similar considerations prevailed in opinions this day filed with regard to the tax exempt status of a nurses' home operated as a necessary adjunct of a hospital, Cedars of Lebanon Hospital v. County of Los Angeles, Cal.Sup., 221 P.2d 31, and the lodgings of priests in effectuating the operation of a religious retreat house. Serra Retreat v. County of Los Angeles, Cal.Sup., 221 P.2d 59. Like reasoning has been applied in other jurisdictions where the exemption of dormitory facilities maintained by Y.M.C.A. and similarly organized institutions has been sought under substantially the same tax exempting language as is here involved, Y.M.C.A. of City of Lincoln v. Lancaster County, supra, 1921, 106 Neb. 105, 182 N.W. 593; In re Syracuse Y.M.C.A., 1925, 126 Misc. 431, 213 N.Y.S. 35; Young Women's Christian Ass'n v. Baumann, 1939, 344 Mo. 898, 130 S.W.2d 499; Salvation Army v. Hoehn, supra, 1945, 354 Mo. 107, 188 S.W.2d 826, and the Germantown Y.M.C.A. case on which defendants mainly rely is distinguishable not only on the basis of the precise exempting language there involved as above noted, but also as contrary to the modern trend of authority.

Defendants further argue that since plaintiff rents the dormitory rooms at its respective branches, their tax exemption would run counter to the statutory provision that the property in question "not [be] used or operated by the owner * * * for profit regardless of the purposes to which the profit is devoted." Rev. & Tax. Code, § 214, subd. (3). However, such contention misconstrues the purport of the stated prohibition. It is true that plaintiff requires its dormitory residents to pay a moderate rental for the rooms in keeping with the modest scale of furnishings, and so realizes income which is used to defray operating expenses. But under the stipulat-

ed facts, it does not appear that there was any real profit motive in such undertaking as integrated into plaintiff's recognized religious and charitable objectives. The housing accommodations are rendered at a minimum charge and while plaintiff's method of bookkeeping only classifies receipts and expenditures as total items in relation to all operations at the respective branches, without breakdown or allocation among any of the particular activities or facilities as provided, it is apparent from plaintiff's accounting records that at each branch the amount of revenue derived from its functions is substantially less than the sum of expenditures, with the difference met by voluntary contributions and a Community Chest allowance. That such operating deficit prevails with respect to the dormitory portions as a segregable department in plaintiff's buildings cannot be disputed when it is remembered that at some of plaintiff's branches, as above noted these facilities constitute the only additional service feature offered and while, wherever furnished, they are a main source of revenue, nevertheless the branch as a whole carries on its work at a net financial loss. Moreover, a further factor affecting the balance of plaintiff's receipts against its expenses in regard to its dormitory facilities is plaintiff's frequent practice of furnishing housing accommodations to young men who apply for lodging though they are without funds to pay even a moderate rental therefor, and arrangements for their limited stay are made on a loan basis. Often the loans are not repaid, and to that extent plaintiff suffers an additional financial loss.

[4] Furthermore, the mere fact that the exempt institution may have income or earnings from its property is not necessarily decisive in determining the tax status of its property or any portion thereof. Both the constitutional provision and the statute contemplate that the exempt institution may have income and even "net earnings" without losing the benefit of its exemption, provided such earnings are derived from the normal pursuit of its exempt purposes and provided further that all other conditions, enumerated in § 214 of the Revenue and Taxation Code, are met. Therefore, income derived by plaintiff here from dormitories maintained for its members in the normal pursuit of its exempt purposes, that is to say, from a facility which is incidental to and reasonably necessary for the accomplishment of its exempt purposes, is to be distinguished from income derived from a facility which is not so correlated with its exempt purposes. It is income in the latter sense that the welfare exemption condition, reasonably construed, should be held to cover in its reference to the receipt of "profit" as precluding property so used from attaining a tax exempt status even though such "profit" be exclusively devoted to the exempt purposes. Analogous considerations illustrating this distinction prevailed in the case of San Gabriel Cemetery Ass'n v. County of Los Angeles, 1942, 49 Cal.App. 2d 624, 122 P.2d 330, 331 where in analyzing the purport of article XIII, § 1b of the state Constitution, exempting from taxation "property used or held exclusively for" burial purposes and "no part thereof * * used or held for profit", the "financial benefit that accrue[d] to the association through the sale of burial space at a price in excess of its cost where such gain [was] used for the upkeep of the cemetery property" was not deemed to involve the receipt of "profit" so as to defeat the tax exempt character of the association's cemetery property. 49 Cal.App.2d page 626, 122 P.2d at page 332. Accordingly, the court distinguished such situation from that existing in the case of Cypress Lawn Cemetery Ass'n v. City and County of San Francisco, 1931, 211 Cal. 387, 295 P. 813, where the association's devotion of "the entire income derived from [its operation of a] hotel * * * to the care and maintenance of" its cemetery, 211 Cal. at page 390, 295 P. at page 814, income received from a *differing use* of property than that prescribed by the constitutional provision—was held "not [to] work an exemption of the hotel proper." 211 Cal. at page 391, 295 P. at page 814. To like effect see opinion this day filed in the consolidated hospital cases, Cedars of Lebanon Hospital v. County of Los Angeles, Cal. Sup., 221 P.2d 31, with reference to the operation of a "thrift shop" on premises of one of the hospitals, and the use of the in-

come therefrom for "hospital * * * or charitable purposes"; also see Y.M.C.A. of City of Lincoln v. Lancaster County, supra, 1921, 106 Neb. 105, 182 N.W. 593, 596; Young Women's Christian Ass'n v. Baumann, supra, 1939, 344 Mo. 898, 130 S.W. 2d 499, 502. In line with the views hereinabove expressed, plaintiff is entitled to the benefit of the welfare exemption law with respect to the portions of its respective branches used as dormitory accommodations.

There now remains for consideration the other disputed facilities furnished by plaintiff at specific branches and claimed to meet the basic requirement of "property used exclusively for religious * * * or charitable purposes" within the meaning of the welfare exemption law: (1) At the *San Pedro Branch,* the restaurant operated by Y.M.C.A. employees but open to the public as well as to plaintiff's members, resident and non-resident, and serving meals at standard charges prevailing in the community; Cluverius Hall, the meeting room where outside groups up to a maximum of 100 may be served meals; the barber shop leased to outside parties at a rental of $10 per week, and the valet shop operated by Y.M.C.A. employees on a gross receipt percentage basis, both shops open to the public and with charges at regular commercial rates; and the "gym store," which at the time here pertinent had expanded its stock of merchandise to include toilet articles, trinkets, curios, and like items over and above its regular line of athletic equipment and clothing, and was open to the public as well as to Y.M.C.A. members; (2) at the *Downtown Branch,* the barber and valet shops—here the former operated by Y.M.C.A. employees on a gross receipt percentage basis and the latter leased to outside parties at a rental of $100 per month—both shops open to the public and charges for the respective services made at commercial rates; and (3) at the *East Los Angeles Branch,* the office space rented to the Selective Service Board at a rental of $100 per month.

With reference to these facilities as located at the mentioned branches, plaintiff takes the position that they not only function primarily as additional services for the benefit of its dormitory residents, but they materially assist plaintiff in making its entire plan attractive to young men as well as promote public interest and awareness of plaintiff's general activities, thereby strengthening and extending plaintiff's moral and uplifting influences in the community. Relative to the *restaurant,* plaintiff argues that the meal service not only accommodates the dormitory residents, their relatives and friends, but likewise brings to this particular branch such members of the public as choose to come so that it functions as a community service—an added facility which, if established at other branches, would redound to their great advantage in the carrying out of the general program; that consistent with its performance of practical charitable work, credit for meals is extended to needy individuals, who sometimes fail to repay the amount of their obligation in this regard; that outside groups are encouraged to meet at plaintiff's branch and participate in its recreational program if there is a place where such groups can get together at mealtime; and that plaintiff has refused to lease the restaurant facility because it wanted to keep control of its operation and maintain the meal service on the same price level in harmony with its basic purposes. In regard to *Cluverius Hall,* plaintiff notes that it is the only place in the community of San Pedro where there are facilities suitable for serving meals to civic organization groups at a reasonable cost and, as such, it constitutes a public service and is valuable in promoting favorable public relations. As to the *tailor* and *barber shop services,* plaintiff maintains that they are provided primarily as an incident to the dormitory facilities—accommodating in the main the dormitory residents, to a considerably lesser extent plaintiff's non-resident members, and only a relatively small portion of the general public; that the public is allowed to avail itself of these particular services only because the demands therefor on the part of plaintiff's members, resident and non-resident, are not sufficient to require their full-time use. In relation to the expanded inventory of the "gym store" as precluding

its tax exempt status, plaintiff calls attention to the fact that such condition was only temporary to meet a wartime need on the part of members of the Armed Forces visiting the San Pedro Branch and whom plaintiff particularly wished to accommodate as part of its basic objectives in serving young men; that the added items of merchandise have been discontinued as the need therefor disappeared, and the "gym store" in question has returned to the uniform policy prevailing with respect to other gym stores operated by plaintiff, limited to the sale of athletic equipment and clothing for use in the sports and recreational activities pursued at the various branches. And finally with regard to the *office rooms* rented to the Selective Service Board, plaintiff emphasizes that such arrangement was temporary and "somewhat involuntary" in that the accommodation was extended to the draft board upon request and following its eviction from certain office space previously occupied in a public school building; that such use of its property, having to do with young men, "had a rather accidental relationship to the basic activities of the Y.M. C.A."; that in any event it was discontinued as of December, 1946, and in the absence of these "special circumstances," "exemption could not be allowed as to this item."

[5] But conceding the praiseworthy motives underlying the establishment of these respective facilities as outlined by plaintiff, it must be remembered that the test for the welfare exemption is not the number of good purposes to which plaintiff's property may be put nor the amount of benefit that may be derived therefrom by plaintiff's members as well as the general public, but whether the property may reasonably be regarded as "exclusively used" for exempt purposes. Under the agreed facts here, the conclusion is inescapable that the restaurant, as well as the tailor and barber shops, all available to the public as well as to plaintiff's members, and charging standard prices for their respective services in competition with like enterprises maintained in the community, are largely commercial in character and properly classifiable as business ventures. That the money derived therefrom may be used exclusively for plaintiff's operational upkeep as a charitable organization, Cypress Lawn Cemetery Ass'n v. City and County of San Francisco, supra, 1931, 211 Cal. 387, 390, 295 P. 813, or that such facilities may be desirable in the promotion of plaintiff's general service plan does not alter the fact that they involve the use of portions of plaintiff's property for facilities which are not merely incidental to and reasonably necessary for the accomplishment of exempt purposes. Y. M. C. A. of City of Lincoln v. Lancaster County, supra, 1921, 106 Neb. 105, 182 N.W. 593, 596. It is true, as plaintiff contends, that in the last-cited case the restaurant facility maintained on the Y. M. C. A. property and held to constitute "a commercial enterprise" so as not to be tax exempt, was rented to outside parties rather than operated by Y. M. C. A. employees as is the situation here. Nevertheless the absence of such consideration alone does not establish the propriety of plaintiff's exemption claim on this particular facility in view of its service of the general public and the basic competitive nature of its operation in relation to similar business in the community that is taxable. Y. W. C. A. v. City of New York, 1926, 217 App.Div. 406, 216 N.Y.S. 248, 252–253. The restaurant as here conducted is in nowise integrated into any educational or training program on the part of plaintiff in the sense that its members prepared the meals incident to the learning of the art of cooking as a gainful occupation, such as was a material consideration in the case of Young Women's Christian Ass'n v. Baumann, supra, 1939, 344 Mo. 898, 130 S.W.2d 499, 502, for the exemption of the cafeteria there involved.

[6, 7] The same essential competitive, commercial features prevail with respect to plaintiff's tailor and barber shops, whether rented to outside parties or operated by its employees, so as to deprive these facilities of a tax exempt status. The fact that the restaurant and the shops may be maintained at a net financial loss or serve primarily plaintiff's own members does not determine their tax exempt status, for use of the property is the criterion of the welfare ex-

emption law, not its self-sustaining ability or the precise extent of its service to the public at large. Likewise commercial in aspect was the expanded "gym store," with a competitive line of merchandise extending beyond the requirements of plaintiff's athletic and recreational facilities. While such expanded inventory was temporary, so long as such store continued to serve the general public, the portion of the property occupied by it was not entitled to an exempt status. And finally, consistent with the recognized rule that property of such an institution as the Y. M. C. A. or Y. W. C. A. "leased or rented for business purposes is generally held not exempt from taxation" under such exemption law as is here involved, "although the proceeds derived in [that] manner are applied to the purposes of the organization", 51 Am.Jur. § 642, p. 611; 34 A.L.R. 1072; 81 A.L.R. 1457, the rented office space to the Selective Service Board cannot be held tax exempt.

[8] Turning now to plaintiff's claim to the benefits of the welfare exemption law in relation to the flood control district assessments, plaintiff cannot prevail in view of the limited scope of the law to exemption from "taxation" and the distinguishable nature of an assessment levy as fully discussed in the opinion this day filed in the consolidated hospital cases, Cedars of Lebanon Hospital v. County of Los Angeles, Cal.Sup., 221 P.2d 31, to which reference is hereby made in disposition of this issue between the parties.

The judgment is reversed and the cause remanded, with instructions to the trial court to proceed in accordance with the views hereinabove expressed. The parties will bear their own costs on this appeal.

GIBSON, C. J., and EDMONDS, CARTER and TRAYNOR, JJ., concur.

SCHAUER, Justice (concurring).

I concur in the judgment. I am in accord with the conclusions of the majority as to the non-exempt character of the shops, restaurants and property leased to the government agency, and as to the inapplicability of the welfare exemption to the flood control assessments.

As to the holding that the dormitory property is exempt from taxation, I concur solely on the ground that it is apparent from the agreed statement of facts that no portion of such property was consistently and intentionally operated so as to produce a profit. As stated by the majority (221 P.2d 54), "That [an] operating deficit prevails with respect to the dormitory portions as a segregable department in plaintiff's buildings cannot be disputed when it is remembered that at some of plaintiff's branches * * * these facilities constitute the only additional service feature offered and while, wherever furnished, they are a main source of revenue, nevertheless the branch as a whole carries on its work at a net financial loss."

If a portion of the dormitory property were operated under a policy of charging more rent than the cost of furnishing shelter, then in my view such property would not be tax exempt even though the profits were devoted to defray the expense of operating other dormitory property at a loss. To hold otherwise would not seem to me to give to the tax exemption statute a "strict but reasonable" construction; rather, with excessive liberality to the selected taxpayer, such holding would effectively delete from the statute the clause, "regardless of the purposes to which the profit is devoted." As I understand the majority opinion, it would permit such a holding. For example, the majority say (221 P.2d 54), "income derived by plaintiff here from dormitories maintained for its members in the normal pursuit of its exempt purposes, that is to say, from a facility which is incidental to and reasonably necessary for the accomplishment of its exempt purposes, is to be distinguished from income derived from a facility which is not so correlated with its exempt purposes. It is income in the latter sense that the welfare exemption condition, reasonably construed, should be held to cover in its reference to the receipt of 'profit' as precluding property so used from attaining a tax exempt status even though such 'profit' be exclusively devoted to the exempt purposes."

The case of San Gabriel Cemetery Ass'n v. County of Los Angeles, 1942, 49 Cal. App.2d 624, 122 P.2d 330, here relied upon by the majority (221 P.2d 54) but distinguished by them in Cedars of Lebanon Hospital v. County of Los Angeles, Cal.Sup., 221 P.2d 31, was concerned with the meaning of the phrase "used or held for profit" in section 1b of article XIII of the California Constitution, which exempts "all property used or held exclusively for the burial or other permanent deposit of the human dead or for the care, maintenance or upkeep of such property or such dead, except as used or held for profit." There, cemetery lots were sold at more than cost, but the excess proceeds were used for upkeep, advertising and the purchase of more lots. It was held that such use of the lots and the proceeds of sale was within the use permitted by the exemption clause of the Constitution. In my view the clause "regardless of the purposes to which the profit is devoted" was placed in section 214 of the Revenue and Taxation Code to prevent a similar construction where, for example, hospital beds are operated at more than cost and the proceeds are devoted to hospital uses. Hence, the cited case neither requires nor permits a construction of the present exemption statute which would exempt dormitory property operated for profit even if such profit is used to defray the expense of operating other dormitory property at a loss.

SHENK, Justice (concurring and dissenting).

I concur in the opinion and judgment insofar as it holds that the dormitories in question are tax-exempt and that all of the properties are taxable under the Los Angeles County Flood Control District Act, Gen.Laws, Act 4463. But I do not agree that the other properties are not exempt from the general tax. My dissent in the main is based on the views expressed in my concurring and dissenting opinion in Cedars of Lebanon Hospital v. County of Los Angeles, Cal.Sup., 221 P.2d 31.

The conclusions of non-exemption are said to result from the partially commercial nature of the restaurant, Cluverius Hall, barber and valet shops, a small merchandising department featuring gymnasium supplies (in that respect concededly exempt) but temporarily selling trinkets to army men, and a space temporarily used by the Selective Service Board during wartime activities at a nominal rental. It is declared that adherence to legal principle does not require that the narrowest possible meaning be given to the exempting language if it would establish too severe a standard and defeat the apparent object of the law. In my opinion the result in this case does what the statement purportedly attempts to avoid. None of the properties was held as investment property with profitmaking as the objective. As in the case of the dormitories, so in the conduct of the other services, there does not appear to be, as said in the opinion, "any real profit motive in such undertaking as integrated into plaintiff's recognized religious and charitable objective." The facts alleged in connection with these, as with other activities, show that there is no profit, and that deficits are met by voluntary contributions and community chest allowances. No contention is made that if the various services were available solely to "Y" members the property would be taxable. But the policy of the "Y" to make its influence as far-reaching as possible renders it impractical to close the doors of its departments to the public generally. So long as the basic conception of need to its members is present, in the absence of any real profit motive, the fact of incidental availability to the public should not be held to convert the service into a commercial venture and thus beyond the application of the exempting language. These services were "integrated" with the exempt purposes, and the property should likewise be held to be exempt. As indicated in my opinion in the Cedars of Lebanon case, the integration with the exempt purposes distinguishes the facts from Cypress Lawn Cemetery Ass'n v. City and County of San Francisco, 211 Cal. 387, 295 P. 813, where the cemetery association conducted a hotel for profit, which was a use clearly dissociated from the exempt cemetery purpose.

The space rented to the selective draft board should likewise be deemed exempt for

the reason that this temporary use of the property otherwise devoted to religious and charitable purposes was in essence a governmental "command performance", without any profit motive, and it does not appear from the facts alleged that a profit was derived by virtue of the nominal rental received.

The arguments presented by the plaintiff and outlined in the majority opinion serve to support a conclusion that all of the properties here involved were used exclusively for religious and charitable purposes.



35 Cal.2d 755

SERRA RETREAT v. LOS ANGELES COUNTY.
L. A. 20612.

Supreme Court of California, in Bank.

Aug. 18, 1950.

Serra Retreat, a nonprofit corporation, sued the County of Los Angeles to recover taxes paid under protest for the tax year 1946–1947. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., rendered a judgment adverse to defendant, and defendant appealed. The Supreme Court, Spence, J., held that portion of retreat house used as living quarters for priests and lay brothers who attended to spiritual and temporal needs of laymen making the retreat was used "exclusively for religious or charitable purposes" within Welfare Tax Exemption Law.

Judgment affirmed.

Prior opinion 206 P.2d 940.

1. Taxation ⇐204(2, 4)

The Welfare Tax Exemption Law must be strictly construed, and institution seeking benefit of law must clearly show that institution comes within terms of law, but law is not to receive so rigid and narrow an interpretation of exemption language as to defeat apparent design of lawmakers. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

2. Taxation ⇐244

Property used "exclusively for religious or charitable purposes," within Welfare Tax Exemption Law includes any property of religious or charitable entity which is used exclusively for any facility which is incidental to and reasonably necessary for accomplishment of religious or charitable purposes of entity. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Exclusively for Religious or Charitable Purposes".

3. Taxation ⇐244

Portion of retreat house used as living quarters for priests and lay brothers who attended to spiritual and temporal needs of laymen making retreat was used "exclusively for religious or charitable purposes" within Welfare Tax Exemption Law, where presence of priests and lay brothers was necessary to conduct and operation of religious and charitable activities of retreat, and was necessary to spiritual and temporal needs of laymen using facilities of retreat. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

Harold W. Kennedy, County Counsel, and Andrew O. Porter, Deputy County Counsel, Los Angeles, for appellant.

Joseph Scott and J. Howard Ziemann, Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff brought this action to recover certain taxes paid under protest for the tax year 1946-1947. The question to be determined is the tax status of that portion of plaintiff's building, a retreat house, used as living quarters for four priests and six lay brothers who attend to the spiritual and temporal needs of laymen making the retreats. Plaintiff relies on the welfare tax exemption extended to "property used exclusively for religious * * * or charitable purposes." Cal. Const. art. XIII,

§ 1c; Rev. & Tax. Code, § 214. The trial court sustained the exemption claim and overruled defendant's general demurrer to plaintiff's complaint. From the judgment accordingly entered in favor of plaintiff, defendant has appealed.

This case presents a problem somewhat similar to that discussed in the opinion this day filed in six consolidated hospital cases. Cedars of Lebanon Hospital v. County of Los Angeles, Cal.Sup., 221 P.2d 31, relative to the welfare exemption of hospital property used for nurses' homes and the housing of other alleged essential personnel. The considerations there determinative that such property was "used exclusively for * * * hospital * * * purposes" within the concept of the welfare exemption likewise here prevail in support of plaintiff's claim to the exemption benefit. Thus it affirmatively appears from the allegations of plaintiff's complaint, which were admitted by the demurrer thereto, that use of the portion of the property for living accommodations for its priests and lay brothers is a use for a facility which is incidental to and reasonably necessary for the accomplishment of religious and charitable purposes. The trial court therefore properly awarded to plaintiff the tax relief here sought.

As appears from the complaint plaintiff, Serra Retreat, is a California religious corporation organized, owned and operated exclusively for religious and charitable purposes, and not for profit; no part of its net earnings, if any there be, inures to the benefit of any person or individual. It has been duly exempted from federal and state income, corporation, franchise, gift, estate, inheritance, social security and unemployment insurance taxes, and it has qualified as an institution entitled to welfare exemption status under the laws of this state. Rev. & Tax. Code, §§ 214, 251, 254, 254.5 and 259.5. The property known as Serra Retreat consists of a single edifice—a retreat house—which is allegedly operated "for the sole and exclusive purpose of dispensing charity and providing a place of religious reflection to which all persons regardless of race, color or creed may come to spend time" in religious meditation and to make a "layman's religious retreat" for the purpose of gaining "spiritual benefits and improvement of character." A layman's retreat lasts for "fifty hours," during which time "religious exercises and instructions are conducted by the Franciscan Fathers" and for the entire period "it is required as part of the religious activity that all retreatants remain constantly on the property, without radios, newspapers, telephone calls or visitors, and that they keep complete and absolute silence so as to be able to meditate upon the religious instructions and exercises without distraction or interruption." Retreats are regularly given over weekends as well as at various times during the week, and the retreat house is "open to the public at any and all times for use as a place of religious worship and meditation." No charge is made for the use of the retreat house or for the board and room received by anyone in connection therewith; rather as a religious institution, it "is supported entirely by voluntary, confidential offerings."

The retreat house consists of a two-story and basement building with housing accommodations for fifty-five lay retreatants, four Roman Catholic Franciscan priests, and six Franciscan lay brothers; in addition to chapel, library, kitchen, dining-rooms, laundry and service quarters. It is further alleged that the presence of said priests and lay brothers on the retreat property is "essential, indispensable and necessary" in carrying out the regular retreat schedule—in that (1) the "sermons, meditations and religious services are given and conducted by said priests alternately," who "live on [the retreat] property so as to participate in and prepare and be available for" the prescribed religious activities in ministering to "the spiritual needs of" the lay retreatants; and (2) all "cooking, housekeeping, laundry, garden and maintenance work in and around [the] retreat house" is done by said lay brothers in caring for "the temporal needs of" the lay retreatants using the retreat facilities. Neither the priests nor the lay brothers receive any "remuneration whatsoever for their services excepting board, room and maintenance," and all "work under a vow of prop-

erty." It is further alleged that the retreat property as a whole has been "irrevocably dedicated to religious or charitable purposes." Rev. & Tax. Code, § 214, subd. (6).

Defendant has recognized plaintiff as a qualifying non-profit religious institution under the welfare exemption law, but it has segregated plaintiff's property in making the tax levy thereon. Thus defendant granted the exemption on 78 per cent of the retreat house, designated as "open to the laymen"—"the chapel, library, dining-room, kitchen, laundry, service quarters and housing accommodations for 55 laymen"—and denied the exemption of the remaining 22 per cent of the building because "used as permanent housing" for the aforesaid priests and lay brothers, the retreat personnel. But such distinction does not comport with the design of the welfare exemption as analyzed in relation to the undisputed facts in this case.

[1, 2] As discussed in the opinion this day filed in the six consolidated hospital cases, Cedars of Lebanon Hospital v. County of Los Angeles, Cal.Sup., 221 P.2d 31, the rule of strict construction applies to the welfare exemption law and the institution seeking its benefit must clearly show that it comes within the terms thereof; but adherence to this rule does not require so rigid and narrow an interpretation of the exempting language as to defeat the apparent design of the lawmakers. In short, there must be a strict but reasonable construction of this law as applied to the particular facts at hand. To this point it would appear that the exemption of property "used exclusively for religious * * * or charitable purposes" should be held to include any property of the religious or charitable entity which is used exclusively for any facility which is incidental to and reasonably necessary for the accomplishment of religious or charitable purposes. The integrated activities as a whole must be examined in determining the tax status of property for the welfare exemption.

As support for its denial of the exemption on that portion of plaintiff's property used for housing the priests and lay brothers, defendant calls attention to the fact that while there is some conflict of opinion, the weight of authority sustains the rule that a parsonage or rectory owned by a church society or religious body, and occupied as a residence by the pastor or corresponding church dignitary, are not exempt as property "used for religious purposes." Annos: 13 A.L.R. 1196; 168 A.L.R. 1247. The cases generally fall into these main categories: (1) those considering a differing law in that the exemption of church property was confined to "places of religious worship" or to "houses of public worship"; (2) those involving an express statutory limitation as to amount of exemption for parsonages and buildings of that character, which direct provision precluded consideration on the additional ground that they constituted property "used for religious purposes"; or (3) those where the determination rested upon an analysis of the particular facts affecting the exemption of the church property in question so as to show that the use of the property for the parsonage or similar building was not a use for a facility which was incidental to and reasonably necessary for the accomplishment of the religious purposes of the church. The present case presents a different problem in that it does not concern an exemption provision in favor of churches, such as § 1½, article XIII, of the California Constitution. Thus our constitutional provision exempting churches from taxation limits the benefit to "buildings * * * used solely and exclusively for religious worship," while the later enacted welfare exemption law is described as "in addition to such [church] exemptions," Cal. Const. art XIII, § 1c, and so, in evidence of a broader concept, refers to property "used exclusively for religious * * * purposes." Ibid., Rev. & Tax. Code, § 214.

[3] But the determinative factor here sustaining the propriety of the welfare tax exemption is the alleged institutional necessity for the provision of living quarters on the retreat property for the essential personnel. So significant are the allegations in the complaint that the "presence on [plaintiff's] property of [the] priests and lay-brothers is essential, indispensable

and necessary to the conduct and operation of [the] religious and charitable activities of [the] Serra Retreat," and that their living on said property is "essential and necessary" to the "spiritual" and "temporal needs," respectively, of "the laymen using the facilities of said institution." These allegations are admitted by defendant's demurrer to the complaint, and the conclusion is inescapable that the portion of plaintiff's building used to furnish housing accommodations for the essential retreat personnel is properly classifiable as property "used exclusively for religious * * * purposes." As so viewed, plaintiff's provision of living quarters for its needed retreat personnel as an institutional necessity—a facility incidental to and reasonably necessary for the accomplishment of its religious and charitable purposes—is wholly distinguishable from the parsonage cases where the provision of housing for the pastor or minister on church property does not stem from claims of institutional necessity as contrasted with mere considerations of residential convenience. It therefore follows that the trial court properly concluded that *all* of plaintiff's retreat house was entitled to the welfare exemption, and correctly overruled defendant's general demurrer to plaintiff's complaint.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.



35 Cal.2d 779

PASADENA HOSPITAL ASS'N, Limited, v. LOS ANGELES COUNTY.

L. A. 20609.

Supreme Court of California, in Bank.

Aug. 18, 1950.

Pasadena Hospital Association, Limited, a nonprofit corporation, sued the County of Los Angeles to recover taxes paid under protest for the tax year 1946–1947. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., rendered a judgment adverse to plaintiff, and plaintiff appealed. The Supreme Court, Spence, J., held that plaintiff had not irrevocably dedicated plaintiff's property within statute exemption from taxation property used exclusively for hospital purposes if property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes.

Judgment affirmed.

Prior opinion 206 P.2d 936.

1. Taxation ⇐241(2)

Whether an "irrevocable dedication" has been made, within statute exemption from taxation property used exclusively for hospital purposes if property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes, is ordinarily to be determined by ascertaining powers of owner with respect to assets, including properties and proceeds thereof. Revenue and Taxation Code, § 214 and subd. (6); Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Irrevocable Dedication".

2. Taxation ⇐241(1, 2), 242(2), 243, 244

Where plaintiff's powers regarding hospital assets could only be ascertained from articles of incorporation of plaintiff, and articles permitted present use of assets for purposes not exempt from taxation under Welfare Exemption Law, and permitted ultimate and permanent diversion of all of plaintiff's assets to nonexempt purposes, there was no "irrevocable dedication" to exempt purposes within statute exempting from taxation property used exclusively for hospital purposes if property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes. Revenue and Taxation Code, § 214, and subd. (6); Const. art. 13, § 1c.

3. Taxation ⇐241(1, 2), 242(2), 243, 244

Fact that plaintiff had operated as a nonprofit, charitable hospital since date of plaintiff's incorporation more than 50 years previously was immaterial on issue as to whether an irrevocable dedication had been

made within statute exempting from taxation property used exclusively for hospital purposes if property is irrevocably dedicated to religious, charitable, scientific or hospital purposes. Revenue and Taxation Code, § 214 and subd. (6); Const. art. 13, § 1c.

4. Corporations ⇐38

Statutory provision that certificate of amendment of articles of incorporation shall be submitted to Secretary of State, who shall file certificate and put an endorsement of filing thereon if he finds that it shows a compliance with law, and thereupon articles shall be deemed amended, is tantamount to a provision that amendment does not become effective until date of filing. Corporations Code, § 3673.

5. Taxation ⇐241(1, 2), 242(7), 243

Where amendment to articles of incorporation received consent of all members of plaintiff corporation before fixation of tax status of plaintiff's property for year involved, but certificate of amendment was not submitted to Secretary of State for filing until after tax status was fixed, such amendment could not be a timely irrevocable dedication of plaintiff's property applicable in year involved within statute exempting from taxation property used exclusively for hospital purposes if such property is irrevocably dedicated to religious, charitable, scientific or hospital purposes. Corporations Code, § 3673; Revenue and Taxation Code, §§ 214 and subd. (6), 441; Const. art. 13, § 8.

Gibson, Dunn & Crutcher, Bert A. Lewis and Samuel O. Pruitt, Jr., all of Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Andrew O. Porter, Deputy County Counsel, Los Angeles, for respondent.

SPENCE, Justice.

This action for the recovery of taxes paid under protest for the tax year 1946-1947 likewise involves the construction of the recently enacted welfare exemption law, Cal.Const. art. XIII, § 1c; Rev. & Tax. Code, § 214, in relation to hospital property. Accordingly it was consolidated for hearing with six other hospital cases as noticed in an opinion this day filed, Cedars of Lebanon Hospital v. County of Los Angeles, Cal.Sup., 221 P.2d 31.

Plaintiff here framed its complaint to allege two causes of action for application of the welfare exemption: (1) as to the portion of the property used for a nurses' home and for a nurses' school operated in connection with the hospital; and (2) as to all of its property on the premise of irrevocable dedication to exempt purposes. Rev. & Tax. Code, § 214(6). Defendant interposed a general demurrer, which was sustained without leave to amend, on the ground that it affirmatively appeared from the complaint that "none of [plaintiff's] property was irrevocably dedicated to the [required] purposes * * * on March 4, 1946 [the tax day in question]." From the judgment accordingly entered in defendant's favor, plaintiff has appealed.

Though as appears from our opinion in the consolidated hospital cases, Cedars of Lebanon Hospital v. County of Los Angeles, Cal.Sup., 221 P.2d 31, the tax exempt status of the portion of the hospital property used for a nurses' home and for a nurses' school was sustained, such consideration is of no avail to plaintiff unless plaintiff qualified in all other respects as an institution entitled to claim the welfare tax exemption on the first Monday in March, 1946—concededly March 4, 1946. Section 214, subdivision (6), of the Revenue and Taxation Code provides that property used exclusively for hospital purposes is exempt from taxation if "[t]he property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes."

Plaintiff argues these alternative grounds as constituting its compliance with the quoted statutory requirement of irrevocable dedication: (1) its articles of incorporation prior to the 1946 amendment thereof as interpreted in the light of its long-

continued use of its property for hospital purposes; (2) so-called amalgamation with a hospital trust; and (3) express amendment in 1946 of its articles of incorporation subsequent to the adoption of the welfare exemption law. Defendant, on the other hand, challenges the efficacy of any of these factors to effect the tax exemption here sought. An examination of the record in the light of applicable legal principles shows defendant's position to be well taken and sustains the propriety of the trial court's ruling denying plaintiff's exemption claims.

According to its complaint, plaintiff was organized as a nonprofit corporation in 1892 and has operated exclusively as such ever since. For many years it has been exempt from all federal and state income, corporation, franchise, and social security taxes as a charitable hospital. Plaintiff's assets stem from these two sources: (1) the major part from charitable gifts, and (2) the balance from the excess of receipts over disbursements, which has been realized in certain of its prior years' operations and invested in hospital property. Plaintiff has never made any distribution of assets to any individual, and it has never used any asset except in furtherance of the charitable hospital purpose for which it was organized.

In 1932, in satisfaction of a legacy of $2,000,000, the executors of the estate of Henry E. Huntington distributed funds to certain trustees, in trust however, to use a portion thereof for the purpose of establishing a memorial hospital and to use the remainder as an endowment fund to invest and reinvest so that it would yield an income for the perpetual maintenance of the hospital. In 1936, the directors and members of plaintiff hospital association accepted a proposal of the trustees under the Huntington will that the hospital owned by plaintiff be conducted thereafter as the "Collis P. and Howard Huntington Memorial Hospital"—becoming *the* hospital contemplated by the said testator and operating under the trust. At that time all the members and directors of plaintiff hospital association resigned, and the trustees of the aforesaid trust became the only directors and members thereof. None of the trustees has ever contributed any property to plaintiff or had ever been a member or director of plaintiff prior to the "amalgamation." "None of [the] trustee members and directors have any basis for claiming any interest in plaintiff's property, should it dissolve." Since the "amalgamation" in 1936, "the entire hospital property has been operated as one unit, some of it being owned by the trust and some of it being owned by plaintiff."

Plaintiff's governing articles of incorporation are recited in full as "Exhibit A," attached to the complaint. Certain provisions thereof pertinent to the question of dedication are as follows:

"Know All Men By These Presents: That we, the undersigned, citizens and residents of the State of California, do hereby voluntarily associate ourselves together for the purpose of incorporating under the laws of the State of California a *private* corporation.

"And We Do Hereby Certify:

* * * * * *

"*Second*—(A) That the *objects* and *purposes* for which this corporation are (is) formed are:

"(1) To establish, maintain, and carry on within the County of Los Angeles, State of California, a hospital for the sick and injured, and for that purpose *or any other lawful purpose where pecuniary profit is not the object thereof,* to purchase, lease * * * (etc.)

* * * * * *

"(7) To convey all or any portion of the corporate property *in trust for such lawful purposes as the Board of Directors may deem advisable*; to receive endowments and to invest the same.

* * * * * *

"(9) To do and perform every act and thing necessary to carry out the foregoing purposes and powers in other states and jurisdiction, *which like corporations* or corporations organized for *social,* charitable or religious purposes under the laws of such states and jurisdictions may lawfully do or cause to be done therein.

"(10) To do each and every thing necessary, appropriate or adapted to carry into effect any and all of the foregoing purposes and powers, or to attain *any one or more of the objects* herein enumerated, or which shall at any time appear conducive to or expedient for the protection or benefit of this Corporation, and, generally, to do any act, or transact any business in connection with said purposes and powers which a copartnership or natural person could do or exercise, and which now or hereafter may be authorized by law; *to carry on any other lawful business, enterprise, or activity whatsoever* which may seem capable of being carried on in connection with the foregoing, or calculated, directly or indirectly, to promote the interests of this Corporation or *to enhance the value of its properties.*

"(B) This is a corporation which does not contemplate pecuniary gain or profit to the members thereof. No part of the net earnings of this corporation shall inure to the benefit of any private member or individual, and no substantial part of the activities of this corporation shall be devoted to carrying on propaganda or otherwise attempting to influence legislation." (Emphasis added.)

After the welfare exemption became a part of the Revenue and Taxation Code, plaintiff, on December 21, 1945, adopted a resolution amending the foregoing section "B" to read as follows: "(B) This corporation has no capital stock, is not formed for profit, and is a corporation which does not contemplate pecuniary gain, profit or dividends to the members thereof. No part of the net earnings of this corporation shall inure to the benefit of any member or individual, and no part of the activities of this corporation shall be devoted to carrying on propaganda or otherwise attempting to influence legislation. *The property of this corporation is irrevocably dedicated to charitable, scientific, educational and hospital purposes, and upon the abandonment, liquidation or dissolution of this corporation said property shall not inure to the benefit of any private person but shall be distributed to a fund, foundation or corporation organized and operated for hospital, scientific, educational or charitable purposes, or to the United States of America, the State of California, or any political subdivision thereof.*" (Emphasis added.)

This amendment received the consent of all the members of plaintiff on March 1, 1946, but was not indorsed as filed in the office of the Secretary of State until March 14, 1946.

As will hereinafter appear, we have concluded that the 1946 amendment to plaintiff's articles of incorporation did not take effect until after the first Monday in March, 1946. It therefore becomes necessary to determine whether upon that date and under its then effective articles of incorporation, plaintiff's properties were "irrevocably dedicated" to exempt purposes within the meaning of the welfare exemption law.

The term "irrevocably dedicated" appears to be new to tax law, and neither counsel nor independent research has disclosed any case wherein that phrase has been construed. Nevertheless, one of the specified conditions for exemption is that "the property is irrevocably dedicated" to exempt purposes; and that provision, like other provisions of the welfare exemption law, must be given a strict but reasonable construction. See Cedars of Lebanon Hospital v. County of Los Angeles, Cal.Sup., 221 P.2d 31.

It will be noted that the requirement that property be "irrevocably dedicated to * * * hospital purposes" or other exempt purposes is concerned with *purposes* rather than with *uses.* The distinction between the two concepts is important here. The question of present uses, rather than of ultimate purposes, to which particular pieces or portions of property were being put was the main and all-important consideration in the aforementioned consolidated hospital cases, Cedars of Lebanon Hospital v. County of Los Angeles, Cal. Sup., 221 P.2d 31, in determining whether each of such pieces or portions of the property was then entitled to exemption. The additional but distinct condition of irrevocable dedication does not appear to be concerned with present uses as distin-

guished from ultimate purposes, and it seems clear that the requirement of irrevocable dedication to exempt purposes could, in itself, be met before any actual use is made of any of the property, and that it would not necessarily be affected by any diversion, through sale or otherwise of any particular piece or portion of the property to non-exempt uses provided the proceeds of such sale or non-exempt uses are irrevocably dedicated to exempt purposes. In other words, while the present exclusive use for exempt purposes is the primary condition to be met in order to obtain exemption for any particular piece or portion of the property at any given time, it would be wholly unreasonable to construe the further condition of irrevocable dedication to exempt purposes as requiring that the particular piece or portion of the property should, in some manner, be frozen permanently and irrevocably into such exclusive use. This reasoning is in line with that found in an opinion given by the office of the Attorney General, where it was said: "In our opinion, however, the statute does not require that the particular parcel of property be dedicated, but rather that the property or its proceeds be dedicated. For example, a church is irrevocably dedicated to religious purposes even if the members reserve the right to sell the property and to use the proceeds for the purpose of constructing a new church in another location which is more suitable to their purposes." 8 Opin.Att. Gen., 1946, 72, 75.

[1, 2] In the present case, we are not called upon to determine what may constitute irrevocable dedication under all circumstances, for we are satisfied that there was no irrevocable dedication to exempt purposes here. We are of the opinion that this requirement of irrevocable dedication is ordinarily to be determined by ascertaining the powers of the owner with respect to its assets, including its properties and the proceeds thereof. And where, as here, the extent of such powers can be ascertained only from plaintiff's articles of incorporation, and such articles permit not only the present use for, but also the ultimate and permanent diversion of all of plaintiff's assets to, non-exempt purposes, then the requirement of irrevocable dedication to exempt purposes cannot be said to have been satisfied under any construction of said subdivision (6) of section 214 of the Revenue and Taxation Code.

As above indicated plaintiff's articles of incorporation, which fixed the extent of its powers on March 4, 1946, conferred such broad powers and enumerated such non-exempt purposes as to preclude the successful assertion of the claim that plaintiff's assets were irrevocably dedicated to exempt purposes on that date. Thus, plaintiff was authorized to permanently divert all of its property to *any* lawful nonprofit purpose (Article Second (A) (1)), though the welfare exemption does not extend to *all* lawful nonprofit purposes and, in fact, expressly excludes certain ones such as fraternal, lodge, or social purposes unless "clearly incidental" in nature, Rev. & Tax. Code, § 214(5), its directors were empowered to convey all or part of its property in trust for *any* lawful purposes which they might deem advisable (Article Second (A) (7)); in carrying out its broad purposes, plaintiff's powers were likened to those of corporations organized for *social* as well as other purposes (Article Second (A) (9)); and finally, plaintiff was vested with authority "to carry on any other lawful business, enterprise or activity whatsoever" which would "enhance the value of its properties" (Article Second (A) (10)). As a restricting factor on these provisions, Article Second (B) prior to the 1946 amendment purported to be no more than a limitation to nonprofit activities—which, of course, may or may not be "charitable" or "hospital" in nature.

[3] Plaintiff argues, however, that its articles of incorporation must be interpreted in the light of methods of its operation as a nonprofit, charitable hospital since the date of its organization more than fifty years ago and, by such standard, there has been an irrevocable dedication of its property to hospital purposes. While the fact that plaintiff is operating, and has for many years operated, as a nonprofit charitable hospital might be considered in determining its status with respect to tort

liability under the authorities cited by plaintiff, Stonaker v. Big Sisters Hospital, 116 Cal.App. 375, 378, 2 P.2d 520; Armstrong v. Wallace, 8 Cal.App.2d 429, 432-433, 47 P.2d 740, it does not necessarily follow that such fact would be of any controlling significance in determining its status with respect to tax exemption. Fletcher, Cyclopedia Corporations, Perm.Ed., vol. 10, ch. 54, § 4932, p. 626; anno. 119 A.L.R. 1012, 1013, 1022; La Societe Francaise v. California Employment Comm., 56 Cal. App.2d 534, 543, 133 P.2d 47; William Budge Memorial Hospital v. Maughan, 79 Utah 516, 3 P.2d 258, 261, 13 P.2d 1119. But in any event, the question under discussion is not whether plaintiff may be classified as a nonprofit, charitable hospital but whether its property has been "irrevocably dedicated" to exempt purposes. On this last-mentioned question, plaintiff's manner of operation and plaintiff's use, past or present, of its properties are wholly immaterial. The sole consideration in determining the question of irrevocable dedication of its properties is that of plaintiff's powers with respect thereto. It seems entirely clear that plaintiff's broad powers with respect to non-exempt purposes were not lost through non-use over a period of years, and that the continued existence of such powers was fatal to its claim of irrevocable dedication to exempt purposes on the tax date in question. In this connection it is futile for plaintiff to cite section 9505 of the Corporations Code, which permits the Attorney General to institute proceedings against a non-profit corporation if "it may fail to comply with trusts which it has assumed or may depart from the general purposes for which it is formed." It does not appear that the permanent diversion by plaintiff of all the corporate assets to certain non-exempt purposes would constitute a violation of any trust or a departure from the broad purposes specified in its articles.

Nor does plaintiff's so-called amalgamation with the Huntington trust strengthen its position on the point involved. It is not shown by the record that any change was made thereby in plaintiff's corporate powers; nor does it appear that there was any conveyance of plaintiff's property to the trust. Rather, in consequence of the new relationship as disclosed by plaintiff's complaint, the trustees of the Huntington trust merely became the directors of plaintiff hospital association, the name was changed to the "Collis P. and Howard Huntington Memorial Hospital," and plaintiff's former directors, upon resigning their office, adopted a resolution announcing the "surrender [of] their responsibilities, assured that the new custodians [would] continue to develop the hospital in accordance with the plans and services of those who have established and carried forward this important and generously supported institution." Though "the entire hospital property has [since] been operated as one unit," it further appears that plaintiff did not relinquish ownership of its property upon consummation of such united undertaking. In the light of these related circumstances, plaintiff's amalgamation with the trust cannot be viewed as effecting an irrevocable dedication of plaintiff's own corporate assets within the meaning of the welfare exemption law.

[4, 5] There finally remains the matter of plaintiff's qualification for the welfare tax exemption by reason of the above-quoted 1946 amendment to its articles of incorporation (Article Second (B)). In challenging the effectiveness of such amendment, defendant properly objects at the outset to its timeliness as a consideration for the tax year 1946-1947. Pursuant to section 8, article XIII, of the Constitution, and section 441 of the Revenue & Taxation Code, each taxpayer is required to file a declaration of his property as of noon on the first Monday in March, at which time the tax status of property becomes fixed for the tax year. It is conceded that in the year 1946 this determinative date was March 4, or ten days before the amendment of plaintiff's articles of incorporation was filed with the Secretary of State. By section 605(d) of the Civil Code, now Corporations Code, § 9305, a "nonprofit corporation may amend its articles [of incorporation] * * * in the same manner and with the same effect as a stock corporation under the general corporation

law existing at the time thereof." So pertinent then is section 362(b) of the Civil Code, now Corporations Code, § 3673 in providing that "[t]he certificate [of amendment] shall be submitted to the Secretary of State, who shall file the same and put an indorsement of filing thereon if he find that it shows a compliance with the provisions of the law [and] [t]hereupon the articles of incorporation shall be deemed amended in accordance with such certificate * * *." This is tantamount to a provision that the amendment does not become effective until the date of filing. See Ballantine & Sterling, California Corporation Laws, 1949 Ed., § 319, p. 391; Fletcher, Cyclopedia Corporations, Perm. Ed., vol. 7, ch. 43, § 3721, p. 891. Accordingly, plaintiff's belated filing of the 1946 amendment precluded it from accomplishing its purpose of obtaining tax exemption for the tax year in question. In view of this conclusion it becomes unnecessary to consider defendant's further objections to the effectiveness of the 1946 amendment.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.



35 Cal.2d 789

FREDERICKA HOME FOR THE AGED v. SAN DIEGO COUNTY.

L. A. 20634.

Supreme Court of California, in Bank.

Aug. 18, 1950.

Fredericka Home for the Aged sued the County of San Diego to recover taxes paid under protest for the tax year 1946–1947. The Superior Court, San Diego County, Arthur L. Mundo, J., rendered a judgment adverse to defendant, and defendant appealed. The Supreme Court, Spence, J., held that plaintiff was a charitable institution within the Welfare Tax Exemption Law.

Judgment affirmed.

Prior opinion 206 P.2d 931.

1. Taxation ⇐204(2), 251

The problem of determining whether a plaintiff is entitled as a charitable institution to welfare tax exemption must be resolved upon basis of a strict but reasonable construction of exempting language of law and plaintiff has burden of showing that it clearly comes within terms thereof. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

2. Taxation ⇐241(2)

An institution must actually dispense charity if it is to satisfy requirement of Welfare Tax Exemption Law that its property be used exclusively for charitable purposes, and it is not sufficient that that institution originated through a charitable gift or bequest. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

3. Charities ⇐1

The concept of "charity" is not confined to relief of needy and destitute, for aged people require care and attention apart from financial assistance, and the supply of such care and attention is as much a charitable and benevolent purpose as relief of their financial wants.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Charity".

4. Charities ⇐1

Fact that institution engaged in caring for aged people charges a fee for such care does not necessarily prevent classification of institution as being a charitable institution if such fees go to pay expenses of operation and not to the profit of the founders or shareholders.

5. Charities ⇐1

The word "charity" as commonly understood does not refer only to aid to poor and destitute and exclude all humanitarian activities, though rendered at cost or less, which are maintained to care for the physical and mental well-being of recipients, and which make it less likely

that such recipients will become burdens on society.

6. Taxation ⇐241(2)

An institution engaged in caring for aged people was a "charitable institution" within Welfare Tax Exemption Law, notwithstanding it charged an entry fee, where 35 per cent of income of institution came from interest on endowment fund and from donations and 65 per cent from entry fees, and rates were established which together with other income would equal expenses, and there was no element of private gain, and entry fee was within reach of persons of limited means, and notwithstanding a three-month probationary period was imposed upon prospective inmates. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Charitable Institution".

7. Taxation ⇐241(2)

Property of institution engaged in caring for aged people, which was used to house personnel of institution, was used "exclusively for charitable purposes" within Welfare Tax Exemption Law. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Exclusively for Charitable Purposes".

Fred N. Howser, Attorney General, E. G. Benard, Deputy Attorney General, James Don Keller, District Attorney, and Carroll H. Smith, Chief Trial Deputy District Attorney, San Diego, for appellant.

Gray, Cary, Ames & Driscoll and John M. Cranston, all of San Diego, for respondent.

SPENCE, Justice.

Plaintiff, a nonprofit corporation operating a home for elderly people on a "life care contract" basis, brought this action to recover taxes paid under protest for the tax year 1946-1947. It claimed that it was a charitable organization devoting its property exclusively to charitable purposes and so entitled to the benefit of the recently adopted welfare exemption. Cal. Const. art. XIII, § 1c; Rev. & Tax. Code, § 214. With certain exceptions—a parcel of vacant land, some acreage leased for commercial purposes, and a small item of solvent credits—the trial court adjudicated the exemption claim in plaintiff's favor and entered judgment accordingly for a tax refund. From such judgment defendant county has appealed, contending that the record does not sustain the conclusion that plaintiff was functioning as a charitable institution within the meaning of the welfare tax exemption law. Upon the undisputed facts, we have concluded that defendant's contention cannot be sustained.

At the trial the only evidence introduced was that offered by plaintiff. It appears that plaintiff was incorporated in 1908 and received as a gift certain land in Chula Vista—some 15 acres—and the buildings then on it. Subsequent buildings were donated, and in 1916 a trust fund of $200,000 was created. It is conceded that plaintiff is a nonprofit corporation organized for the purpose of providing a home for aged people at its site in Chula Vista, and that the property in dispute, with the exception of the portion hereinafter mentioned, is used exclusively for such purpose and is irrevocably dedicated thereto; that all of its income—whether from charges to inmates, investments, gifts or donations—is used entirely in the maintenance and operation of the home; that the members of its board of directors serve without compensation, and that the compensation paid to its employees is "fair and reasonable." But regardless of these qualifying factors, defendant cites plaintiff's "manner of operation" as determinative of its ineligibility for the tax benefit applicable to a "charitable institution" within the meaning of the welfare exemption law.

Applicants for admission to the home must have attained the age of 69 years, be in good health, and meet the approval of the board of directors—including consideration over a three months' probationary period. Prior to November 1, 1944,

each applicant, in addition to paying a fixed fee for maintenance at the home, was required to execute a trust agreement whereby three-fifths of the applicant's estate would go to the home upon death of the applicant. A new policy was adopted after said date eliminating the trust agreement as an entry requirement, and at the same time the minimum fee for admission to the home was fixed at $5,500. By the terms of the life care contract made with the applicant, the home agreed to furnish room, board, and other services.

As documentary evidence in its behalf and representing the "last figures available at the time [the exemption] claim was filed", Code Civ.Proc. § 1963, subds. 28–32, plaintiff introduced a financial report for the fiscal year ending June 30, 1945. According to that accounting record, 21 new residents were admitted during the period covered, 16 of them under the policy of charging a minimum fee of $5,500 as established in November, 1944, the average fee being $6,264.04. The exact amount of the admission fee of each applicant was computed actuarily and also depended on the applicant's choice of accommodations. According to one of plaintiff's directors, the division as to the source of plaintiff's income was fixed at 35 per cent from interest on the endowment fund and donations and 65 per cent from admission fees. Certain other schedules introduced in evidence clearly showed that over 25 per cent of plaintiff's gross cash income, as well as its land and buildings, came from sources other than the residents of the home. The trial court found that the total amounts received by plaintiff from its inmates and from the endowment fund have always been insufficient to pay operating expenses of the home, and that the deficit has been met through voluntary gifts and contributions from persons not inmates of the home. The same director, a certified public accountant who prepared all of plaintiff's tax reports, also testified that plaintiff had been exempted from payment of all federal social security and income taxes, as well as from state unemployment insurance taxes, and a finding was so made. The court further found that the recited facts attesting to plaintiff's method of operation prevailed during the taxable year in question, 1946–1947, and "were true when plaintiff's claim for exemption was filed and [denied] by the county officials." Such finding was in accord with the testimony of plaintiff's director attesting to the continued level of service and "policy" of operation maintained at the home "from the inception of the institution as I know it" to "the present [time]" (date of trial, January, 1948).

[1, 2] As discussed in the opinion filed by this court in certain consolidated hospital cases, Cedars of Lebanon Hospital v. County of Los Angeles, Cal.Sup., 221 P.2d 31 the problem of determining whether or not plaintiff is entitled as a charitable organization to the welfare tax exemption must be resolved upon the basis of a "strict but reasonable construction" of the exempting language, and the claimant of such benefit has the burden of showing that it clearly comes within the terms thereof. It is not sufficient that the institution shall have originated through a charitable gift or bequest, but "*it must actually dispense charity*" if it is to satisfy the requirement that its property be "used exclusively for * * * charitable purposes." 51 Am.Jur. § 601, p. 584. (Emphasis added.) However, due regard must be had for the ordinary acceptation of the exempting language and its purport in effecting the object of the lawmakers. In the light of such guiding principles, the particular facts establishing plaintiff's method of operation and function in the community must be considered.

[3-5] The concept of charity is not confined to the relief of the needy and destitute, for "aged people require care and attention apart from financial assistance, and the supply of this care and attention is as much a charitable and benevolent purpose as the relief of their financial wants." In re Estate of Henderson, 17 Cal.2d 853, 857, 112 P.2d 605, 607. So the charge of fees by such an institution as a home for the aged will not necessarily prevent its classification as charitable if such sums "go to pay the expenses of operation and not to the profit of the founders

or shareholders," for all persons may "under certain conditions be proper objects of charity." Scripps Memorial Hospital, Inc., v. California Employment Comm., 24 Cal. 2d 669, 675, 151 P.2d 109, 113, 155 A.L.R. 360; see, also, 51 Am.Jur. § 602, p. 585; anno. 34 A.L.R. 634, 637; 62 A.L.R. 328, 330; 108 A.L.R. 284, 286. In short, as the word "charity" is commonly understood in modern usage, it does not refer only to aid to the poor and destitute and exclude all humanitarian activities, though rendered at cost or less, which are maintained to care for the physical and mental well-being of the recipients, and which make it less likely that such recipients will become burdens on society.

Defendant's challenge of plaintiff's denomination as a charitable institution and the use of its property for charitable purposes stems primarily from the fact that plaintiff does not extend free services to the poor, but the welfare exemption law as above quoted makes no such requirement as a qualifying factor for the tax exemption, and if such condition were intended, appropriate language to that effect could readily have been adopted. Rather, the welfare exemption law as here involved appears to rest on a concept of charity in its ordinary sense. Consistent with such interpretation, the controlling consideration in determining whether an institution such as plaintiff should be classified as a charitable one is not whether a few or all of the recipients of its benefits may make reasonable contributions toward defraying the cost of such benefits, but whether such contributions as are made do not exceed what is required for the maintenance of the institution at a reasonable standard and are devoted to the purposes for which the institution was founded, which purposes, in the absence of the required contributions, would clearly be deemed to be charitable. If such is the situation, then the institution is no less a charity because of the receipt of such contributions, and within such concept plaintiff properly claims a tax-exempt status under the welfare exemption law.

The record contains abundant evidence that approximately 35 per cent of plaintiff's income came from interest on the endowment fund and from donations, while only about 65 per cent came from fees of the inmates. Moreover, it appears from the testimony of one of the directors of the home, as above mentioned, that the rates were set so that the amounts received from the inmates "together with income from the endowment and from other sources" would equal expenses. In such state of the record, defendant unavailingly attacks the trial court's finding to the effect that the inmates of the home do not pay the full cost of their support and maintenance, and that in fixing the rates to be charged "the directors * * * do not endeavor to [make] a profit or even to meet all operating expenses, but rather endeavor to set rates as low as possible without creating a deficit so large that [it] cannot [be met] by gifts and contributions which can reasonably be expected."

While it is true that each applicant for admission to the home is required to pay an entry fee in return for his care, it is also true that plaintiff contributes a substantial proportion of the annual cash expenditures, as well as the use of its properties for such care. Under these circumstances, the mere payment of such fees by the inmates does not militate against plaintiff's status as a charitable organization. Nor does it matter that plaintiff requires the applicant to the home to submit to a three-month probationary period and meet the approval of the board of directors rather than permit the home to be open to the admission of any individual upon demand. Such stipulation only suggests an attempt to maintain the home in a manner which would engender harmony of association among the elderly inmates rather than endanger their peaceful, congenial living conditions through the introduction of discordant elements.

[6] As was pertinently said in Re Estate of Henderson, supra, 17 Cal.2d 853, at page 857, 112 P.2d 605, at page 607: "Since the enactment of the Statute of Charitable Uses during the reign of Elizabeth, aid to the aged and infirm has been recognized as charitable." Here the record shows that plaintiff is ministering to its

elderly residents at a charge which, although appreciable, is within the reach of persons in modest circumstances and is no greater than that which is required to augment the substantial amount which plaintiff is able to contribute to the accomplishment of its purposes. There can be no doubt that arrangements for such life care contracts fill a social purpose as well as a need of the applicants for admission. Approaching those years when the physical and mental faculties normally decline over an indefinite period of time and being faced with the prospect of expending increased but indeterminable amounts for care during that period, the applicants, by means of such life care contracts, avoid the need of living in penury occasioned by the haunting fear that they will exhaust their meagre resources and become public charges. Accordingly, it is our conclusion that where, as here, the payments made by the elderly residents are within the reach of persons of limited means, where such payments are not commensurate with the benefits derived, where there is no element of private gain, and where all the income of the institution—including that received from residents and the substantial portion received from gifts and other sources—is devoted exclusively to affording a reasonable standard of care to such elderly persons for the balance of their lives, the concept of charity in its ordinary sense, as well as under a strict but reasonable construction of the welfare exemption law, is met. Such determination of plaintiff's status as a charitable institution is in accord with the general trend of authority in cases determining the character of institutions for tax exemption as well as for other purposes. 51 Am.Jur. § 602, p. 585; In re Estate of Henderson, supra, 17 Cal.2d 853, 857–858, 112 P.2d 605; Scripps Memorial Hospital, Inc., v. California Employment Comm., supra, 24 Cal.2d 669, 675, 151 P.2d 109, 155 A.L.R. 360; also, Bishop & Chapter of Cathedral of St. John the Evangelist v. Treasurer of City and County of Denver, 37 Colo. 378, 86 P. 1021, 1024–1025; Old Colony Trust Co. v. O. M. Fisher Home, Inc., 301 Mass. 1, 16 N.E.2d 10, 11; Gundry v. R. B. Smith Memorial Hospital Ass'n, 293 Mich. 36, 291 N.W. 213, 214–215; Salvation Army v. Hoehn, 354 Mo. 107, 188 S.W.2d 826, 829–831; In re Vassar's Estate, 127 N.Y. 1, 27 N.E. 394, 397–398; In re Mendelsohn, 262 App.Div. 605, 31 N.Y.S.2d 435, 440–441; People ex rel. Doctors Hospital, Inc., v. Sexton, 267 App.Div. 736, 48 N.Y.S.2d 201, 205; Baylor University v. Boyd, Tex.Civ.App., 18 S.W.2d 700, 701; Brattleboro Retreat v. Town of Brattleboro, 106 Vt. 228, 173 A. 209, 212–213.

[7] Such adjudication of plaintiff's status in relation to the welfare tax exemption likewise comprehends that portion of its property used to house its personnel as that issue is here presented. Thus, there is considerable testimony in the record showing that those of the personnel living on plaintiff's premises do so as a matter of institutional necessity. In this regard it must be remembered that a prerequisite for entrance to the home as a resident is the 69-year age qualification, indicating the need of adequate personnel to care for such elderly persons on the basis of 24-hour service. All of this testimony as to the institutional necessity of plaintiff's furnishing of housing accommodation for certain personnel stands uncontradicted in the record. Similar considerations were discussed in certain opinions filed with regard to the tax-exempt status of a nurses' home and the housing of other alleged essential personnel as a necessary adjunct to a hospital, Cedars of Lebanon Hospital v. County of Los Angeles, Cal.Sup., 221 P.2d 31, and the lodging of priests and lay brothers in effectuating the operation of a religious retreat house, Serra Retreat v. County of Los Angeles, Cal.Sup., 221 P.2d 59, to which opinions reference is hereby made in support of this phase of plaintiff's welfare tax exemption claim.

It therefore follows that the trial court correctly determined that plaintiff is a charitable institution and entitled to ex-

emption from taxation on all the property in dispute.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.



35 Cal.2d 653

STANLEY v. COLUMBIA BROADCASTING SYSTEM, Inc. et al.
L. A. 20686.

Supreme Court of California, in Bank.
Aug. 4, 1950.

Rehearing Denied Aug. 31, 1950.

Action by Jack Stanley against the Columbia Broadcasting System, Inc. and others, to recover on an implied agreement of defendant to pay plaintiff for a radio program which plaintiff claimed to have originated. The Superior Court, Los Angeles County, Roy V. Rhodes, J., entered judgment for plaintiff for $35,000 and the named defendant appealed. The Supreme Court, Carter, J., held that verdict for plaintiff for $35,000 was sustained by the evidence.

Judgment affirmed.

Traynor and Spence, JJ., dissented.

Prior opinion, 208 P.2d 9.

1. Literary property ⇐7

The originator of a novel idea reduced to concrete form and disclosed to wrongful appropriator under circumstances indicating that compensation was expected if the idea should be used, may recover from such appropriator upon an implied contract.

2. Literary property ⇐7

The general rule that the problem of similarity between the two compositions, whether literary, musical or dramatic, is a question of fact to be determined ultimately by comparison of the two works upon the basis of the opinion of the average individual possessing a practical understanding of the subject, applied to radio programs involved in action to recover on an implied agreement of defendant to pay plaintiff for a radio program which the plaintiff claimed to have originated. Civ. Code, §§ 980, 983.

3. Literary property ⇐9

In action on implied contract of defendant to pay plaintiff for a radio program which the plaintiff claimed to have originated, finding of jury as to the similarity of the defendant's program to plaintiff's was sustained by the evidence.

4. Appeal and error ⇐1001(1)

Jury's finding that the defendant's radio program was similar to plaintiff's would not be disturbed on appeal where there was sufficient evidence to sustain it.

5. Literary property ⇐9

In action on implied contract to pay plaintiff for a radio program which plaintiff claimed to have originated, evidence sustained finding that the defendant had access to plaintiff's program idea.

6. Literary property ⇐9

In action on implied contract to pay plaintiff for a radio program which plaintiff claimed to have originated, evidence sustained finding that plaintiff's radio program was new and novel and was originated by plaintiff.

7. Literary property ⇐2

An author who takes existing materials from sources common to all writers, arranges and combines them in a new form giving them an application unknown before is entitled to a copyright notwithstanding that he may have borrowed much of his materials and ideas from others, provided they are assembled in a different manner and combined for a different purpose and his play and arrangement are a real improvement upon existing modes; since the labor of making such selection, arrangements and combinations has entailed the exercise of skill, discretion and creative effort. Civ. Code, §§ 980, 983.

8. Appeal and error ⇐842(7)

In action on implied contract to pay plaintiff for a radio program which plaintiff claimed to have originated, the question of originality of plaintiff's program was not one of law to be determined by the court but was one of fact for the jury's determination.

9. Literary property ⇐5

Where originator of radio program made his audition recording before an audience in defendant's broadcasting studio, he was not making his idea "public property" within the meaning of the law. Civ. Code, §§ 980, 983.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Public Property".

10. Literary property ⇐5

Prior to publication an author may make copies of his production and enjoy the benefit of limited or restricted publication without forfeiture of the right of a general publication. Civ.Code, §§ 980, 983.

11. Literary property ⇐9

In action on implied contract to pay plaintiff for a radio program which plaintiff claimed to have originated by plaintiff, verdict for plaintiff for $35,000 was sustained by the evidence.

12. Appeal and error ⇐981
New trial ⇐99

A motion for a new trial on the ground of newly discovered evidence is to a large extent addressed to the discretion of the trial judge and an appellate court will not disturb his ruling unless a gross or unmistakable abuse of discretion appears.

13. New trial ⇐99

In action on implied contract to pay plaintiff for a radio program which plaintiff claimed to have originated, denial of the defendant's motion for a new trial on ground of newly discovered evidence was not an abuse of discretion.

O'Melveny & Myers, Homer I. Mitchell, Louis W. Myers, W. B. Carman, Jr., and Deane F. Johnson, all of Los Angeles, for appellant.

Loeb & Loeb and Herman F. Selvin, all of Los Angeles, as amici curiæ on behalf of appellant.

Harold A. Fendler, Beverly Hills, and John W. Preston, Los Angeles, for respondent.

CARTER, Justice.

Defendant has appealed from a verdict and judgment for $35,000 given by a jury in favor of the plaintiff. The action was brought to recover on an alleged implied agreement of defendant to pay plaintiff for a radio program which plaintiff claims to have originated.

In his complaint, plaintiff alleged that during the year 1941 he originated and caused to be prepared, composed and written an original script for a radio program entitled "Walter Wanger Presents" and a radio program format entitled "Preview Parade" or "Hollywood Preview" and that about September 1st of that year he had this script recorded for the purpose of submitting it to prospective sponsors, advertising agencies and broadcasting companies. He alleged that he, at all times, retained full ownership of the radio program and that he at no time licensed or authorized the use of it in any manner. Plaintiff further alleged that during the years 1942, 1943 and 1944 he submitted to the defendant, Columbia Broadcasting System, Incorporated, the radio program, script, format and records for the purpose of having the defendant determine whether or not it desired to purchase it or license the right to use it under an implied agreement that if the defendant did use the radio program it would pay plaintiff its reasonable value. But that on or about the first of May, 1945, the defendant produced and presented a radio program entitled "Hollywood Preview" which substantially copied and embodied plaintiff's radio program and, as a result, became indebted to the plaintiff for the use thereof.

On this appeal, defendant contends that the court should have found, as a matter of law, that there was no similarity between the two programs; that the evidence was insufficient to show that defendant had access to plaintiff's program idea;

that there can be no implied agreement to pay for an abstract idea which is not new or novel; that the jury arbitrarily ignored the uncontradicted, unimpeached testimony of defendant's witness, Hudson; that when an idea is made public there can be no liability for its use; that its motion for a new trial on the grounds that (1) the jury's verdict for damages was so excessive that it appeared to have been given under the influence of prejudice and passion, (2) newly discovered evidence, and (3) that the evidence was insufficient to support the verdict should have been granted.

[1] As a general observation from the cases, it may be stated that the right of the originator of an idea to recover from one who uses or infringes it seems to depend upon whether or not the idea was novel and reduced to concrete form prior to its appropriation by the defendant, and, where the idea was disclosed by the originator to the appropriator, whether such disclosure took place under circumstances indicating that compensation was expected if the idea was used.

Where these prerequisites exist, recovery may be had upon a theory of contract implied in fact or in law. Plus Promotions, Inc., v. R. C. A. Mfg. Co., D.C. N.Y., 49 F.Supp. 116; Alberts v. Remington Rand, Inc., 175 Misc. 486, 23 N.Y.S.2d 892; Healey v. R. H. Macy & Co., 251 App.Div. 440, 297 N.Y.S. 165, affirmed 277 N.Y. 681, 14 N.E.2d 388.

Plaintiff's complete program is as follows:

"Announcer: 'Ladies and gentlemen, Walter Wanger Presents Hollywood Preview! Hollywood Preview! Hollywood Preview!

" 'And here is Hollywood's distinguished producer, Walter Wanger.'

"Wanger: 'How do you do, ladies and gentlemen. Welcome to our Hollywood Preview Parade, a radio show designed for your pleasure and to give you a voice in what pictures Hollywood shall produce in the months to come. Hollywood is very interested in giving you motion pictures you want to see. Unfortunately producers do not and cannot always know just what you do want. This is the reason for this "Preview Parade." Each week we plan to present a radio story we think will make a good film. We ask you to send us your opinion and suggest players for the leading roles. Our sponsor will give worthwhile cash prizes for the best letters, but more about that later.

" 'Now allow me to introduce Mr. True Boardman.'

"Boardman: 'This is the sixth program of the new series, "Walter Wanger Presents." Your host is one of Hollywood's most progressive film leaders, the President of the Academy of Motion Picture Arts and Sciences, and producer of such outstanding films as Foreign Correspondent, Blockade, Long Voyage Home, Stagecoach, Algiers, and currently Sundown.

" 'Each week Mr. Wanger selects a story which he feels should be made into a picture. You are asked to write to Mr. Wanger and give him your opinion. The sponsors pay $500 for the best letter written by one of our listeners and if enough of you vote for it our play will be produced as a motion picture.

" 'And now, once again, Walter Wanger.'

"Wanger: 'Thank you, Mr. Boardman. Tonight our play is entitled "So Gallantly Gleaming." It has been written by Harvey Thew, Peter Ordway, and Sonya Levien. The radio adaptation is by Hector Chevigny.

" ' "So Gallantly Gleaming" tells a thrilling and romantic story of a great explorer, his beautiful wife, and the acquisition of California. Listen closely. Do you think it should be made into a motion picture? Your votes will decide.

" 'Our guests who will later give their opinion are Miss Joan Bennett, Hector Chevigny and Henry Hathaway. Music is by Robert Armbruster.' "

(Drama)

"Boardman: 'Thank you, ladies and gentlemen. Did you like "So Gallantly Gleaming?" Would you like to see it as a motion picture? The story of John

Charles Fremont, I think, is one that deserves retelling. In a moment we will hear the opinion of our three Hollywood guests, Joan Bennett, Hector Chevigny, and Henry Hathaway, and then have an opportunity to compare their opinions with yours.

" 'Now again a word as to the real idea behind this program. Each week Walter Wanger Presents brings you a story which we think would be a good motion picture. And here is your part in the program. We ask you to write to Mr. Wanger, telling him whether or not you would like to have this play made into a motion picture, and why. Also include your choice of stars to play the leading roles. The best letter received each week will receive an award of $500 from our sponsor. The award is based not on the style of your letter, not on brilliant writing, but entirely on the reasons you set down as your opinion. And believe me, Hollywood is waiting for your vote. Whether or not you win a prize, your vote will help decide whether or not to film "So Gallantly Gleaming." The American picture-going public has long said it wished a voice in the choice of stories presented on the screen. Here is the chance for you to have that voice and make it heard across the nation. Write your letter now tonight. Address Walter Wanger, Hollywood, California.

" 'Last week Mr. Wanger presented "Out of the Night", the sensational novel which has attracted such nationwide comment. A storm of argument was aroused. Sixty-eight thousand letters have been received to date, and we are happy to announce that Warner Brothers Studio have arranged to make this startling story into a film in the near future. So, thanks to your letters, you have helped Warner Brothers to their decision to film "Out of the Night."

" 'Last week's best letter was from Mrs. William Wentworth of Brockton, Massachusetts. Congratulations, Mrs. Wentworth! Your check for $500 goes forward immediately.

" 'Now, Mr. Wanger, I think we are all anxious to hear the opinions of your guests about tonight's show.'

(Interview with Board of Experts)

"Wanger: 'Thank you. Thank you very much. Thank you, Joan Bennett, Henry Hathaway, Hector Chevigny. Do you ladies and gentlemen, agree with the opinions of our guests? Do you agree that "So Gallantly Gleaming" should become a motion picture? And who do you think should play the leading roles? Won't you write and tell us. Remember that whether your letter is best and wins the prize or not, you are helping Hollywood decide on what to give you on the screen. Next week we will have something totally different for you, a story called "Two Arabian Knights." Until then, this is Walter Wanger saying, Good night.'

"Announcer: 'Walter Wanger Presents is brought to you at this time each week by our sponsor. Original music for tonight's show was written and directed, as always, by Robert Armbruster. The cast included Hollywood's outstanding radio stars—Lurene Tuttle, Lou Crosby, Norman Field, Elliott Lewis, Lou Merrill, Frederick Shields, Paul Whitley, Norene Gamille, Gayne Whitman.

" 'This is John Hiestand hanging out the "Goodnight" sign until we meet again next week at this same time. This is the National Broadcasting Company.' "

The following is a portion of the broadcast preceding and following the drama as actually put on the air by defendant:

"Announcer: 'Its The Flying Red Horse * * * the sign that identifies the *Mobilgas* and *Mobiloil* dealers who bring you * * * "Hollywood Preview" * * * with Mr. Otto Kruger!'

"Announcer: 'Tonight, on behalf of your Mobilgas and Mobiloil dealer * * * Mr. Otto Kruger, eminent star of radio, stage and screen brings you another Hollywood Preview of a motion picture of the future! Tonight's story * * * "Growing Pains" * * * a comedy by Aurania Rouveral now scheduled for production by RKO Pictures.

" 'And as our star * * * Miss Marcy Maguire!

"'Now * * * ladies and gentlemen * * * Otto Kruger!'

"Kruger: 'Thank you. Good evening, everyone. Well, its another Preview Night here in Hollywood, and Mobilgas invites you to share in the excitement. For just as the first showing of a new motion picture in the film capitol means bright lights and eager crowds, so does the same spirit of enthusiasm prevail on our radio version of Hollywood Preview. So, tonight it's "Growing Pains" * * * famous as a play * * * and now being prepared for filming at RKO. And as our star * * * well, because "Growing Pains" is a story about irresistible youth, we wanted Hollywood's most enthusiastic, effervescent young lady in the leading role of Terry. And we found exactly that in the person of redheaded * * * Marcy Maguire.'

"Announcer: 'And now, "Growing Pains" * * *'

"Announcer: 'So ends tonight's Hollywood Preview Story.'"

(Interview with star follows.)

"Announcer: 'Now, as our theatre audience fills out cards giving their comments and indicating their favorites for the picture version of "Growing Pains", a special word of greeting to some new listeners.'" (Advertising for sponsor follows; announcements as to producer, director and music.)

[2] The problem of similarity between two compositions, whether literary, musical or dramatic, is a question of fact to be determined ultimately by a comparison of the two works upon the basis of the opinion of the average individual possessing a practical understanding of the subject. Although the majority of the decided cases involved a questioned infringement of a copyrighted work, it would seem that the test of whether or not an infringement existed would be the same as the question here involved—the determination of whether or not such similarity exists between plaintiff's and defendant's programs as to suggest to the average person the use by defendant of an idea originating with plaintiff upon proof of the other elements necessary to enable the plaintiff to recover. The analogy between the two is drawn by the court in De Acosta v. Brown, 2 Cir., 146 F.2d 408.

The parties have conceded that the applicable sections of the Civil Code, 980 [1] and 983 [2] as they read at the time plaintiff's cause of action arose, are but codifications of the common law. The common law right in literary property and the right existing under the copyright law are contrasted as follows: "The term 'copyright' is sometimes used to designate the property in intellectual productions conferred by the common law as well as that conferred by statute, the full phrase 'common-law copyright' being sometimes used. The justification for this use of the term at the present day is found only in the fact that the common law confers on the owner of an intellectual production the exclusive right to make first publication of it, that is, the right to copy it in the first instance * * * Whether the common law ever conferred a copyright in the sense of an exclusive right of continued publication and sale has been a matter of doubt and dispute, * * * but however this may be, the range of rights and liabilities existing at common law with respect to intellectual productions is essentially and greatly different from those existing under the copyright statutes. [Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 28 S.Ct. 722, 52 L.Ed. 1086.] Speaking generally, common-law rights are limited to unpub-

1. "§ 980. The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession."

2. § 983. If the owner of a product of the mind intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this state is concerned."

lished works, and all common-law property rights therein are lost on a publication * * * while statutory copyrights relate mainly to published works, * * * Again, *common-law rights in unpublished works are of a wider and more exclusive nature* than the rights conferred by statutory copyright in published works. The common law prohibits any kind of unauthorized interference with, or use of, an unpublished work on the ground of an exclusive property right, and the common-law right is perpetual, existing until lost or terminated by the voluntary act of the owner, * * * while a statutory copyright permits a 'fair use' of the copyright publication, without deeming it an infringement. * * *" [Emphasis added.] 18 C.J.S., Copyright and Literary Property, § 2, page 138, et seq.; and cases there cited.

The test, with respect to infringement, which is laid down by the cases is that impression received by the average reasonable man upon a comparative reading of the two works "not by a dissection of sentences and incidents, suitable for the study of a digest or text-book, but inherently unnatural for any man who has the kind of brains that make him able to adapt a work of fiction." Frankel v. Irwin, D.C., 34 F.2d 142, 144. White-Smith Music Co. v. Apollo Co., 209 U.S. 1, 17, 28 S.Ct. 319, 52 L.Ed. 655, 14 Ann.Cas. 628; 13 C.J. 1113, sec. 276, note 30; 18 C.J.S., Copyright and Literary Property, § 94; Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F.2d 1, 18; Hewitt v. Coward, 180 Misc. 1065, 41 N.Y.S.2d 498; Dymow v. Bolton, 2 Cir., 11 F.2d 690; Twentieth Century-Fox Film Corp. v. Dieckhaus, 8 Cir., 153 F.2d 893; 15 Cornell L. Q. 633, 639.

In determining whether the similarity which exists between a copyrighted literary, dramatic or musical work and an alleged infringing publication is due to copying, the common knowledge of the average reader, observer, spectator or listener is the standard of judgment which must be used. Echevarria v. Warner Bros. Pictures, D.C., 12 F.Supp. 632; Sieff v. Continental Auto Supply, D.C., 39 F.Supp. 683; Barbadillo v. Goldwyn, D.C., 42 F.2d 881, 885.

[3] With respect to the comparison between the two programs and without unnecessarily "dissecting" them, there appears to be sufficient similarity to justify the finding of the jury as the "average, reasonable man." There are, it is true, certain dissimilarities which appear: The lack of the so-called Board of Experts on defendant's program; the fact that the studio audience only was requested to respond; and the rather less emphasis which is placed on the reaction of the public to the play it has heard. The element of prizes offered for the best letter was incorporated into defendant's program after it had made its first few appearances on the air and was continued for a period of six weeks. Each case must be determined on its own facts. Frankel v. Irwin, supra. "It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations. That has never been the law, but, as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that, as was recently well said by a distinguished judge, the decisions cannot help much in a new case. Fendler v. Morosco, 253 N.Y. 281, 292, 171 N.E. 56." Nichols v. Universal Pictures Corporation, 2 Cir., 45 F.2d 119, 121. "Evidence of these differences is relevant upon the question of infringement, but if such differences are shown to exist, the question remains for the trier of fact to decide the issue." Universal Pictures Co. v. Harold Lloyd Corporation, 9 Cir., 162 F.2d 354, 361; Pellegrini v. Allegrini, D.C., 2 F.2d 610. "Slight differences and variations will not serve as a defense." Universal Pictures Co. v. Harold Lloyd Corporation, supra, 162 F.2d 361; Fleischer Studios, Inc., v. Ralph A. Freundlich, Inc., 2 Cir., 73 F.2d 276, 278; Nutt v. National Institute Incorporated for the Improvement of Memory, 2 Cir., 31 F.2d 236, 238.

[4] We then have a question of fact—that of the similarity between the two programs. This question of fact was decided adversely to defendant by the jury whose duty it was to make the determination. The rule is settled that this determination will

not be interfered with upon appeal where there is evidence to sustain it. The evidence, in the form of the two programs alone, shows that there is substantial similarity to support the verdict.

Because of the factual dissimilarity between this case and Golding v. R.K.O. Pictures, Inc., Cal.Sup., 221 P.2d 95, the scope of the inquiry upon the issue of similarity is necessarily different. In each case the issue of similarity was properly submitted to the jury. Similarity having been found by the jury, we look to the evidence to ascertain whether such similarity existed as to the portion of the production which plaintiff claims to have originated. In this case it is the entire plan, the grouping together or arrangement of various elements which constitutes the claimed infringement. In the Golding case it is only the plot or basic dramatic core of the play which is claimed to be original and to have been unlawfully copied by the defendant. It follows that the inquiry in the Golding case is a more limited one than that in the present case because of the nature of the claimed infringement.

[5] The next contention made by the defendant is that the defendant had no access to plaintiff's program idea. There is evidence in the record to show that plaintiff submitted his program to several officials and employees of the broadcasting company at different times during the years 1942, 1943 and 1944. Implicit in this submission was the belief that if the program were used he would be compensated therefor. It was admitted by defendant's witness Hudson at the trial that it was the custom in the radio industry to pay for such ideas when and if they were used.

[6, 7] It is conceded by the defendant in its brief that plaintiff's idea had been reduced to the concrete form of a script format and recording. The next question to be discussed is whether or not plaintiff's idea as such was so new and novel as to be worthy of protection. It may be conceded at the outset that there is nothing new in a play broadcast over the air; it may also be conceded that there is nothing new in the use of the words "Hollywood Preview" in connection with the first showing to the public of a *motion picture;* it may also be noted that audience participation, as such, is not new to radio. But when all of these elements are joined to make one idea for a radio program, it is the *combination* which is new and novel. An author who takes existing materials from sources common to all writers, arranges and combines them in a new form, giving them an application unknown before, is entitled to a copyright, notwithstanding the fact that he may have borrowed much of his materials and ideas from others, provided they are assembled in a different manner and combined for a different purpose, and his plan and arrangement are a real improvement upon existing modes; for the labor of making these selections, arrangements and combinations has entailed the exercise of skill, discretion and creative effort. Edwards & Deutsch Lithographing Co. v. Boorman, 7 Cir., 15 F.2d 35. "If the author has accomplished a unique and useful result through the application of intellectual labor and literary or artistic skill, his work is entitled to a copyright which will protect the plan, arrangement and combination of the materials therein, even though all the materials of such work, or some parts of its plan, or the arrangement and modes of illustrating the subject matter thereof, may be found separately, or in a different form or setting, or in a different combination in other distinct works." Ball, The Law of Copyright and Literary Property, p. 247. Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App.2d 556, 90 P.2d 371. It has been previously pointed out that an author's right in the fruits of his intellectual labor at common law is even broader than that which he has under the law of copyright.

It was admitted by Hudson, defendant's principal witness, that prior to the time the program in question was placed on the air that there was no program in which the listening audience in the studio or the listening audience on the radio were asked to give their opinions as to the suitability of the material broadcast by radio for motion picture products. He further admitted that it was a new idea for the listening audience, whether studio, or the entire listening public, to comment on the prospective stars to

appear in the proposed productions. The defendant, however, maintains that its studio audience participation was merely atmosphere and was not intended to give the public any real participation in the choice of future pictures. If this was the true intention of defendant, the following excerpt from the testimony of Hudson shows that the studio audience was not so advised nor led to believe:

"Q. When you first put the program on the air starting on May first your studio audience was asked to submit comment first as to whether they thought the material suitable for pictures, and second, the persons they would like to see in the leading roles, isn't that right? A. That is right."

[8] Thus the evidence shows that defendant's principal witness, a man who had been in the radio business for some years, believed that a plan such as plaintiff's was new in the sense that the particular combination of ideas had not before been used in radio. It is also evident that it was the custom in the radio industry to pay for such ideas. Furthermore, the question of originality of plaintiff's program is not one of law to be determined by the court but is one of *fact* for the jury's determination. Yadkoe v. Fields, 66 Cal.App.2d 150, 159, 151 P.2d 906; Dezendorf v. Twentieth Century-Fox Film Corp., 9 Cir., 99 F.2d 850, 851; New York Belting & Packing Co. v. New Jersey Car-Spring & Rubber Co., 137 U.S. 445, 450, 11 S.Ct. 193, 34 L.Ed. 741.

The next contention made by defendant is that the jury arbitrarily ignored the uncontradicted, unimpeached testimony of defendant's witness, Hudson. The record shows that this witness' testimony was contradicted and impeached at different times throughout the trial. His testimony with respect to the so-called program evolved by him in 1940 (before defendant had access to plaintiff's work) which it is contended is the one broadcast by the defendant company, is worthy of mention. He testified that the idea back of his program was to promote the sale of stories by authors who could not get a hearing from important motion picture executives. He admitted that he had not considered having any audience participation feature, and, of course, no prize offered for the best letters, nor had he considered the title "Hollywood Preview." It would seem that the audience participation feature, whether the studio audience or the entire listening public, was one of the more salient parts of plaintiff's program. The members of the listening, movie-going public, may well have been sufficiently intrigued with the thought that they were having a voice in the selection of "moving pictures of the future" so as to increase the popularity rating of the program. There was a great deal of testimony at the trial concerning the "Hooper" system of ratings. This is a system used to ascertain the number of listeners tuned in to a particular program. It was also shown at the trial that the percentage of listeners increased with respect to this particular program after the "prize for the best letter" feature was added. Using the same test here as to the similarity between the program actually broadcast and Hudson's program, it would seem that defendant's contention is without merit. It would not be apparent to the "reasonable man" upon a comparison of the two that there was such similarity to raise the inference that defendant's program was that originated by Hudson in 1940.

[9, 10] Defendant's contention that there can be no liability to pay for an idea which has been made public is without merit when the facts of this case are considered. When plaintiff made his audition recording before an audience in the National Broadcasting Company's studio he was not making his idea "public property" within the meaning of the law. Prior to publication an author may make copies of his production and enjoy the benefit of limited or restricted publication without forfeiture of the right of a general publication. The communication of the contents of a work under restriction, known as a "restricted or limited" publication, is illustrated by performances of a dramatic or musical composition before a select audience, private circulation of the manuscript, etc. Ball, Literary Property and Copyright, 473; Werckmeister v. American Lithographic Co., 2 Cir., 134 F. 321, 324, 68 L.R.A. 591; Palmer v. De Witt, 47 N.Y. 532, 543, 7 Am.Rep.

480; American Tobacco Co. v. Werckmeister, 207 U.S. 284, 28 S.Ct. 72, 52 L.Ed. 208, 12 Ann.Cas. 595; Nutt v. National Institute Inc. for the Improvement of Memory, supra; Ferris v. Frohman, 223 U.S. 424, 32 S.Ct. 263, 56 L.Ed. 492; Uproar Co. v. National Broadcasting Co., D.C., 8 F.Supp. 358, affirmed 1 Cir., 81 F.2d 373.

[11] With respect to defendant's motion for a new trial which was denied by the trial court, various contentions are made by defendant as to why it should have been granted. First, it is said that the jury's verdict was so excessive that it must have been given under the influence of passion or prejudice. There is evidence in the record to show that plaintiff spent several years in the preparation of his idea for a radio program; that he had a recording made of it when the audition was held which entailed the employment of various screen and radio actors, technicians and the like. There is evidence to show that plaintiff's idea was of no value whatsoever to him after its use by the defendant. As was said in Yadkoe v. Fields, 66 Cal.App.2d 150, 161, 151 P.2d 906, 912: "Moreover, the implied finding that the nature of the material here involved is such that no value attaches thereto aside from the use thereof, and that once such material is used the value therein is gone, is fully justified by the evidence. * * * Under the circumstances here presented, appellant's contention as to lack of evidence of the value of the use of the material is without merit." The above quoted case involved the affirmation by the District Court of Appeal of a jury verdict of $8,000 damages given for the use of isolated "gags". In the present case, both plaintiff and his expert witness testified as to the estimated worth of the program idea, and as to the custom in the industry to pay the author a certain percentage of the production costs based on the number of weeks a show was on the air. "'The fact that personal property which is injured or destroyed by the wrongful or negligent act of another, has no market value, does not restrict the recovery to nominal damages only; its value or the plaintiff's damages must be ascertained in some other rational way and from such elements as are attainable. In such case the proper measure of damages is generally its actual value or its value to the owner. The value of an article may be shown by proof of such elements or facts as may exist—such as its cost, the cost of reproducing or replacing it, its utility and use * * *." Universal Pictures Co. v. Harold Lloyd Corporation, 9 Cir., 162 F.2d 354, 370, quoting from 15 Am.Jur. 554, 555. It would appear that the evidence is sufficient to support the finding of the jury as to the amount of damages, and that the verdict was not given under the influence of passion and prejudice.

[12, 13] The newly discovered evidence claimed by defendant is shown by the affidavit of one James Allen who states that in 1935 he conceived the idea of a radio program on which would appear stories presented in dramatic form to the public as a "showcase" of possible literary material for the legitimate stage. This idea was registered with "Billboard", a theatrical publication in New York City in 1935. In 1939, this idea was registered with the Screen Writers' Guild under the possible title, "Play Preview." It contained no element of audience participation or offer of prizes. The idea back of his program was to present the stories to "the attention of stage and screen producers" and not to the public generally. Allen's 1939 prospectus did not set forth any of the details of his idea. Plaintiff was working for Allen as musical director at that time, and he states that he made several suggestions with respect to the program. This is denied by Allen in his affidavit. There are affidavits in the record to the effect that plaintiff had discussed his program idea in 1938 with the affiants. These affidavits present the same conflict as the evidence adduced at the trial. They were before the court upon the motion for a new trial. A motion for a new trial on this ground is to a large extent addressed to the discretion of the trial judge, and an appellate court will not disturb his ruling unless it is manifest that a gross or unmistakable abuse of discretion appears. Kirschbaum v. McCarthy, 5 Cal.2d 191, 54 P.2d 8; Cooper v. Kellogg, 2 Cal.2d 504, 42 P.2d 59; Buckhantz v. R. G.

Hamilton Co., 71 Cal.App.2d 777, 163 P.2d 756; Montaldo v. Hires Bottling Co., 59 Cal.App.2d 642, 139 P.2d 666. It cannot be said that there was such an abuse of discretion in the present case.

The judgment is affirmed.

GIBSON, C. J., and SHENK and EDMONDS, JJ., concur.

SCHAUER, Justice.

I concur in the judgment of affirmance.

The problem in this case is to me a closer one and more difficult of solution than that presented in Golding v. R. K. O. Pictures Inc., 208 P.2d 1. In Golding there is no substantial similarity between the two works except possibly in the so-called "central core," which, in this decade, as I have shown (208 P.2d 8), is no more novel or original than (on a claim of like date) the Star Spangled Banner. But here there is cognizable similarity or deducible relationship between every substantial element of the program which defendant produced and that which was proposed by plaintiff. Likewise, the evidence shows ample opportunity for piracy. The sole controlling question then is one of fitness for literary protectability of that which was pirated.

The problem here is more difficult than in Golding because here we are in a newer field; all of its vistas have been by no means explored. The merchandise offered for sale in this case—and assertedly appropriated—is of a quite different character from that involved in Golding. The craft of story-plotting, together with the art of story-telling, has come down through the centuries, and legislatures and courts long have experimented with affording a measure of monopolistic or property-right protectibility to literary compositions of conventional nature even though all plotted stories, it is said, must be but an application of one or more of "The Thirty-Six Dramatic Situations." (Georges Polti.) Although original plots (dramatic situations) were exhausted centuries ago, original and novel ideas for handling old plots seem inexhaustible, and as long as sufficient originality in treatment or handling of the old plot appears the law endeavors to afford property protection.

In Golding, where the details and whole treatment of plaintiffs' play and defendants' picture are essentially different, and where the only possibly cognizable similarity is in the so-called "central core" or "basic plot," we can turn to a plot catalog and it becomes immediately obvious that no property right of plaintiffs has been appropriated in The Ghost Ship. But here, as above indicated, the problem and its solution are not so simple; the answer cannot as yet, I think, be found in a catalog nor even in the law books.

The plaintiff here did not write a story or a play. He does not claim originality in the handling of any dramatic plot. He does claim to have originated a plan for a radio program and to have written and recorded the formal script for the proposed program. Such a plan, together with its script, if truly original, may constitute a protectible "product of the mind" (see Civil Code, § 980). The plan, together with the script as formulated by plaintiff, has been set forth fully in the majority opinion and is largely again quoted in the dissenting opinion of Justice Traynor; it need not be repeated here. Suffice it to say that such plan proposed this version of the "theatre of the air" type of weekly program: Recognized plays—at least plays which had already been produced or scheduled for production in motion picture form—would not be used; instead, sketches or scenarios which the author was offering for motion picture use would be adapted for radio presentation; the special announcer or "producer" for the radio presentation would be a prominent picture figure; he would ask the radio audience to send in their opinions of the show with particular reference as to whether they would like a motion picture version and their ideas for casting the parts; a cash prize would be awarded each week to the author of the "best letter"; the program would be denominated "———[the producer] Presents" and, generically, it was referred to as a "Hollywood Preview" or "Preview Parade." Plaintiff does not claim

to have himself authored any play offered for use on the proposed program.

Several years after the plaintiff's plan was submitted to defendant it (in 1945) produced a program entitled "Hollywood Preview." Like plaintiff's plan it embodied a theatre-of-the-air type presentation "of a motion picture of the future" with announcements pertaining to the production by an "eminent star of radio, stage and screen"; the studio audiences were requested to "fill out cards giving their comments" on the proposed picture production and "suggesting their favorite stars for the motion picture." Likewise, the defendant in connection with the program it produced, announced a six-weeks prize-contest for best letters relating to the program in which letters, it was suggested, the listeners should "express their opinion of the stories 'previewed'" and "vote for the stories they would like to see on the screen."

The pervasive over-all similarity between plaintiff's program-plan and that used by defendant is patent; the evidence establishes (under rules which historically have governed appellate courts) that plaintiff submitted his plan to defendant and that there was opportunity to appropriate it. The jury, under proper instructions, impliedly found that it was appropriated with an implied promise to pay its reasonable value. The basic question for us then, as I view it, is this: Is the plan as presented by plaintiff such an original product of the mind as to be legally the subject of private ownership? If it is, and if a protectible element of it has been appropriated by defendant, the verdict must stand; if not, the defendant is entitled to judgment.

A fair answer to such critical question requires this further factual analysis. No single basic element of plaintiff's program can be said to be novel or to have originated with him; all such elements had been used before. Plaintiff, however, did suggest what appears to have been a novel adaptation and application of the audience participation idea—its adaptation and application, theoretically, to aid producers in the selection of stories for picture production. The real object of the audience participation technique is, of course, an appeal to the interest of the listeners. This program, it would seem, was devised to appeal particularly to "movie fans," to win their radio program attention through catering to their motion picture interest. Upon the record it cannot be held that this particular application of the audience participation appeal, as it was dressed up and treated by plaintiff, was not originated by him nor that its admittedly somewhat varied and limited use in the program produced by defendant was so unsubstantial as to be legally negligible.

The learned and careful trial judge painstakingly explained to the jury that "Any person is free to use matters in the public domain as sources of literary or dramatic property but no person * * * is free to use the composition of another if such composition involves a new arrangement, combination or treatment of matters in the public domain, although such matters by themselves might not be protectible." He further told the jury that "in order to return a verdict for plaintiff, the radio program idea which plaintiff expressed in writing and recorded, or some feature thereof, must have been new, novel and original. An abstract idea cannot be the subject matter of an implied agreement to purchase but if such abstract idea is reduced to concrete form, it may in such form be made the subject of such an agreement to the extent that the concrete form of such idea is new, novel and original." Lastly, in this connection, it is to be noted that the jury were told: "You should determine, *first* [italics added], whether plaintiff's idea could be the subject matter of such an agreement; secondly, whether the facts justify your finding that there was any such implied agreement; and, thirdly, whether defendant copied or appropriated from plaintiff any portion of plaintiff's idea which is found to be a proper subject matter of such an agreement"; and he cautioned the jury, "If you find similarities between plaintiff's program * * * and defendant's program * * * you must determine, first, whether any of such similarities are in ideas or features or combinations thereof which are new, novel or original, and, secondly, whether, if any such similarities ex-

ist such similarities were appropriated by defendant from plaintiff's program or, on the other hand, whether they were originated by employees of defendant or were secured from sources other than plaintiff's program. Unless you are convinced * * * that there are such similarities between the two programs and that such similarities are a result of defendant's use of plaintiff's program rather than origination and development by employees of defendant or from the use of other sources, your verdict must be for the defendant * * * Independent creation of identical ideas is not a basis for liability. In order that a verdict can be returned against defendant there must have been copying or appropriation from plaintiff."

It is difficult to conceive how the jury could have been more clearly or adequately instructed on the applicable law. The question as to whether, on the law as declared by the trial judge, the evidence admits of the findings made by the jury is admittedly a close one. But where, as here, there is an element of originality in plaintiff's program and there is some similarity between every element of plaintiff's program and that which defendant produced, and where plaintiff's program was submitted to defendant and the jury has found, on the instructions quoted, that defendant copied and appropriated plaintiff's program, including an original element thereof, in the construction of the one it produced, and further found the implied promise to pay the value of that which it appropriated, it seems to me that we should breach a fundamental principle of trial by jury were we to hold that the evidence does not support the verdict. In other words, I think that the dissenting view in this case rests not on a pure question of law nor on a total lack of evidence but, necessarily, on an analysis of the evidence which argues its weight. I do not think that because the element of originality in the combination of free ideas is comparatively small, we can hold that as a matter of law the composition is wholly unprotectible.

Obedient, then, to the principle declared in such cases as Cardillo v. Liberty Mutual Ins. Co. (1947), 330 U.S. 469 [67 S.Ct. 801, 807, 91 L.Ed. 1028]; Ellis v. Union Pacific Railroad Co. (1947), 329 U.S. 649, 653 [67 S.Ct. 598, 600, 91 L.Ed. 572, 576]; Eagles v. United States ex rel. Samuels (1946), 329 U.S. 304, 317 [67 S.Ct. 313, 320, 91 L.Ed. 308, 317]; Estate of Bristol (1943), 23 Cal. 2d 221, 223, 143 P.2d 689; Cate v. Certain-teed Products Corp. (1943), 23 Cal.2d 444, 448, 144 P.2d 335; Estate of Teel (1944), 25 Cal.2d 520, 526, 154 P.2d 384; Fackrell v. City of San Diego (1945), 26 Cal.2d 196, 207, 157 P.2d 625, 158 A.L.R. 773; Viner v. Untrecht (1945), 26 Cal.2d 261, 267, 158 P.2d 3; Pewitt v. Riley (1945), 27 Cal.2d 310, 316, 163 P.2d 873; De Young v. De Young (1946), 27 Cal.2d 521, 526, 165 P.2d 457; Millsap v. National Funding Corp. (1944), 66 Cal.App.2d 658, 665, 152 P.2d 634; Southern Calif. Freight Lines v. State Bd. of Equalization (1945), 72 Cal.App.2d 26, 29, 163 P.2d 776; Berry v. Chaplin (1946), 74 Cal.App.2d 652, 663, 169 P.2d 442; Medina v. Van Camp Sea Food Co. (1946), 75 Cal.App.2d 551, 556, 171 P.2d 445; Seidenberg v. George (1946), 76 Cal. App.2d 306, 308, 172 P.2d 891, the verdict should be sustained.

For the reasons above stated I concur in the judgment of affirmance.

TRAYNOR, Justice (dissenting).

Abstract ideas are common property freely available to all. What men forge out of these ideas with skill, industry, and imagination, into concrete forms uniquely their own, the law protects as private property. It gives the special form the stamp of recognition; it does so to stimulate creative activity. It does something more to stimulate creative activity: it assures all men free utilization of abstract ideas in the process of crystallizing them in fresh forms. For creativeness thrives on freedom; men find new implications in old ideas when they range with open minds through open fields. They would indeed be stifled in their efforts to create forms worth protecting, if in the common through which they ranged they were diverted from their course by one enclosure after another. "We must take care to guard against two extremes equally prejudicial: The one that men of ability, who have employed their

time for the service of the community, may not be deprived of their just merits and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. The act that secures copyrights to authors guards against the piracy of the words and sentiments, but does not prohibit writing on the same subject." Lord Mansfield, in Sayre v. Moore, 1 East 361, 101 Eng.Rep. 140.

It would be ironic if copyright law, designed to encourage creative activity, became the instrument of its destruction. The very function of creative activity is to keep the common field in continuous germination; it is not for copyright law to render it barren by a succession of enclosures denying access to those who would cultivate it. "The object of copyright is to promote science and the useful arts. If an author, by originating a new arrangement and form of expression of certain ideas or conceptions, could withdraw these ideas or conceptions from the stock of materials to be used by other authors, each copyright would narrow the field of thought open for development and exploitation, and science, poetry, narrative, and dramatic fiction and other branches of literature would be hindered by copyright, instead of being promoted. A poem consists of words, expressing conceptions of words or lines of thoughts; but copyright in the poem gives no monopoly in the separate words, or in the ideas, conception, or facts expressed or described by the words. A copyright extends only to the arrangement of the words. A copyright does not give a monopoly in any incident in a play. Other authors have a right to exploit the facts, experiences, field of thought, and general ideas, provided they do not substantially copy a concrete form, in which the circumstances and ideas have been developed, arranged, and put into shape." Eichel v. Marcin, D.C., 241 F. 404, 408-409; Nichols v. Universal Pictures Corp., 2 Cir., 45 F.2d 119, 121; Holmes v. Hurst, 174 U.S. 82, 19 S.Ct. 606, 43 L.Ed. 904. To insure free trade in ideas, therefore, the monopoly created by copyright is limited to "the arrangement and combination of the ideas * * * the form, sequence, and manner in which the composition expresses the ideas." Bowen v. Yankee Network, Inc., D.C., 46 F.Supp. 62, 64.

The policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract. Even though an idea is not property subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed. That disclosure may therefore be consideration for a promise to pay. Bristol v. Equitable Life Assur. Soc., 132 N.Y. 264, 267, 30 N.E. 506, 28 Am.St.Rep. 568; Moore v. Ford Motor Co., 2 Cir., 43 F.2d 685, 686. Unlike a copyright, a contract creates no monopoly; it is effective only between the contracting parties; it does not withdraw the idea from general circulation. Any person not a party to the contract is free to use the idea without restriction.

Even though the idea disclosed may be "widely know and generally understood", Schonwald v. F. Burkart Mfg. Co., 356 Mo. 435, 202 S.W.2d 7, 13, it may be protected by an express contract providing that it will be paid for regardless of its lack of novelty. Brunner v. Stix, Baer & Fuller Co., 352 Mo. 1225, 1237, 181 S.W.2d 643; High v. Trade Union Courier Pub. Co., Sup., 69 N.Y.S.2d 526, 529. An implied-in-fact contract differs from an express contract only in that the promise is not expressed in language but implied from the promisor's conduct. Yadkoe v. Fields, 66 Cal.App.2d 150, 158, 151 P.2d 906; Ryan & Associates, Inc., v. Century Brewing Ass'n, 185 Wash. 600, 603, 55 P.2d 1053, 104 A.L.R. 1353; Cole v. Phillips H. Lord, Inc., 262 App.Div. 116, 28 N.Y.S.2d 404, 409. It is not a reasonable assumption, however, in the absence of an express promise, or unequivocal conduct from which one can be implied, that one would obligate himself to pay for an idea that he would otherwise be free to use. Even an express contract to pay for "valuable information" to be submitted by the plaintiff does not carry the implication of a promise to pay if it is found upon disclosure to be common knowledge. Masline v. New York, New Haven & Hartford R. Co.,

95 Conn. 702, 708, 112 A. 639. If the idea is not novel, the evidence must establish that the promisor agreed expressly or impliedly to pay for the idea whether or not it was novel. Masline v. New York, New Haven & Hartford R. Co., supra; Soule v. Bon Ami Co., 235 N.Y. 609, 139 N.E. 754.

The gravamen of plaintiff's cause of action is not the unauthorized use of his idea, since ideas may be freely borrowed, but the breach of an agreement to pay for its use. If the evidence discloses that there is no express or implied-in-fact contract there can be no recovery. Bristol v. Equitable Life Assur. Soc., 132 N.Y. 264, 267, 30 N.E. 506, 28 Am.St.Rep. 568; Alberts v. Remington Rand, Inc., 175 Misc. 486, 23 N.Y.S.2d 892, 894; Bowen v. Yankee Network, Inc., D.C., 46 F.Supp. 62, 63-64. It is urged that even in the absence of express or implied contract recovery may be predicated upon a quasi-contract, or implied-in-law promise to pay the reasonable value of the idea if it is used. Quasi-contractual liability, however, is based, not upon any evidence of consensual agreement but in the absence of such agreement, upon the theory that the defendant would be unjustly enriched if he were allowed to use the idea without paying for it. A defendant who makes use of an abstract idea that is common property is not unjustly enriched thereby, since he has taken nothing to which the plaintiff or any other person has the right of exclusive ownership. Given the principle that abstract ideas are free, there is no more right to recovery for their use in an action in quasi-contract than in an action for infringement of copyright. It has been consistently held that an action in quasi-contract for the use of an idea is governed by the same principles that control a tort action for copyright infringement: the idea must be embodied in a concrete form attributable to plaintiff's own ingenuity, Bailey v. Haberle Congress Brewing Co., 193 Misc. 723, 85 N.Y.S.2d 51, 52; Bowen v. Yankee Network, Inc., D.C., 46 F.Supp. 62, 63; Thomas v. R. J. Reynolds Tobacco Co., 350 Pa. 262, 267, 38 A.2d 61, 157 A.L.R. 1432; Moore v. Ford Motor Co., D.C., 28 F.2d 529, 539, affirmed 2 Cir., 43 F.2d 685, 688, and the form as distinguished from the abstract idea must be used by the defendant. Matarese v. Moore-McCormack Lines, Inc., 2 Cir., 158 F.2d 631, 634, 170 A.L.R. 440; Plus Promotions, Inc., v. R.C.A. Mfg. Co., D.C., 49 F.Supp. 116, 117; Booth v. Stutz Motor Car Co., 7 Cir., 56 F.2d 962, 969. In either case the plaintiff must prove that property was taken that was his. His choice of alternative actions is analogous to that of a plaintiff whose personal property has been converted and who may elect between a tort action for the value of the converted property and an action based upon an implied-in-law contract to pay the reasonable value of its use. The plaintiff's election will govern the nature of his recovery, but it does not affect the basic elements of his cause of action. Bank of America Nat. Trust & Savings Ass'n v. Hill, 9 Cal.2d 495, 498-499, 71 P.2d 258; Los Angeles Drug Co. v. Superior Court, 8 Cal.2d 71, 74, 63 P.2d 1124; Hallidie v. Enginger, 175 Cal. 505, 508, 166 P. 1; Corey v. Struve, 170 Cal. 170, 172, 149 P. 48; Bechtel v. Chase, 156 Cal. 707, 711, 106 P. 81.

Plaintiff developed a script and format embodying his idea for a radio program based upon the production of radio plays in a Hollywood setting. Had defendant appropriated the concrete form in which the idea was expressed, the "literary or artistic creation available for advertising use or otherwise", Williamson v. New York Cent. R. Co., 258 App.Div. 226, 16 N.Y.S.2d 217, plaintiff would have a cause of action for infringement of his common law copyright in the development of the idea that he had conceived. Civil Code § 980; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App. 2d 556, 561, 90 P.2d 371; Sheldon v. Metro-Goldwyn Pictures Corp., 2 Cir., 81 F. 2d 49, 54. Plaintiff concedes, however, that there could be no recovery if this action were one in tort for copyright infringement and that he was properly nonsuited as to his cause of action based thereon, presumably because there was no appropriation of whatever craftsmanship gave concrete form to his program idea. For the same reason there could be no recovery in

quasi-contract. Plaintiff can only recover upon an implied-in-fact agreement that defendant would pay him the reasonable value of his idea.

Plaintiff's second cause of action, upon which the judgment in his favor rests, was based upon the allegation that he submitted his program idea to defendant's agents "at said defendant's special instance and request * * * under and pursuant to an implied agreement that if said defendant used plaintiff's said radio program or any part or portion thereof, that said defendant would pay to plaintiff the reasonable value thereof." There is substantial evidence to support the allegation that defendant accepted plaintiff's submission of his program idea with knowledge that he expected to be compensated for its use under an implied agreement that he would be paid for the idea if it proved to be commercially valuable and was in fact used by the defendant.[1] The evidence does not, however, furnish support for an inference that defendant agreed to pay for the use of the idea even though it might prove to be "common or even open to public knowledge." High v. Trade Union Courier Pub. Co., Sup., 69 N.Y.S.2d 526, 529.

Such a promise cannot reasonably be implied from the practice of the radio industry.[2] Admittedly, the industry is will-

1. Plaintiff testified to his conversation with Russ Johnson, then program director of KNX, defendant's station for the Los Angeles area:

"I think I called him on the telephone for an appointment and told him I had a recording, and a format and a script on what I thought was a new and a good radio idea, and he asked me to bring it to his office. I brought it to his office, and when I got it there he told me he was very busy at the time and would I please leave the recording, and the script and the format with him for about a week or 10 days, or at the outside two weeks, and that he would listen to me in the interim and give me his opinion as to what he thought of it, and if the Columbia Broadcasting System or its sales department could sell it."

Hal Hudson, defendant's western program director, also testified to his conversation with Ben Paley, defendant's program operations manager:

"Q. Did Mr. Paley ever mention to you the fact that Stanley had a program? A. Yes. At some later date I believe he told me that Mr. Stanley had a program entitled Walter Wanger Presents.

"Q. Well, can you fix the date of that statement that Mr. Paley made to you? A. Only that it undoubtedly was after May 15, 1943 because before that time I had no responsibilities toward new programs. My duties were concerned with programs on the air.

"Q. What did Mr. Paley tell you about this program Walter Wanger Presents? A. He told me only that Stanley, whom I had previously met, had such a program.

"Q. Did he tell you what it was about? A. No, he didn't.

"Q. What was the occasion of his mentioning it to you? What did he say? A. I think he said in effect, 'Stanley has a program Walter Wanger Presents which I would like to have you hear.'"

"Q. Did he tell you it concerned the broadcast of stories written for motion pictures? A. No. He told me nothing about it. He said, 'I think it is a pretty good program.'"

2. The testimony of Hudson, upon which plaintiff relies, demonstrates the willingness of the industry to pay for ideas of commercial value but furnishes no support for any inference that it would agree to pay for common and hackneyed ideas:

"Q. Now, Mr. Hudson, is there any recognized right in the radio field to an original program idea? A. It seems to me that is a point of law which I am not qualified to answer.

"Q. You are not familiar with the practices of the industry so far as the recognition of program ideas are concerned, or payment therefor? A. I am familiar with the practice, yes.

"Q. Now, is there such a thing as recognition in the radio industry of a radio program idea? A. Yes.

* * * * * *

"Q. By Mr. Fendler: Is there any practice in the radio industry on the part of broadcasting companies to pay for the reasonable value of radio program ideas apart from services? A. Ideas which they have contracted for?

"Q. Which they have contracted for or used. A. Which they have contracted for, yes.

"Q. As a matter of fact, the broadcasting companies request the submis-

ing to pay for new ideas of commercial value to it, but there is no basis for an inference that a national radio network would agree to pay for the use of an idea, regardless of whether it is novel or shopworn, hackneyed, and commonplace. "A duty not to use an idea already known cannot be created by virtue of the fact that one makes a confidential disclosure of that idea." Smoley v. New Jersey Zinc Co., D.C., 24 F.Supp. 294, 300, affirmed 3 Cir., 106 F.2d 314. Plaintiff's recognition that novelty is essential to the marketability of a radio program idea is implicit in his statement to Johnson that he had "what I thought was a new and a good radio idea." Defendant's policy is set forth in a standard form, of which plaintiff was aware, that all persons who submit program ideas for consideration were requested to sign.[3] In that form, Columbia unequivocally disclaimed any intention to pay for the use of a non-novel idea. Its willingness to consider plaintiff's program idea was in accord with that policy. The evidence does not indicate any intention on defendant's part to deviate therefrom. It must therefore be held that plaintiff submitted his program idea to defendant upon the latter's implied-in-fact promise to pay him the reasonable value of the idea if it should prove to be novel and commercially valuable and if defendant should put it to use.

This appeal thus presents two questions for the decision of this court:

(1) Is plaintiff's radio program or any part thereof novel and commercially valuable?

(2) Is there similarity between plaintiff's idea and defendant's radio program with respect to any novel aspects of the former to support an inference that defendant made unauthorized use of plaintiff's idea?

I.

Plaintiff testified that the basic idea of his program, for the use of which he claimed a reimbursement of $100,000, was to give the people of America "a voice in what pictures Hollywood shall produce in the years to come." His idea took the form of a proposed weekly radio program entitled "Walter Wanger Presents," "Preview Parade," or "Hollywood Preview," which was to present a play that might be suitable for motion picture production. The listening public was to be encouraged to write letters, by an offer of prizes for the best, commenting upon the motion picture value of the plays and suggesting stars for the leading roles; it was thus to have a voice in selecting stories and stars for motion pictures.

Virtually none of the elements of the proposed program to give the public a voice in this selection is novel. There is nothing novel in the idea of linking dramatized stories on the radio with the glamour of Hollywood. The following programs, broadcast nationally, were also based upon this idea: "Lux Theater of the Air," "Hollywood Star Time," "Screen Guild Theater," "Hollywood Premiere," "Hollywood Playtime," "Hollywood Players," "This is Hollywood."

There is nothing novel about plaintiff's title "Hollywood Preview." There was uncontradicted testimony that during the period defendant's program was broadcast, another program with the same title was broadcast locally over other stations. Moreover, these words have long been associated with the previews of Hollywood motion pictures, notably at Grauman's Chinese Theater and at the Carthay Circle Theater. To the millions of movie-conscious persons at whom all these programs

sion of program ideas, do they not? A. I wouldn't say they solicit them. They accept them.

"Q. And they accept them upon the basis that if they are used, they will be paid for? A. Yes.

"Q. Is that right? A. Yes.

"Q. And that is well understood in the industry, isn't that correct? A. Yes."

3. "To Columbia Broadcasting System, Inc.

"I am submitting my idea, summarized or characterized below, about a radio program to you today with the understanding that you are wholly free to determine questions of priority and originality in connection with any identical or substantially similar ideas * * *."

are aimed, the title has become generic and descriptive, symbolizing the glamour associated with Hollywood, the bright lights, the milling throngs waiting for a glimpse of the celebrities attending a first showing of a motion picture. "There can be no property in words which are merely generic or descriptive." Johnston v. Twentieth Century-Fox Film Corporation, 82 Cal.App. 2d 796, 808, 187 P.2d 474, 482. That this title is generic or descriptive is clearly indicated by plaintiff's use of it in the script of his proposed program, not as its title (the proposed title was "Walter Wanger Presents"), but as a descriptive term, indicating the first performance of a proposed motion picture. In giving their program this title, defendants appropriated nothing in which plaintiff could claim a property interest.

There is nothing novel in the idea of listener participation in a radio program. Radio has long been glutted with programs in which listeners are importuned to participate. Thus listeners on the Jack Benny program were importuned to submit letters on the topic "I hate Jack Benny because—." Listeners on the program entitled "The Shadow" were importuned to relate in a hundred words or less why they use Camay Soap. Listeners on the program entitled "Listeners' Digest" were importuned to write on what they considered the outstanding radio entertainment they had heard in the preceding week.

There is nothing novel in the idea of giving prizes to radio listeners for best letters. The idea of giving prizes for best letters is an ancient one in advertising.

There is nothing novel in the idea of soliciting the comments of listeners as to whether a radio program merits commercial presentation. Thus the Major Bowes program solicited the comment of listeners on the amateurs on the program with the object of determining whether they should receive professional engagements.

There is nothing novel about the following elements or their combination with the foregoing features of plaintiff's program: repetition and emphasis of the title throughout the broadcast, introduction of the master of ceremonies by the announcer, a master of ceremonies prominent in the motion picture industry, announcement of the title of the play to be presented and the stars therein, and announcement of the author of the play. These elements have for years been a part of almost every program featuring radio stories with a Hollywood connection. Defendant, as well as plaintiff, may use these elements freely either singly or in combination. See, Ornstein v. Paramount Productions, Inc., D.C., 9 F.Supp. 896, 901.

It may be possible to combine such hackneyed elements so imaginatively that they comprise a novel program idea, or to give them a new twist that places them in the category of fresh material. A new twist to a worn idea may be as much entitled to credit as an entirely new idea. "No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed * * *." Emerson v. Davies, 8 Fed.Cas., pages 615, 618, No. 4,436, "Presenting old material in a new plan or arrangement is sufficient to lend copyrightability to the resulting work." Amdur, Copyright Law and Practice, 86; Universal Pictures Co. v. Harold Lloyd Corporation, 9 Cir., 162 F.2d 354, 363; Edwards & Deutsch Lithographing Co. v. Boorman, 7 Cir., 15 F.2d 35, 36. Two architects may originate very different designs for the same structure, specifying the use of identical materials; each has a property interest in his design. Similarly writers may create original stories out of the same problem, as Anatole France created "Thais", Somerset Maugham, "Miss Thompson" ("Rain"), and Andre Gide, "Symphonie Pastorale." And in the literature of music there are many creative variations by one great composer on the themes of another.

Plaintiff has made no unique combination or interpretation of old material. Whatever novelty there may be in his program lies in a fresh variation of the listener participation idea, a variation of the idea in the Major Bowes program of having the listeners participate in deter-

mining whether amateur artists should become professionals. Although the evidence demonstrates that previous to the presentation of plaintiff's program to defendant there was no radio program in which the listeners participated in determining the selection of stories and stars for motion pictures, there is a question whether plaintiff has conceived a variation of the listener participation idea substantial enough to warrant a claim to novelty. Novelty of ideas in radio programs must be assessed in the light of the fact that many programs are commonplace presentations of commonplace materials. Inevitably ideas in this field may have a claim to novelty by virtue of their attention-getting possibilities, even though they lack the brilliance commonly associated with creative thought. A fresh application of the familiar, however dull or commonplace it may appear to the critical, may be a marketable idea if it gives enough promise of winning the attention of the public. It is not for the court to consider the quality of an idea or to pass judgment on the public's taste; the problem before it is not one of aesthetics but of property rights. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–252, 23 S.Ct. 298, 47 L.Ed. 460. On the other hand, in the fertile field of commonplaceness there is also a propagation of ideas whose claims to novelty are spurious, for whatever value they may have rests not on their uniqueness but on their resemblance to the familiar. The value of a fresh application of an idea that has thrived on repetition may lie, not in the application, but in the familiar idea itself. The secret of success of such programs as plaintiff's seems to be listener participation, and since listener participation has already been used for such a variety of purposes, it is open to question whether its application to plaintiff's purpose is imaginative enough to compel one to say that something new has been added, that there has been a variation of the old that in some measure transforms it. See, Hirsch v. Paramount Pictures, D.C., 17 F.Supp. 816, 818.

II.

Whatever the validity of plaintiff's claim to novelty for his application of the listener participation idea, it constitutes his only claim to novelty, and defendant is not liable if it did not use that application.

There can be no finding that defendant used plaintiff's program idea without proof that it had access thereto. Twentieth Century-Fox Film Corp. v. Dieckhaus, 8 Cir., 153 F.2d 893, 894, certiorari denied 329 U.S. 716, 67 S.Ct. 46, 91 L.Ed. 621; Lewys v. O'Neill, D.C., 49 F.2d 603, 608, 610. Access is established by proof that employees of defendant read or heard plaintiff's program before or in the course of the development of defendant's program. Kustoff v. Chaplin, 9 Cir., 120 F.2d 551, 560. It is undisputed that before defendant's program was broadcast, the employees of defendant had read and considered the script, recording, and format submitted to them by plaintiff. There was a conflict in the evidence as to whether Hudson, defendant's western program director, developed defendant's program before plaintiff submitted his idea. The jury resolved that conflict against the defendant. Proof of opportunity to use plaintiff's idea, however, does not compel affirmance of the judgment without proof that defendant availed itself of that opportunity. Kustoff v. Chaplin, supra; Cain v. Universal Pictures Co., D.C., 47 F.Supp. 1013, 1015. Direct proof of use is seldom available. If there is proof of access, however, copying may be inferred from similarity between the two programs with respect to the feature of plaintiff's idea, which it will be assumed for the purpose of this dissent was novel, the application of listener participation to the determination of a story's suitability for motion pictures.

It must therefore be determined whether there is such a similarity between the two programs. Mere general similarity that proceeds not from the novelty of plaintiff's idea but from its commonplaceness is irrelevant. Only similarity with respect to what is novel in plaintiff's idea is relevant. Booth v. Stutz Motor Car Co., 7 Cir., 56 F.2d 962, 969; Saco-Lowell Shops v. Reynolds, 4 Cir., 141 F.2d 587, 593; Plus Promotions, Inc., v. R. C. A. Mfg. Co., D.C., 49 F.Supp. 116, 117. The standards that govern this inquiry are the same as

those governing the question whether there is relevant similarity between two productions to support a finding of copying in a suit for copyright infringement. When a plaintiff claims the protection of common law or statutory copyright for his literary effort, that protection extends only to any originality of treatment or expression that is copyrightable. When a plaintiff claims the protection of an implied-in-fact contract for an abstract idea, his idea must have the characteristic of novelty for which defendant has promised to pay. In both cases, only similarity appearing between the two works with respect to that which is protected in plaintiff's work is relevant. General similarity in non-protectible elements, being irrelevant, cannot support an inference of copying in a piracy suit or use in a suit upon a contract. Harold Lloyd Corp. v. Witwer, 9 Cir., 65 F.2d 1, 17; MacDonald v. Du Maurier, D.C., 75 F. Supp. 655, 662; Shipman v. R. K. O. Radio Pictures, 2 Cir., 100 F.2d 533, 537; Rosen v. Loew's Inc., 2 Cir., 162 F.2d 785, 788.

The majority opinion holds that the jury's finding will be upheld on appeal if "such similarity exists between plaintiff's and defendant's programs as to suggest to the average person the use by defendant of an idea originating with plaintiff. * * * In determining whether the similarity which exists between a copyrighted literary, dramatic or musical work and an alleged infringing publication is due to copying, the common knowledge of the average reader, observer, spectator or listener is the standard of judgment which must be used. * * * The evidence, in the form of the two programs alone, shows that there is substantial similarity to support the verdict." This statement assumes that a general similarity between the two programs justifies submitting to the jury the issue of use. Recovery can be allowed, however, only if there is similarity between the programs with respect to the novel aspects of plaintiff's program.

The majority opinion holds that plaintiff has met this requirement by introducing evidence that his program contains a novel idea. Once he has done this, the mere fact of introduction of the two programs into evidence is enough to allow the case to go to the jury and to support a verdict reached thereon. The jury compares the programs as an average listener would. If it receives the impression from its common knowledge that there is similarity between the two programs, this impression and common knowledge support the inference that defendant used plaintiff's program idea, and defendant is liable for the reasonable value thereof. The jury may determine that defendant must pay therefor, even though it is evident that plaintiff's protectible property interest in his program comprises only a small part thereof, and even though it is evident from a comparison of the two programs that there is no similarity between them in regard to the novel idea of plaintiff's program. Such a procedure may have the prejudicial effect of supporting a charge of piracy even though substantial similarity between two programs results from the use in both of stock situations or standardized techniques long used in the radio industry and therefore in the public domain. See, Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F. 2d 1, 17; Moore v. Ford Motor Co., D.C., 28 F.2d 529, 536; Echevarria v. Warner Bros. Pictures, D.C., 12 F.Supp. 632, 635; 18 C.J.S., Copyright and Literary Property, § 113, p. 231. It is therefore of the greatest importance to narrow the issue of similarity. If the jury is permitted to reach its verdict on the basis of a general comparison of the programs in their entirety, there is great risk that similarity between the programs in their commonplace aspects will be weighed to defendant's disadvantage and that plaintiff will be permitted reimbursement for the non-novel elements of his program idea, for which defendant did not agree to pay. If a general similarity may of itself support a verdict in plaintiff's favor an appellate court would be powerless to afford relief from such a verdict, even though the only similarity is between the non-novel elements contained in both programs.

The error inherent in the scope of inquiry prescribed by the majority opinion is not obviated by its concession that, once the jury has returned a verdict for plain-

tiff that may have been based on irrelevant general similarity, "we look to the evidence to ascertain whether such similarity existed as to the portion of the production which plaintiff claims to have originated." We thus have the anomalous situation in which a case must first be submitted to the jury and a verdict returned for the plaintiff before the court can determine whether the case should have been submitted to the jury.

Such a result is not supported by the weight of case authority. In Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F.2d 1, plaintiff sought to enjoin the exhibition of a motion picture by the defendant on the ground that it constituted an infringement of a magazine story previously published by the plaintiff. Admittedly there was substantial similarity in plot and in several isolated comedy sequences, and on this basis, the trial court gave judgment for the plaintiff. The Circuit Court of Appeals for the Ninth Circuit, however, reversed the judgment, stating that an examination of the two scripts revealed no similarity in those elements of plaintiff's production that were the product of his own ingenuity and creative talent. In discussing the fact that plaintiff relied upon admitted similarities in basic elements of each production, the court stated: "In the case at bar, if it be assumed that there are such similarities between the story and the play as to provoke in the casual observer the consciousness that there is such a similarity between them, and that copying may be inferred therefrom, we are still confronted with the fact that mere similarity does not necessarily involve literary piracy or an infringement of a copyright. Such similarities then as exist would require further analysis to determine whether or not they are novel in the story and thus copyrightable. The copyright of a story only covers what is new and novel in it, so that the question of infringement involves a consideration of what is new and novel in the story to which the author has acquired a monopoly which has been misappropriated by another * * * 'It should also be borne steadfastly in mind, that if a work is not entirely original, there is no copyright in the unoriginal part, which will prevent its use, separately, or in combination, with matter not covered by copyright. Hence, of course, any inquiry as to infringement must exclude *permissible reproduction* of such *non-original matter.*'" 65 F.2d 23–24.

In Dymow v. Bolton, 11 F.2d 690, the Circuit Court of Appeals for the Second Circuit also reversed a trial court verdict for the plaintiff that had been reached upon admitted similarity in non-original elements of the two productions. In stating that infringement could not be established by cutting and trimming down to basic themes and concepts, the court stated: "This incomplete skeleton the two plays have in common, but it is with real difficulty that the flesh and blood, the incidental, yet essential adornment and trimming, of the plays can be cut away to show similarity between a few bones. This difficulty is fatal to plaintiff's case * * * the copying which is infringement must be something * * * recognized as having been taken from the work of another." 11 F.2d 692. See also Twentieth Century-Fox Film Corp. v. Dieckhaus, 8 Cir., 153 F.2d 893; Nichols v. Universal Pictures Corp., 2 Cir., 45 F.2d 119; Frankel v. Irwin, D.C., 34 F.2d 142; Cain v. Universal Pictures Co., D.C., 47 F.Supp. 1013.

It follows that the issue before this court is not, as the majority opinion holds, whether there is substantial similarity between the two programs, but whether there is evidence of substantial similarity between the two programs with respect to plaintiff's novel idea to justify submitting the case to the jury. That issue can be determined only by the comparison of the two radio scripts whose contents are not disputed. Such a comparison will reveal whether there is relevant similarity between them. Defendant's motion for a directed verdict raised the issue whether there was such similarity. If there was no evidence of such similarity, then no proper inference of copying could be drawn, and the trial court should not have let the case go to the jury on the basis of the general similarity between the two programs. In denying the motion for a directed verdict, the trial court committed

reversible error. Hewitt v. Coward, 180 Misc. 1065, 41 N.Y.S.2d 498, 500; Soy Food Mills, Inc., v. Pillsbury Mills, Inc., 7 Cir., 161 F.2d 22, 25; Nichols v. Universal Pictures Corp., 2 Cir., 45 F.2d 119, 122; Wiren v. Shubert Theatre Corp., D.C., 5 F.Supp. 358, 362; Becker v. Loew's, Inc., 7 Cir., 133 F.2d 889, 894; Dorsey v. Old Surety Life Ins. Co., 8 Cir., 98 F.2d 872, 874, 119 A.L.R. 1250; Barbadillo v. Goldwyn, D.C., 42 F.2d 881, 885; Eastern Wine Corp. v. Winslow-Warren, Ltd., 2 Cir., 137 F.2d 955, 960; California Fruit Growers Exchange v. Sunkist Baking Co., 7 Cir., 166 F.2d 971, 973; Kaeser & Blair, Inc., v. Merchants' Ass'n, Inc., 6 Cir., 64 F.2d 575, 576; see Code of Civil Procedure § 426, subd. 3.

The cases relied upon by the majority indicate that only when there is evidence of relevant similarity to support an inference of copying is the question of copying submitted to the jury. Universal Pictures Co. v. Harold Lloyd Corp., 9 Cir., 162 F.2d 354, 363; Fendler v. Morosco, 253 N.Y. 281, 287, 171 N.E. 56; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 561, 90 P.2d 371. In reversing the judgment, this court would not be substituting its judgment for that of the jury, as the majority opinion suggests, but would be determining that there was insufficient evidence to support the implied finding that there was similarity between the two programs with respect to plaintiff's novel idea.

Plaintiff's program was based on the idea, in his own words "the most important idea in my show," that it would afford the public a "voice in what pictures Hollywood shall produce in the years to come." This idea is emphasized in virtually every paragraph of the program: "Wanger: How do you do, ladies and gentlemen. Welcome to our Hollywood Preview Parade, a radio show designed for your pleasure *and to give you a voice in what pictures Hollywood shall produce in the months to come.* Hollywood is very interested in giving you motion pictures you want to see. *Unfortunately producers do not and cannot always know just what you do want. This is the reason for this 'Preview Parade.'* Each week we plan to present a radio story we think will make a good film. We ask you to send us your opinion and suggest players for the leading roles. Our sponsor will give worthwhile cash prizes for the best letters, but more about that later.

"Of the five stories we have so far presented this series, three will be made into motion pictures *largely because of your voting.* * * *

"Boardman: * * * *Each week Mr. Wanger selects a story which he feels should be made into a picture.* You are asked to write to Mr. Wanger and give him your opinion. *The sponsors pay $500 for the best letter written by one of our listeners and if enough of you vote for it our play will be produced as a motion picture.*

"Wanger: * * * 'So Gallantly Gleaming' tells a thrilling and romantic story. * * * Listen closely. *Do you think it should be made into a motion picture? Your votes will decide.*

"Boardman: * * * *Now again a word as to the real idea behind this program. Each week Walter Wanger Presents brings you a story which we think would be a good motion picture. And here is your part in the program. We ask you to write to Mr. Wanger, telling him whether or not you would like to have this play made into a motion picture, and why. Also include your choice of stars to play the leading roles. The best letter received each week will receive an award of $500 from our sponsor. * * * And believe me, Hollywood is waiting for your vote.* Whether or not you win a prize, *your vote will help decide whether or not to film 'So Gallantly Gleaming.' The American picture-going public has long said it wished a voice in the choice of stories presented on the screen. Here is the chance for you to have that voice and make it heard across the nation.* * * *

"Last week Mr. Wagner presented 'Out of the Night'. * * * A storm of argument was aroused. 68,000 letters have been received to date, and we are happy to announce that Warner Brothers Studio have arranged to make this startling story

into a film in the near future. *So, thanks to your letters, you have helped Warner Brothers to their decision to film 'Out of the Night'.* * * *

"Wanger: * * * Thank you, [board of experts] * * * Do you, ladies and gentlemen, agree with the opinions of our guests? *Do you agree that 'So Gallantly Gleaming' should become a motion picture?* And who do you think should play the leading roles? Won't you write and tell us. *Remember that whether your letter is best and wins the prize or not, you are helping Hollywood decide on what to give you on the screen.* * * *" (Italics added.)

It is apparent from defendant's programs that their basic idea was to simulate the "first showing of a new motion picture in the film capitol" and thereby to capture in its "radio version of [a] Hollywood Preview," the "same spirit of enthusiasm," to make its listeners feel they were viewing that glamorous event. The programs were described as a "Hollywood Preview of a motion picture of the future," as a preview of a "new story written especially for the screen," and "now scheduled for production" or "now in preparation" at one of the motion picture studios. The public was to be given "a glimpse into the movies of tomorrow" but nobody at any time was asked to influence their selection. The *studio* audience was requested to "[fill] out cards giving their comments" on the play and "suggesting their favorite stars for the motion picture" for the purpose of giving a Hollywood atmosphere by adapting to a broadcast of motion pictures "previewed" on the air, the custom of having the motion picture audience fill out preview cards. There was no intimation that the reaction of the studio audience would in any way influence the production of the picture. In contrast the radio audience comments solicited in plaintiff's program were not for the purpose of atmosphere; they were indispensable to his idea of giving the public a voice in the selection of motion pictures to be filmed. On August 21, 1945, defendant announced that a contest awarding prizes for best letters would be staged for a six-weeks period; that listeners would thus be given "a chance to express their opinion of the stories 'previewed'" and "to vote for the stories they would like to see on the screen." Defendant's contest was the time-honored advertising scheme used to increase sales of the sponsor's gasoline. To participate, listeners had to get entry blanks from the sponsor's service stations. The contest, lasting only six weeks, was an incident of the program, not its core. Defendant's program did not, in its contest feature, or otherwise, give the listening public the impression that "if enough of [the listeners] vote for it [the] play would be produced as a motion picture." It was specifically announced on defendant's programs that a "motion picture of the future" was being presented: on three programs it was stated that the plays were in production.

A comparison of defendant's program with the application in plaintiff's program of the listener participation idea, makes it clear that defendant did not in any of its programs copy that idea. There is a fundamental difference between the themes of the two programs. The basic idea of plaintiff's program was listener participation in the selection of stories and stars for motion picture production in the future. The basic idea of defendant's programs was listener participation in the simulation of whatever glamour attends a Hollywood preview. If there is kinship between the two programs, it rests on their common capitalization of Hollywood glamour. But defendant stops short of executing plaintiff's idea that the public might do more than behold the glamour that spells Hollywood by participating in determining by what and by whom it should be bedazzled.

SPENCE, J., concurs.

Rehearing denied; TRAYNOR and SPENCE, JJ., dissenting.

35 Cal.2d 690

GOLDING et al. v. R. K. O. PICTURES, Inc. et al.

L. A. 20699.

Supreme Court of California, in Bank.

Aug. 4, 1950.

Rehearing Denied Aug. 31, 1950.

Action by Samuel R. Golding and Norbert Faulkner and others, against R. K. O. Pictures, Inc., and Val Lewton for infringement of a literary property. The Superior Court, Los Angeles County, Ingall W. Bull, J., entered judgment for plaintiffs for $25,000 and from an order denying a motion for judgment notwithstanding the verdict, the defendants appealed. The Supreme Court, Edmonds, J., held that evidence sustained finding that owners of play had been damaged in sum of $25,000 by infringement of owners' common law copyright by producers of motion pictures.

Judgment affirmed.

Traynor, Schauer and Spence, JJ., dissented.

Prior opinion, 208 P.2d 1.

1. Literary property ⇐9

In action for infringement of common-law copyright of literary property, plaintiff must establish ownership of a protectible property interest, unauthorized copying by the defendant and damage resulting therefrom.

2. Literary property ⇐1

Literary property in the fruits of a writer's creative endeavor extends to the full scope of the writer's inventiveness but only the produce of the writer's creative mind is protectible.

3. Literary property ⇐9

An inference of copying may arise when there is proof of access coupled with a showing of similarity to plaintiff's protectible property and when there is strong evidence of access, less proof of similarity may suffice, but if the evidence of access is uncertain, strong proof of similarity to plaintiff's protectible property must be shown before the inference of copying may be indulged.

4. Literary property ⇐8

The fact that a plan or theme of the plaintiffs' story is similar to the plots of prior stories does not defeat the claim of originality for common law copyright purposes, and where there was strong evidence from which jury had reasonably concluded that scenario of moving picture was copied from plaintiffs' play, the fact that the defendants could have obtained the story from another source was of no consequence.

5. Literary property ⇐9

In action by writers of a play for infringement of common law copyright finding that defendants had opportunity and inclination to pirate plaintiffs' literary property was clearly supported by the evidence.

6. Literary property ⇐9

Proof of access establishes no more than opportunity to copy and not actual copying of literary property.

7. Literary property ⇐9

In action for infringement of common law copyright of literary property, liability for damages must rest upon substantial evidence of similarity between plaintiffs' literary property and the moving picture produced by the defendants.

8. Appeal and error ⇐1001(2)

No finding of fact is binding upon an Appellate Court if it is not supported by substantial evidence.

9. Appeal and error ⇐989

The function of the Supreme Court, when the contention of insufficiency of the evidence is made, is to examine the record to ascertain whether there is evidence to support the verdict of the jury.

10. Appeal and error ⇐989

Where writers of play asserted that the defendants' moving picture infringed common law copyright of the writers, it was necessary to read or view the play and the moving picture involved to determine whether they presented any substantial similarity so far as the property of the writers of the play was concerned, but the appellate court would not substitute itself for the jury to decide what it thought of

the issue of similarity but would determine only whether there was any substantial evidence of similarity to support the jury's finding for such writers.

11. Literary property ⇐9

In action by writers of play called "The Man and His Shadow" for infringement of common law copyright by producers of motion picture called the "Ghost Ship," evidence sustained finding that there was substantial similarity to plaintiffs' protectible property in such play.

12. Literary property ⇐8

In determining whether writers of play have a protectible common law property right therein, the play must be subjected to expert analysis and if such right is found to exist, the question of similarity of motion picture to the original and protectible part of the play must be determined on the basis of an average observer.

13. Evidence ⇐474(16)

The owner of property is competent to testify to its worth.

14. Literary property ⇐9

Evidence sustained finding that owners of play had been damaged in the sum of $25,000 by infringement of owners' common law copyright by producers of motion picture.

Mitchell, Silberberg & Knupp and Guy Knupp, all of Los Angeles, for appellants.

Loeb & Loeb and Herman F. Selvin, all of Los Angeles, as amici curiae on behalf of appellants.

Harold A. Fendler, Beverly Hills, for respondents.

EDMONDS, Justice.

In an action for the infringement of literary property, the producers of a motion picture appeal from a judgment awarding the authors of the assertedly plagiarized stage play damages in the sum of $25,000. The sufficiency of the evidence to support the judgment is the principal question presented for decision.

Samuel R. Golding and Norbert Faulkner, both well-established writers, collaborated in writing a play entitled, "The Man and His Shadow". They neither published nor dedicated it to the public and it was not copyrighted. The Pasadena Playhouse produced the play in December, 1942. After the authors made some revisions, they submitted it to R.K.O. Radio Pictures, Inc. and Val Lewton, a producer. Lewton retained the manuscript for about six weeks. At that time, according to the evidence, Lewton was looking for a story with the action on board a ship in order to utilize an old set which was available. The appellants admit access to the play in that a copy of it was in the custody of Lewton for some time.

In August, 1943, the appellants released the motion picture entitled "The Ghost Ship" and this action followed. Upon the trial, the play was read to the jurors and the motion picture was shown to them. After they returned a verdict for damages in the amount of $25,000, a motion for judgment notwithstanding the verdict was denied. The appeal is from the judgment and from the order denying the motion.

The central dramatic situation or core in which the plaintiffs claim property is as follows: The action takes place on board a ship. Only one person aboard, a passenger, suspects the captain of being a murderer. He accuses the captain who neither admits nor denies the accusation; in fact, to his crew and passengers the captain clearly implies that his accuser is either guilty of hallucinations or himself desires to kill him. The accuser knows that he is subject to the captain's whims and is in a position where he can be killed or imprisoned. The captain, sure of his authority, informs the accuser that he is free to try to convince any one on board ship of the truth of his suspicions. The passenger tells his story to the first mate and to others on the ship but they refuse to believe him and instead suspect the passenger of hallucinations or malice. Finally, however, the captain becomes aware that he is suspected by at least one other person and he threatens to kill, or does kill that person as an inter-

meddler. Knowledge that his murders are about to be uncovered causes him to lose his mind and brings about his own undoing and death.

In the plaintiffs' play this basic dramatic core was filled out by placing the passengers and crew upon a pleasure cruise and making the captain an imposter who has come to show his superiority to the man in whose shadow he has worked for years; this man is the person throughout who knows the captain's true identity. There are various other sub-characters who give body and filling to the central plot, but as testified to by both Golding and Faulkner, this matter was all superficial and could be changed in innumerable ways without affecting the literary property and its value.

The moving picture "Ghost Ship" has its captain as the dominant figure of the story. The locale of the drama is on a freighter with members of the crew having the subordinate roles. The ship carries no passengers and, to that extent, the minor characters are quite different from those in the play. However, the captain and his obsession with authority and the fact that no one aboard can successfully challenge his position is found in the picture, as is the dramatic struggle between the captain and his adversary, the one person who knows his true nature. Basically, the psychological situation is that described by the plaintiffs as the dramatic core of their work.

The producers contend that the evidence does not support the finding of plagiarism. The correct standard for making a comparison between the play and the picture, they assert, is that of an ordinary observer; if dissection, rather than observation, is necessary to determine the question of similarity, a finding of infringement is unwarranted. They also claim that the evidence is insufficient to support the award of damages. In answer, the respondents argue that "whether or not similarities are apparent to an 'ordinary observer' and support a finding of copying is a question of fact upon which the jury's unanimous determination is conclusive."

[1] The rights asserted in this case are not based upon statutory copyright but stem from the so-called common-law copyright. Civ.Code, § 980. Upon such a cause of action, to recover for infringement, or piracy, of literary property, three elements must be established: (1) ownership by the plaintiff of a protectible property interest; (2) unauthorized copying of the material by the defendant; and (3) damage resulting from the copying. See Caruthers v. R.K.O. Radio Pictures, Inc., D.C., 20 F.Supp. 906, 907.

[2] Literary property in the fruits of a writer's creative endeavor extend to the full scope of his inventiveness. This may well include, in the case of a stage play or moving picture scenario, the entire plot, the unique dialogue, the fundamental emotional appeal or theme of the story, or merely certain novel sequences or combinations of otherwise hackneyed elements. It is, however, only the product of the writer's creative mind which is protectible. If only a portion of the play or story is original and the remainder is but an orthodox collection of filler comprising matters in the public domain, the property right must be fully analyzed and closely defined, because in the subsequent determination of the issue of copying, it is necessary to make a comparison of the two works, and such comparison is of value only if it is based upon a correct determination of the issue as to the extent and nature of the plaintiff's protectible interest.

The question as to whether the claimed original or novel idea has been reduced to concrete form is an issue of law. The determination of it must be made as a condition precedent to the vesting of any rights stemming from the common law copyright. The plaintiff must establish, as the subject of the cause of action, a right in the nature of property which is capable of ownership. Certainly, if the only product of the writer's creative mind is not something which the law recognizes as protectible, that is, an idea not reduced to concrete form, O'Brien v. R.K.O. Radio Pictures, 68 F.Supp. 13, no right of action for infringement of literary property will lie even if the idea assertedly infringed is original and the result of his independent labor.

[3] After a plaintiff has established a protectible property right, the further issue, common to all copyright cases, statutory or common law, is: Was the plaintiff's material copied by the defendant? There will seldom be direct evidence of plagiarism, and necessarily the trier of fact must rely upon circumstantial evidence and the reasonable inferences which may be drawn from it to determine the issue. An inference of copying may arise when there is proof of access coupled with a showing of similarity. Shipman v. R.K.O. Radio Pictures, Inc., 2 Cir., 100 F.2d 533, 538; O'Rourke v. R.K.O. Radio Pictures, Inc., D. C., 44 F.Supp. 480, 482. Where there is strong evidence of access, less proof of similarity may suffice. Conversely, if the evidence of access is uncertain, strong proof of similarity should be shown before the inference of copying may be indulged.

It is particularly important to keep clearly in mind, insofar as the question of similarity is concerned, that it is only similarity as to the plaintiff's protectible property which is relevant. Thus, if the property interest entitled to protection extends only to certain sequences or characters, similarity of the plaintiff's and the defendant's works as to other phases of the play or scenario is wholly irrelevant.

If it is established that the plaintiff has a protectible property in his literary work, and there was copying, the elements of liability for infringement or piracy are established and all that remains is the determination of damages. On this latter issue, the rules are the same with regard to literary property as apply to any other form of personal property. Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371; Universal Pictures Co. v. Harold Lloyd Corp., 9 Cir., 162 F.2d 354.

The plaintiffs do not claim that their entire play, or any particular sequence or dialogue, was directly or totally pirated. Their insistence throughout has been that the thing of value in their play is the central dramatic situation and the interplay of the dominant and secondary characters upon each other. All other characterizations and dialogue are admittedly nothing more than hackneyed filler which could be added or subtracted without affecting the value or substance of the plaintiffs' literary property.

Golding testified that when Lewton became reluctant to purchase the play, he told the producer that a moving picture of "The Man and His Shadow" could be based upon very simple lines, and the action need not necessarily take place on a pleasure yacht. The story might well be played in all its dramatic aspects on a freighter, having an ordinary captain and an ordinary crew. There is one important dramatic figure in this play and only one, he said; that is the captain, with his insane lust for power, driving to carry out his sadistic objectives. And as the production on the Pasadena stage was summarized by the witness, "the sub-story of the other characters seemed very much warped and almost trivial as compared to the figure of the captain who dominated the scene when he appeared."

The first question presented for decision is whether this basic dramatic situation constitutes protectible literary property. On the subject of the use of such plots Faulkner, who formerly had been a story editor at a studio, testified that "the basic duty of [the story editor] is to read a book or * * * play * * * and condense the story theme into two or three pages. This material is then used for conferences with producers and executives of the studios so they don't have to read the whole book or play * * * You have in studios a great problem of budget * * * That means the studio gives a producer an assignment and says, 'Here is a story, but * * * we don't want you to spend more than this amount of money for the production.' * * * Now in such cases, the story editor goes in and talks over the story with the producer, he says, 'You can do this story * * *, for the lower budget cost because you can eliminate certain incidents, certain persons, certain settings, so that you can create the same basic theme and powerful story. * * *'"

According to this evidence, the real value of a story or play may have little to do with specific dialogues or sequence of

scenes or locale and there is ample evidence tending to prove that the basic dramatic core of the plaintiffs' play constitutes the truly original and valuable feature of it. Further, there was testimony to the effect that this particular psychological drama, with its emphasis upon the captain's controlling monomania for authority and power, was particularly well timed with the early days of the war and, therefore, of unusual value at that time. Nor was it a mere abstract idea. It had been reduced to the form of a full stage play. Its creators had embellished it with much of the trappings that give form, if not substance, to such literary work.

[4] The fact that a plan or theme of the plaintiffs' story is similar to the plots of prior stories does not defeat the claim of originality within the meaning of that word for copyright purposes. "It is not essential that any production, to be original or new within the meaning of the law of copyright, shall be different from another * * * the true test of originality is whether the production is the result of independent labor or of copying." Drone, Copyrights, cited with approval in Fred Fisher, Inc., v. Dillingham, D.C., 298 F. 145, 151; to same effect, Amdur on Copyrights, sec. 3, pp. 69, 70. It is of no consequence that R.K.O. *could have* obtained the story from another source, when there is strong evidence from which the jury has reasonably concluded that the scenario of "Ghost Ship" was copied from the plaintiffs' play. "Any subsequent person is, of course, free to use all works in the public domain as sources for his compositions. No later work, though original, can take that from him. But there is no reason in justice or law why he should not be compelled to resort to the earlier works themselves, or why he should be free to use the composition of another, who himself has not borrowed. If he claims the rights of the public, let him use them; he picks the brains of the copyright owner as much, whether his original composition be old or new. The defendant's concern lest the public should be shut off from the use of works in the public domain is therefore illusory; no one suggests it." Fred Fisher, Inc., v. Dillingham, supra, 298 F. at page 150. Or, as stated by Justice Holmes: "Others are free to copy the original. They are not free to copy the copy." Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249, 23 S.Ct. 298, 299, 47 L.Ed. 460.

Concerning the issue of copying, and its subsidiary determinations of access and similarity, the evidence as to access is strong. The producers of the motion picture have conceded access, but because the inference of copying must rest upon both access and similarity, it is necessary to examine, to a certain extent, the nature of the evidence of access.

[5] It appears without conflict that the plaintiffs' play was submitted to Lewton to read and consider. Both Golding and Faulkner testified to conversations with Lewton regarding the acceptability of the story for moving picture purposes. In one of the discussions of it, according to Golding, Lewton stated: "Well, Golding, I don't have to buy my stories. I don't have to lay out money for originals; I get my idea and I call in a couple of writers in the lot and I make my stories that way." It was a few days later that the manuscript was returned to plaintiffs. The evidence of opportunity and, indeed, inclination to pirate plaintiffs' literary property is therefore clearly supported by the evidence.

[6, 7] Proof of access, however, establishes no more than the opportunity to copy and not actual copying. Kustoff v. Chaplin, 9 Cir., 120 F.2d 551, 560; Cain v. Universal Pictures Co., D.C., 47 F.Supp. 1013, 1015. And liability for damages must rest upon substantial evidence of similarity between plaintiffs' literary property and the moving picture produced by the defendants. The play was read to the jury and the picture was viewed by them. There was no other evidence of similarity offered or received, and whether such evidence is sufficient to sustain the jury's implied finding of similarity is a question which can only be determined upon appeal by reading the play and seeing the moving picture, which have been done by this court.

[8, 9] The parties are directly at variance as to whether this issue of similarity presents a question of law or of fact. The only direct statements in the cases appear to confirm the playwrights' position that it is a question of fact for the jury. Universal Pictures Co. v. Harold Lloyd Corp., 9 Cir., 162 F.2d 354, 360; Dam v. Kirke La Shelle Co., C.C., 166 F. 589. However, they extend this point too far when they contend that the determination by the jury of this issue "is conclusive" upon appeal. No finding of fact is binding upon an appellate court if it is not supported by substantial evidence. The function of this court, when the contention of insufficiency is made, is to examine the record to ascertain whether there is evidence to support the verdict of the jury.

[10] The situation presented by the issue of similarity is a peculiar one. There is always *some* evidence in the record. That is to say, if plagiarism is claimed there will always be *a* play by the plaintiff and one assertedly copied from it by the defendant. Yet the mere existence of two dramatic works in evidence does not, per se, constitute sufficient evidence of similarity. It is necessary to read or view the two works to see if they present any substantial similarity insofar as the plaintiff's property in his work is concerned. This is not to say that the appellate court will substitute itself for the jury to decide what it thinks of the issue of similarity, it is merely a question of determining if there is any substantial evidence of similarity to support the jury's finding.

[11] In the present case, the movie "Ghost Ship" contains all the elements of the plaintiffs' basic dramatic situation. It is true that the story is placed on a freighter instead of a luxury cruise; that it showed no passengers but only the crew aboard; and that there are many differences in the minor characters. "Evidence of these differences is relevant upon the question of [similarity], but if such differences are shown to exist, the question remains for the trier of fact to decide the issue." [162 F.2d 361] Universal Pictures Co. v. Harold Lloyd Corp., supra; Maurel v. Smith, D.C. 220 F. 195, 199; Sheldon v. Metro-Goldwyn Pictures Corp., 2 Cir., 81 F.2d 49, 56. The basic factors of the play and the moving picture show strong similarity in their respective plots although superficially there is considerable difference. But such differences go to the quality of the plagiarism, and not to its existence or nonexistence.

The appellants' main contention, however, is that in making a comparison of the two works, "the standard of the ordinary observer should be applied—that is, the comparison should be made without dissection of the works under observation and without expert or elaborate analysis." Harold Lloyd Corp. v. Witwer, 9 Cir., 65 F.2d 1, 18; Frankel v. Irwin, D.C., 34 F.2d 142, 144; Dymow v. Bolton, 2 Cir., 11 F.2d 690, 692. It is therefore, argued that the court must look at the two plays as a whole to determine if they would impress the average observer as similar. The argument suffers from oversimplification. The rule of law stated is correct insofar as the issue of *similarity* is concerned, but it has no application to the preliminary issue of *originality* or a plaintiff's protectible property interest.

[12] It is essential from the nature of the inquiry as to originality to first dissect the play to determine wherein, if at all, plaintiffs have any protectible property right. Assuming this is established, then comparison may be made between the two works *as to the original and protectible portion only.* If, as may often be the case, plaintiff's rights extend to the entire play, then the trier of fact should compare the one with the other. If, as in Stanley v. Columbia Broadcasting System, Cal.Sup., 221 P.2d 73, the plaintiff establishes his ownership of an original combination and arrangement of various elements into a new plan for a radio broadcast, the comparison made by the trier of fact should be of that plan with the broadcast which was made by the defendant. But where, as in the present case, the plaintiffs' property rights extend only to the dramatic core, a portion of the play, the issue of similarity is accordingly limited to a comparison on the basis of an average observer looking to that part of

the literary work which can properly be protected from infringement. Otherwise stated, dissection may be necessary to define the existence and extent of a plaintiff's property interest, and on the issue of similarity the test is always that of the average observer comparing such property interest with the alleged copy made by the defendant.

[13, 14] In support of the appellants' contention that there is not sufficient evidence of the value of the damages sustained by the authors of the play, it is argued that all of the evidence concerning the value of the motion picture rights is found in the testimony of the respondents, and that no person with experience in the determination of the value of such property was called to testify on their behalf. But the testimony of Faulkner, who stated his opinion in regard to the value of the play, was not necessary as an expert for both he and his co-author testified as owners of the property. Each of them told the jury that the value of the play before the infringement was between $25,000 and $50,000 and that it had no value after the production and distribution of the picture. It is a well recognized rule that the owner of property is competent to testify as to its worth. 10 Cal.Jur. 1023. "Literary property is not distinguished from other personal property and is subject to the same rules and is likewise protected, Palmer v. De Witt, 47 N.Y. 532, 538, 7 Am.Rep. 480. California has held that plaintiffs may testify to the value of an unpublished manuscript prior to misappropriation in Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371. See Yadkoe v. Fields, 66 Cal.App.2d 150, 151 P.2d 906; Nathan v. King Features Syndicate, Sup., 32 N.Y.S.2d 519." Universal Pictures Co. v. Harold Lloyd Corporation, supra. The testimony of the appellants' experts that the play contained no material of value for motion picture purposes merely created a conflict in the evidence.

The judgment and the order denying the motion for judgment notwithstanding the verdict are affirmed.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

TRAYNOR, Justice (dissenting).

The majority opinion in this case, unlike that in Stanley v. C. B. S., Cal.Sup., 221 P.2d 73, recognizes that the question whether there has been copying of plaintiffs' work cannot be submitted to the jury until it has been determined by the trial judge that there is evidence of substantial similarity between plaintiffs' play and defendants' motion picture with respect to the protectible features of plaintiffs' play. With these conflicting decisions before him, may a trial judge on motion for nonsuit or directed verdict determine on the authority of Golding v. R. K. O. whether there is relevant similarity between the two productions, and only if there is such similarity, deny the motion and submit the case to the jury? Or must he, on the authority of Stanley v. C. B. S., deny the motion without consideration of the issue of relevant similarity and let the case go to the jury before determining whether plaintiff established a cause of action upon which the case could properly have gone to the jury?

I cannot agree that a comparison of defendants' picture with plaintiffs' play reveals evidence of similarity not attributable to the use of a common idea, theme, or plot in the public domain and therefore not subject to exclusive appropriation by any author. I would therefore reverse the judgment.

Under Civil Code section 980[1] the author of an original composition has a property interest in it that will be protected against copying to the extent that it is marked by original expression in "a concrete form, in which the circumstances and ideas have been developed, arranged, and put into shape." Eichel v. Marcin, D.C., 241 F.

1. "The author or proprietor of any composition in letters or art has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or a similar composition."

404, 409; Holmes v. Hurst, 174 U.S. 82, 19 S.Ct. 606, 43 L.Ed. 904. That principle governs the determination of a charge of piracy, whether under federal or common law copyright. Twentieth Century-Fox Film Corp. v. Dieckhaus, 8 Cir., 153 F.2d 893, 894, 897–898; Echevarria v. Warner Bros. Pictures, Inc., D.C., 12 F.Supp. 632, 634; Columbia Pictures Corp. v. Krasna, Sup. 65 N.Y.S.2d 67, 68.

"Exclusive ownership" is limited to the "representation or expression." (Civil Code section 980.) Themes, ideas, and plots in books or plays are a common fund from which every author may draw the basic materials of his work without restriction. They are not subject to exclusive ownership, and no author can acquire a superior interest in a theme or plot by making an earlier use thereof. "The copyright cannot protect the fundamental plot which was common property long before the story was written; it will protect the embellishments with which the author added elements of literary value to the old plot, but it will not operate to prohibit the presentation by someone else of the same old plot without the particular embellishments." London v. Biograph Co., 2 Cir., 231 F. 696, 698–699; Harold Lloyd Corp. v. Witwer, 9 Cir., 65 F.2d 1, 24; Lewys v. O'Neill, D.C., 49 F.2d 603, 607; Dymow v. Bolton, 2 Cir., 11 F.2d 690, 692; Nichols v. Universal Pictures Corp., 2 Cir., 45 F.2d 119, 121, 122; Cain v. Universal Pictures Co., D.C., 47 F.Supp. 1013, 1016; Dellar v. Samuel Goldwyn, Inc., 2 Cir., 150 F.2d 612, 613; Shipman v. R. K. O. Radio Pictures, 2 Cir., 100 F.2d 533, 536; Fendler v. Morosco, 253 N.Y. 281, 287, 171 N.E. 56; see Chafee, Reflections on the Law of Copyright, 45 Col.L.Rev. 503, 513–514. The author's only property interest is in the concrete form that he has developed by his own originality and craftsmanship, the "arrangement and combination of the ideas * * * the form, sequence, and manner in which the composition expresses the ideas." Bowen v. Yankee Network, Inc., D.C., 46 F.Supp. 62, 64.

Plaintiffs have developed an unprotectible plot into an original play entitled to protection. The protection extends, however, only to its "details, sequence of events, and manner of expression and treatment." Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App.2d 556, 561, 90 P.2d 371, 374. Even if defendants have taken from the play its plot, they have taken nothing of its expression and development to which alone plaintiffs can claim a superior right.

Plaintiffs rely on a dictum in Dam v. Kirk La Shelle, 2 Cir., 175 F. 902, 907–908, 41 L.R.A., N.S., 1002, 20 Ann.Cas. 1173, that a basic plot may be protected by copyright. What the court there described as a "plot," however, was in fact the concrete form of plaintiff's literary work appropriated almost verbatim by the defendant. Any intimation that a plot apart from its development and expression in a concrete form is protectible should not have survived the decision of Shipman v. R. K. O. Radio Pictures, supra, 100 F.2d 533, 536–537, 538. See also, Dymow v. Bolton, 2 Cir., 11 F.2d 690, 692; Sheldon v. Metro-Goldwyn Pictures Corp., 2 Cir., 81 F.2d 49, 53–54; Christie v. Cohan, 2 Cir., 154 F.2d 827, 828.

The majority opinion, however, states that "the fact that a plan or theme of the plaintiffs' story is similar to the plots of prior stories does not defeat the claim of originality within the meaning of that word for copyright purposes." The implication is that the plot of the play is protected by copyright if plaintiffs conceived it independently of earlier stories in which it is found. It is settled, however, that the plot of a literary work is not protectible merely because the author has conceived it independently. "We assume that the plaintiff's play is altogether original, even to an extent that in fact it is hard to believe. We assume further that, so far as it has been anticipated by earlier plays of which she knew nothing, that fact is immaterial. Still, as we have already said, her copyright did not cover everything that might be drawn from her play; its content went to some extent into the public domain * * * Whatever may be the difficulties *a priori*, we have no question on which side of the line this case falls. A comedy based on conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of

copyright than the outline of Romeo and Juliet." Nichols v. Universal Pictures Corp., 2 Cir., 45 F.2d 119, 122; Sheldon v. Metro-Goldwyn Pictures Corp., 2 Cir., 81 F.2d 49, 54; De Acosta v. Brown, 2 Cir., 146 F.2d 408, 410; Echevarria v. Warner Bros. Pictures, Inc., D.C., 12 F.Supp. 632, 635; Fendler v. Morosco, 253 N.Y. 281, 287, 171 N.E. 56; MacDonald v. Du Maurier, D.C., 75 F.Supp. 655, 660; McConnor v. Kaufman, D.C., 49 F.Supp. 738, 744; Becker v. Loew's, Inc., 7 Cir., 133 F.2d 889, 892, certiorari denied 319 U.S. 772, 63 S.Ct. 1438, 87 L.Ed. 1720; Heywood v. Jericho Co., 193 Misc. 905, 85 N.Y.S.2d 464, 468.

The majority opinion seeks to support the converse proposition by the cases of Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 23 S.Ct. 298, 47 L.Ed. 460, and Fred Fisher, Inc., v. Dillingham, D.C., 298 F. 145. Those decisions, however, support the rule of the Nichols and Sheldon cases and do not enunciate a rule contrary thereto. In Bleistein v. Donaldson Lithographing Co., supra, infringement resulted from the defendants' identical reproduction in reduced size of plaintiff's lithographs of circus scenes. Copying was admitted. As a defense it was alleged that plaintiff's lithographs were picturizations of actual scenes and living persons and he was not entitled to copyright thereof. The court held that the fact that the subject of the production was in the public domain did not excuse the theft of the concrete form in which plaintiff's original development of the subject was expressed. "It is obvious also that the plaintiff's case is not affected by the fact, if it be one, that the pictures represent actual groups,—visible things * * * that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy." 188 U.S. 239, 249, 23 S.Ct. 298, 299. It is clear that Justice Holmes regarded as protectible only plaintiff's originality of expression.[2] His holding that defendants were not free to copy the original expression and development of a non-protectible theme or subject cannot be distorted to mean that others are precluded from giving the same theme a different form. One does not "copy the copy" merely by using the same subject or theme. The "whole contribution may not be protected; for the defendants were entitled to use, not only all that had gone before, but even the plaintiffs' contribution itself, if they drew from it only the more general patterns; that is, if they kept clear of its 'expression.'" Sheldon v. Metro-Goldwyn Pictures Corp., 2 Cir., 81 F.2d 49, 54.

Since "the degree of protection afforded by the copyright is measured by what is actually copyrightable in it; that is, by the degree and nature of the original work", American Code Co. v. Bensinger, 2 Cir., 282 F. 829, 834; Dorsey v. Old Surety Life Ins. Co., 10 Cir., 98 F.2d 872, 873, 119 A.L.R. 1250, similarity between the play and the picture not attributable to the copyrightable features of the play is irrelevant. Harold Lloyd Corp. v. Witwer, 9 Cir., 65 F.2d 1, 17; Nichols v. Universal Pictures Corp., 2 Cir., 45 F.2d 119, 121; Cain v. Universal Pictures Co., D.C., 47 F.Supp. 1013, 1017; Affiliated Enterprises v. Gruber, 1 Cir., 86 F.2d 958, 961; De Montijo v. Twentieth Century-Fox Film Corp., D.C., 40 F.Supp. 133, 138; Shipman v. R. K. O. Radio Pictures, Inc., 2 Cir., 100 F.2d 533, 537; Rush v. Oursler, D.C., 39 F.2d 468, 473; Rosen v. Loew's, Inc., 2 Cir., 162 F.2d 785, 788; Eichel v. Marcin, D.C., 241 F. 404, 409; MacDonald v. Du Maurier, D.C., 75 F. Supp. 655, 662; Hewitt v. Coward, 180 Misc. 1065, 41 N.Y.S.2d 498, 500; Columbia Pictures Corp. v. Krasna, Sup., 65 N.Y.S.2d 67, 69; Heywood v. Jericho Co., 193 Misc. 905, 85 N.Y.S.2d 464, 468; see dissenting opinion in Stanley v. C. B. S.,

2. The same explanation applies to Judge Learned Hand's decision in the Fred Fisher case, holding that defendant's identical duplication of plaintiff's original variation of a musical theme constituted copyright infringement. 298 F. at page 150; see also his concurring opinion in Shipman v. R. K. O. Radio Pictures, supra.

Cal.Sup., 221 P.2d 73. General similarity between two productions attributable to their use of a common plot drawn from the public domain, or similarity in incident attributable to the use of common sources of material, is not evidence of literary piracy. Unless "the two works, when compared, show such pronounced similarities of substantial portions of protectible material, i. e., of details, sequence of events, and manner of expression and treatment, as to warrant the inference of copying," it is error to submit the issue of copying to the jury. Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 561, 90 P.2d 371.

Upon this principle, the federal and New York courts have consistently reversed judgments for plaintiffs or granted motions for dismissal or for judgment on the pleadings for defendants when the only similarity between the two productions has been that attributable to the use of a common plot. In Harold Lloyd Corp. v. Witwer, 65 F.2d 1, the Ninth Circuit Court of Appeals reversed a judgment for plaintiff based on the trial court's finding that defendant's motion picture had been copied from plaintiff's magazine story. Both works were based on the same plot: A university freshman of little physical ability, attempting to impress a coed with his athletic prowess becomes involved in a number of ludicrous situations that subject him to the ridicule of the student body. Through a series of improbable events, he involuntarily becomes a game-winning football hero and wins the love of the girl and the plaudits of his classmates. These similarities were held to be irrelevant, attributable only to the "use of common materials, and common sources of knowledge, open to all men." The court declared that "the resemblances are either accidental or arising from the nature of the subject", 65 F.2d at page 17 and held that the "*reproduction* of such *non-original matter*," even though a conscious borrowing, is not actionable copying. 65 F.2d at page 24.

In Ornstein v. Paramount Productions, Inc., D.C., 9 F.Supp. 896, plaintiff's story and defendant's motion picture were both based on a married woman's sacrifice of her honor to pay for her husband's medical care. In each story, the husband accepted the aid in ignorance of its source, and upon discovery indignantly repudiated his wife. Both story and picture described the wife's struggle against adversity until her reconciliation with her husband in the picture and her death in the story. The court dismissed plaintiff's bill for failure to state a cause of action, holding that the acknowledged similarities lay only in a common plot in the public domain. Substantial dissimilarities in treatment and development between the two productions were held as a matter of law to preclude a finding of copying. The same result was reached in the following cases: Heywood v. Jericho Co., 193 Misc. 905, 85 N.Y.S.2d 464 (both plays dealt with the return of a Negro war hero to his native southern community, his love for a white girl, and their struggle against the bigotry, violence, and hatred of the white community); Collins v. Metro-Goldwyn Pictures Corp., D.C., 25 F.Supp. 781, 782 (both stories portrayed the life of a test pilot); London v. Biograph Co., 2 Cir., 231 F. 696 (both stories dealt with the successful attempts of two thieves to poison each other to avoid a division of their spoils); Fendler v. Morosco, 253 N.Y. 281, 171 N.E. 56 (both plays were based on the love of a white youth for an Hawaiian girl); MacDonald v. Du Maurier, D.C., 75 F.Supp. 655 (the book "Rebecca" was alleged to have infringed a story by plaintiff concerned also with the conflict between a second wife and the spirit and memory of the first); McConnor v. Kaufman, D.C., 49 F.Supp. 738 (both plays dramatized the late Alexander Woolcott's eccentricities and interest in unsolved murders); Columbia Pictures Corp. v. Krasna, Sup., 65 N.Y.S.2d 67 (both stories involved the writing of letters to a soldier overseas by an adolescent girl posing as her own older sister); and Cain v. Universal Pictures Co., D.C., 47 F. Supp. 1013 (alleged infringement was based on the common use of a sequence in which a storm forces the hero and heroine to take overnight refuge in a church loft; see also Dymow v. Bolton, 2 Cir., 11 F.2d 690, 692; Kustoff v. Chaplin, 9 Cir., 120 F.2d 551, 561; Lewys v. O'Neill, D.C., 49 F.2d 603, 607; Dellar v. Samuel Goldwyn, Inc., D.C.,

40 F.Supp. 534, 536; Rush v. Oursler, D.C., 39 F.2d 468, 472–473; Rosen v. Loew's Inc., 2 Cir., 162 F.2d 785, 788; Eichel v. Marcin, D.C., 241 F. 404, 408–409; Lowenfels v. Nathan, D.C., 2 F.Supp. 73, 80; Gropper v. Warner Bros. Pictures, Inc., D.C., 38 F.Supp 329, 332; Affiliated Enterprises v. Gruber, 1 Cir., 86 F.2d 958, 961; Caruthers v. R. K. O. Radio Pictures Inc., D.C., 20 F.Supp. 906, 907; Christie v. Harris, D.C., 47 Supp. 39, 42, affirmed *sub nom* Christie v. Cohan, 2 Cir., 154 F.2d 827.

If, however, the finding of copying is supported by evidence of similarity between two works with respect to the expression and development of their common plot in a concrete form and sequence of events marked by the first author's craftsmanship and creative talent, a judgment for plaintiff based thereon will be affirmed, as in Sheldon v. Metro-Goldwyn Pictures Corp., 2 Cir., 81 F.2d 49. In that case, plaintiff's play was based on the 1857 trial in Scotland of a young woman named Madeleine Smith, on the charge that she murdered a discarded lover to prevent his revelation of their former intimacy to her present fiance. "This was the story which the plaintiffs used to build their play. As will appear they took from it but the merest skeleton, the acquittal of a wanton young woman, who to extricate herself from an amour that stood in the way of a respectable marriage, poisoned her lover. The incidents, the characters, the mis en scène, the sequence of events, were all changed; nobody disputes that the plaintiffs were entitled to their copyright. All that they took from the story they might probably have taken, had it even been copyrighted." 81 F.2d at page 50. From this "merest skeleton" plaintiffs developed an original story of sensuality and murder suggested by the events upon which it was based. Defendant's motion picture presented not just a similar story based on the same facts (which would have been permissible even if it were suggested by plaintiff's play), but substantially the same details, sequence of events, manner of expression and development, and often the same dialogue, that gave plaintiffs' play its character of originality and concreteness of form. The Second Circuit Court of Appeals reversed a decree of dismissal, stating that although plaintiffs could not preclude any subsequent use of the same source of material or story outline or the deliberate borrowing of their plot, they were entitled to protection against piracy of their original contribution to that plot in a concrete form. Since similarity between the two works was manifested by a parallelism of incident and detail originally developed by plaintiffs, an inference of copying was held to be reasonable. In De Acosta v. Brown, 2 Cir., 146 F.2d 408, 410, both works were based on the life of Clara Barton, but there was similarity between them in the names of seven principal characters (of the six fictional names one accidentally misspelled name in plaintiff's story was identically reproduced in defendant's), in a fictional romance between Miss Barton and a young gold prospector even as to the details of its genesis and termination, and in the complete sequential development of the story outline. The Second Circuit Court of Appeals affirming a judgment for the plaintiff, emphasized that the finding of infringement was supported by evidence of similarity in expression and development and not by similarity in the plot of the two stories or in their use of historical material. See also, Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App.2d 556, 561, 90 P.2d 371, and Universal Pictures Co., Inc. v. Harold Lloyd Corp., 9 Cir., 162 F.2d 354, 360, in which judgments for the plaintiffs were held supported by evidence of the use of identical comedy sequences originally developed by the plaintiffs, not by similarities resulting from the use of the same plot.

Admittedly, both play and picture in the present case utilize the same basic plot, the story of a paranoiac ship's captain obsessed by his position and authority, engaged by an opponent aboard his ship, and defeated by that opponent and by his own mental collapse. If a plot apart from its expression in a concrete form were protectible, the first use of this plot would have withdrawn from all subsequent use a most fertile field for the production of stories of the sea. The captain and his opponent have long been stock sea story material. They

were present in the persons of Captain Bligh and Fletcher Christian of "Mutiny on the Bounty," of Wolf Larsen and Humphrey van Weyden of "The Sea Wolf," and in the principals of numerous other stories of ships and the men who man them. It is immaterial, however, whether the plot common to play and picture is old or new; the only protection plaintiffs can claim under copyright law is limited to its expression and development in a concrete form. In the present case there is no substantial evidence of similarity between the play and picture with respect to the features protected by copyright. "When one attempts comparison of the two works, in those matters as to which copyright protects—that is, the spirit or soul infusing the creatures of the author's imagination, what they desire, and how they go about achievement, the reasons for their actions, and the words in which such reasons are expressed—I can see nothing but differences." Frankel v. Irwin, D.C., 34 F.2d 142, 144; MacDonald v. DuMaurier, D.C., 75 F.Supp. 655, 662.

Plaintiffs' captain (Crawley) is an impostor, an actor who knows nothing of seamanship, who has killed the real captain to get aboard the boat and bring about the death of an enemy (Brancato) he believes has ruthlessly stifled the acting ability that he (Crawley) may now display. He exults in the power he possesses, but only because he holds it by virtue of his ability to act the part of the captain. He is obsessed by his art, not by his authority. He challenges Brancato to expose him to demonstrate that by his consummate acting he can make others believe only what he wants them to believe. He kills only because murder is necessary to the maintenance of his pretense. He hates Brancato and attempts to drive him to suicide. When he believes he has accomplished his purpose, he takes his own life in fear and remorse. The form and development of this story, the embellishment of incident and detail, give the play the stamp of plaintiffs' originality and entitle it to protection, but only against piracy of the protectible features.

Defendants, however, have taken from plaintiffs' play, if anything, only that which is common property. In order to use an old ship set not then in use, they used a story outline a great deal older and more timeworn. They added to it nothing not already in the public domain; certainly they added to it no ingredient for which plaintiffs can claim protection. Their story was built on a tyrannical captain, his abuse of authority, and his eventual defeat. Their captain (Stone) is a veteran of the sea, competent and experienced. Pride in his authority has become an obsession, driving him insane. He kills only to prove his authority. He does not hate his opponent, Merriam, whose only common denominator with plaintiff's Brancato is his opposition to an insane captain. He does not commit suicide, but is killed to prevent the murder of Merriam.

"This incomplete skeleton the two plays have in common, but it is with real difficulty that the flesh and blood, the incidental, yet essential, adornment and trimming, of the plays can be cut away to show similarity between a few bones." Dymow v. Bolton, 2 Cir., 11 F.2d 690, 692. Here, as in Stanley v. C. B. S., Cal.Sup., 221 P.2d 73, defendant's motions for nonsuit, directed verdict, and judgment notwithstanding the verdict raised the question whether there was substantial evidence of relevant similarity to justify the submission of the case to the jury for a determination whether that similarity was the result of copying. In denying the motions, the trial court erroneously determined that there was substantial evidence of relevant similarity. In reversing the judgment, this court would not be substituting its judgment for that of the jury on a question of fact, but would determine merely that there was insufficient evidence to support a finding of copying. Nichols v. Universal Pictures Corp., 2 Cir., 45 F.2d 119, 121, 122; Hewitt v. Coward, 180 Misc. 1065, 41 N.Y.S.2d 498, 500; Dorsey v. Old Surety Life Ins. Co., 10 Cir., 98 F.2d 872, 874, 119 A.L.R. 1250; Soy Food Mills, Inc. v. Pillsbury Mills, Inc., 7 Cir., 161 F.2d 22, 25. I would therefore reverse the judgment.

SPENCE, J., concurs.

SCHAUER, Justice.

I dissent.

Certainly there was no necessity for the defendants to read plaintiffs' "The Man and His Shadow" in order to obtain the "basic plot," or its subordinates, as depicted in "The Ghost Ship"; they needed only to turn to "The Universal Plot Catalog" (Henry Albert Phillips) or to "Story Plotting Simplified" (Eric Heath). In the last named work (which admittedly only suggests further sub-classifications or applications of the fundamental law[1] proclaimed by Georges Polti[2]) we find in chapter XIX (sub-situation 15 of the sixteenth situation) the following listing:

"Madman	Victim	The Cause"
"A sea-captain	His crew	Insanity"

And in chapter XXVII we find:

"Superior Rival	Inferior Rival	The Object"
"A sea-captain	His first mate	A native girl"

These situations, it seems to me, are too well and widely known and have been too often written about, to admit of present proprietorship in them merely as such. *They might be used in something original but they are not original.* Yet it is only in relationship to these situations that any similarity between play and picture can be found. They fit the "The Ghost Ship" almost precisely; indubitably they constitute the so-called "basic plot" or "central core" of the picture story; they fit it far more closely than does any situation portrayed in plaintiffs' sketch; and they were free to defendants' use.

Plaintiffs' sketch, likewise, uses formulae plot and subordinates. It avails of a mad sea-captain, a passenger instead of a crewman, and, as the cause, descends to jealousy —mad jealousy. Jealousy, in the Thirty-Second Situation of Polti, is labeled "Mistaken Jealousy." "The reason," says Heath, "is that jealousy in itself is not dramatic." Even "Mistaken Jealousy" has poor emotional value and "the usual solution [which plaintiffs have adopted] * * —a murder, *suicide,* divorce, or separation —is extremely hackneyed and undramatic." (Italics added.) Plaintiffs' use of the equally hackneyed "pursuit-escape" technique and "A hurricane A vessel Seamanship" may be found clearly depicted and specifically listed in Heath's exposition of Polti's law. (Fifth Situation, chap. VIII.)

Regardless of whether similarity or protectibility should be first determined it seems obvious in this case that plaintiff cannot recover. The majority opinion admits that "the basic dramatic core of the plaintiffs' play constitutes the truly original and valuable feature of it * * * [That,] in the present case, the plaintiffs' property rights extend only to the dramatic core * * *" It might as well be claimed on behalf of plaintiffs that they possess a common law copyright to the origination and use of some certain word already in common usage. To see if the claim to originality and proprietorship in such combination of letters could possibly be tenable we should first turn to a dictionary and if we found that combination as a recognized word in the "public domain" of the English language we should go no further in listening to plaintiffs' claim. Here we need only turn to the dramaturgic equivalent of a dictionary—a catalog of plots in the public domain of literature—to find the "central core"—the admittedly sole basis of plaintiffs' claim of a protectible element.

1. "There are only thirty-six fundamental dramatic situations, various facets of which form the basis of all human drama." ("The Thirty-Six Dramatic Situations," by Georges Polti, 1916.)

2. Recognition of the "law" antedates Polti; Goethe relates that "Gozzi maintained that there can be but thirty-six tragic [dramatic] situations. Schiller took great pains to find more, but he was unable to find even so many as Gozzi."

So far as I know, no copyrights or other forms of literary protection have heretofore been granted as to the literary use of madmen, sea-captains or murders, as such. I find nothing of literary novelty in the portrayal, by either plaintiffs or defendants, of dominant and secondary characters; nor in the concept that a ship's captain has supreme authority over his command on the high seas and may demonstrate a mad lust for or brutal exercise of power; nor in the proposition that a paranoiac may captain a ship or be a killer; nor in the manner in which the above elements, or any of them, have been put together by either plaintiffs or defendants. In any event the similarity, if any, between the story by plaintiffs and the picture by defendants lies exclusively in the plots which are in the public domain, not in the treatment thereof which originality could make protectible.

As I view the film, if it possesses any quality at all which may be said to give it character, originality or any element of literary protectibility, that quality would seem to be a combination of details in production, an imprint of the artistries of director and actor. But, insofar as plot or, as the majority denominate it, "central core," is concerned, I am satisfied that neither the story told by plaintiffs nor that pictured in the film, can be said to possess *in this decade* any element of originality qualifying it to be the subject of exclusive literary property rights and protectibility. In some aspects each plot is at least as old as Shakespeare[3] and, since Polti, the whole substance of each has been but a published formula. And if either work does possess originality in substance, structure or form sufficient to make it protectible as literary property, then, measured by an equal standard, it surely follows that the film is so different from plaintiffs' story as to preclude plaintiffs' recovery for plagiarism.

The Ghost Ship sailed but I think neither it nor its author was engaged in piracy; and I think upholding the judgment in this case supports a result which approaches closer to piracy than did any act of the defendants. Certainly the individual writer should have ample protection for his literary enterprise but zeal to protect him should not lead to strait-jacketing producers against what appears here to have been but a legitimate exercise of their own freedom of enterprise in an open field.

For the reasons stated I would reverse both the judgment and the order denying the motion for judgment notwithstanding the verdict.

Rehearing denied; TRAYNOR, SCHAUER and SPENCE, JJ., dissenting.

3. See MacBeth, Hamlet, Othello, King Lear; see also the works listed by Polti under examples of the Twenty-Fourth Situation, sub-classification A(9).



99 Cal.App.2d 56

KOVACS v. MUTUAL BROADCASTING SYSTEM, Inc. et al.
Civ. 17228.

District Court of Appeal, Second District, Division 3, California.
Aug. 18, 1950.

Action by Edward Kovacs against the Mutual Broadcasting System, Inc. and others, to recover for the alleged appropriation by defendants of a radio program and format which plaintiff allegedly originated. The Superior Court, Los Angeles County, Stanley Mosk, J., entered judgment in favor of plaintiff for $25,000 and the defendants appealed. The District Court of Appeal, Vallée, J., held that evidence sustained finding that plaintiff's program was original and novel and finding of similarity was sufficient to support award of damages.

Affirmed.

1. Literary property ⇐2

If a format for a radio program is original and novel, it may constitute a protectible product of the mind. Civ.Code, § 980.

2. Literary property ⇐9

The question of originality and novelty of literary property is one of fact for jury.

3. Literary property ⇐9

In action to recover for alleged appropriation by defendants of a radio program and format allegedly originated by plaintiff, evidence sustained finding that plaintiff's program was original and novel.

4. Literary property ⇐8

Access to a literary property may be proved indirectly and a charge of piracy does not fail merely because infringer was not caught in act of copying.

5. Literary property ⇐9

Access to a literary property may be inferred from surrounding circumstances or it may be found from similarities in plan, arrangement and combination of materials, or from identity of phraseology, or from other evidentiary facts.

6. Literary property ⇐9

Proof of substantial similarities between original literary property and that allegedly pirated gives rise to an inference of both access and copying.

7. Appeal and error ⇐1008(1)

The weight to be given inference of both access and copying of an original idea as against direct evidence of nonaccess and noncopying is a question for trier of fact.

8. Appeal and error ⇐1010(1)

The implied finding of a jury of similarity between original idea and that allegedly copied is binding on a reviewing court when supported by substantial evidence.

9. Literary property ⇐9

In action by writer of radio program called "Your Hearts Desire" for infringement of common law copyright by producers of radio program called "Your Hearts Desire" evidence sustained finding that there was a substantial similarity to plaintiffs protectible property right in radio program produced by defendants.

10. Appeal and error ⇐197(3)

Where implied findings of jury are supported by evidence and it appears that case was decided correctly on merits, objection to a variance between complaint and proof which might have been obviated by an amendment of complaint cannot be urged for first time on appeal.

11. Literary property ⇐9

In action based on alleged appropriation by defendant of a radio program and format which plaintiff claimed to have originated, testimony of plaintiff as owner that value of program was $100,000 and that after defendant's use thereof it had no value was sufficient to support award of damages to plaintiff of $25,000.

Crider, Runkle & Tilson, Clarence B. Runkle, all of Los Angeles, for appellants.

Herzbrun, Chantry & Oleis, Allen M. Singer, all of Beverly Hills, for respondent.

VALLÉE, Justice.

Appeal by defendants from a judgment in favor of plaintiff for $25,000 entered upon a verdict of a jury in an action based upon the alleged appropriation by defendants of a radio program and format which plaintiff claims to have originated.

The complaint contains two causes of action. The first, based upon the alleged plagiarism of a commonlaw copyright, alleges that: during 1944 plaintiff "originated and caused to be prepared and composed and written an original script and radio program format for a radio program entitled 'Your Heart's Desire,'" and caused the script to be transcribed upon records for the purpose of submission to prospective sponsors, advertising agencies and broadcasting companies; since 1944 defendants have been fully informed of the nature of plaintiff's radio program, and about September 9, 1946, "sold, produced and presented a radio program substantially copying, embodying and using plaintiff's radio program and radio format without the knowledge, authority and consent of the plaintiff" under the title "Heart's Desire," which program was and is being broadcast nationally over the radio stations of Mutual Broadcasting System, Inc.; defendants appropriated the benefits

and profits to which the plaintiff is solely and exclusively entitled; the amount of such profits and benefits received by defendants is unknown to plaintiff and he is entitled to an accounting for said profits and benefits alleged on information and belief to amount to more than $200,000.

The second cause of action is based on the theory of breach of an implied contract. The prayer sought an injunction, an accounting, and the reasonable value of the use of the radio program.

The principal defendant is Raymond R. Morgan, called Morgan, who is the sole owner of, and doing business as, Raymond R. Morgan Company. Defendant Mutual Broadcasting System, Inc., called Mutual, operates a national radio network. Defendant Thomas S. Lee Enterprises, Inc., called Don Lee, is the western outlet for Mutual. Defendant Ben Alexander was the master of ceremonies employed and furnished by Morgan. Morgan sold his radio program, "Heart's Desire," to Mutual as a package program, i. e., Morgan to provide everything connected with the program. It was broadcast over Mutual nationally five days a week for one-half hour. Originally it was a sustaining program, i. e., solely at the expense of Mutual. Later, half of each broadcast, or fifteen minutes, was sold to defendant Phillip Morris & Co., Ltd. The program was on the air for approximately two years. It was discontinued about the time of trial.

Plaintiff conceived the idea for his radio program in 1942 or 1943. At his request, Maurice Lawrence, a writer, wrote a script for a sample broadcast of the idea, entitled "Your Heart's Desire." A recording of this sample broadcast was made in Hollywood on September 21, 1944.

Plaintiff testified that shortly after the recording he played his transcription "to the head of KGFJ, and he liked it and called Mrs. Kershner. She liked it and sent the program to the head of the sales department, a man by the name of McCrillis. He played the program. He liked the show and he told me that the show is only good for coast to coast. Therefore he will take the show personally to the Mutual Broadcasting Company because he thought that would be the best bet, and he has the best entre there. * * * I got it back about four weeks later." McCrillis testified he took the transcription to Leon Wray, an account executive of Don Lee and Mutual. Wray had formerly worked for KGFJ and McCrillis knew him "real well * * * I just took it to him and told him I would like to have him listen to it and see what he thought of it; see if he could do anything with it." McCrillis was unable to say how long he left it with Wray—"it might have been a week, two weeks, three weeks."

Plaintiff then delivered the transcription to James Strain, program director of station KMTR. At that time KMTR was changing its call letters to KLAC. Strain liked the show and played it for Don Fedderson, the head of the station. Defendant Morgan at that time was handling the publicity and advertising for KMTR in connection with the change of the radio call letters, and his contact man, a Mr. Raisback, was at KMTR on several occasions during this period. The transcription remained at KMTR about five months, when it was sent to plaintiff who was in New York. He took it to Kenny Delmar (Senator Claghorn on the Fred Allen show), who at that time was looking for a radio show to be broadcast over the CBS network. While he was negotiating with Delmar in the fall of 1946 he first learned of defendants' program "Heart's Desire" being broadcast over Mutual. Thereafter he made no attempt to sell his radio program and format because it was "worthless."

Plaintiff's script and transcription start with the following announcement to the radio audience: "Your hearts desire program * * * Have you a desire that lies secretly within your heart * * * something that you have always dreamt about or wanted to do * * * of course, you have, who Hasnt—Well, on this new thrilling and amazing program, the makers of Champion cigarettes [a fictitious sponsor] may make that very wish come true * * * simply write in and tell us about [it] * * * sing with a leading band * * * dance with Fred Astaire or Gin-

ger Rogers * * * perhaps you would like to play a love scene with Robert Young or Hedy Lamarr * * * have a dinner and dancing date with a well known personality who knows perhaps these and any other desires may be yours for the asking." The writers of the winning letters are then introduced separately. The master of ceremonies reads the letter of each (supposedly written in response to a previous solicitation as indicated in the announcement) in which he or she has expressed his or her heart's desire. The heart's desire of each is then gratified either on stage or in such manner as may be necessary to gratify it. The introduction of each letter writer is preceded and followed by humorous comments by the master of ceremonies. Each person whose letter is selected and who participates in the show is given a carton of Champion cigarettes and a war bond.

Defendants' program is as follows: It begins with the following announcement: "What's Your Heart's Desire? I'm asking you thousands of listeners at home * * all over this big network. This is your program: Would you like to have a vacuum cleaner? A pressure cooker? A mattress? A box spring? An electric stove? An automatic ironer? A percolator? It's yours for the asking * * * all you have to do is write me a letter * * * just tell me * * * What Is Your Heart's Desire? * * * This is Ben Alexander, folks, starting a new week doing everything I can to make your dreams come true * * * to get you your Heart's Desire! And don't forget, all you listeners at home, this is your program! That's why we're on the air * * * this show was designed for *you* * * * the great *listening audience at home!* It's a pleasure for me to grant you your Heart's Desires but you've got to do your part. And you know what that is? Just simply write me a letter telling me what you want. But write in an interesting way * * * not just an ordinary letter like * * * well, say, like you want a stove * * * tell me why you want a stove * * * are you cooking over a camp fire? Is it funny? Or is it tragic? Get the idea? It's so simple to write an interesting letter. Now I'll give you the idea of how this show works. The studio here in Hollywood is crammed full of swell people who are willing to help me out. You realize I couldn't begin to read all of your letters myself, so these nice folks are going to open and read your letters for me. They're ready and anxious to start to act for you, to help you get Your Heart's Desire!" The studio audience is then asked whether there are any letters among those they have opened and read asking for a certain item mentioned by the master of ceremonies. If so, the member of the studio audience is asked to explain the letter over the microphone. If there are several letters requesting the same item, the winning letter is chosen on a contest basis through audience applause. The writer of the letter is then granted his or her heart's desire, and the one explaining the winning letter receives a gift. Interspersed throughout the program are humorous and ad lib comments by the master of ceremonies. Defendants' program was first broadcast on September 9, 1946.

Defendants claim their program was originated by Ray Maypole and Charles Morin; that Morin suggested Morgan as the man to see to exploit it; and that they explained the program idea to Morgan about the first of August, 1946. Morgan testified that the program idea outlined to him was "based on the radio audience sending in letters that had things they wanted to get, in which the hero of the program, as I saw it * * * would not be the person, the hero would be the letter," and the persons who received the gifts "would not be the comparatively few people in the studio audience, but the great unlimited audience that we had out in the homes. They had the chance to participate in these gift give-aways * * * *and that to my knowledge was something that had never happened before in radio.* That was almost the exact opposite of what we were doing on the Queen For A Day program. In Queen For A Day, in order to become Queen, or in order to get a gift, you must be a member of the audience; but the poor little lady in the house listening to the program would have no chance to receive any-

thing, or get a present. *That was the great difference,"* and the idea of having the studio audience open the mail was a "great idea." (Italics added.) Shortly thereafter Morgan went to New York and brought the program idea to the attention of Mutual. Maypole and Morgan had no script for the program at this time. Morgan testified that even up to the time of the trial broadcast they had no script for the program. "We had nothing except the idea that the letters would be good performers * * * we had nothing—hardly a scrap of paper, hardly a few notes."

Appellants' contentions are: 1. Plaintiff has no protectible interest in his radio program and format because it lacks originality and novelty. 2. The evidence is insufficient to justify the jury's implied finding of similarity or access from which an inference of copying may be drawn. 3. The evidence fails to prove any damages or recovery pleaded in the first cause of action. 4. The evidence fails to sustain plaintiff's second cause of action based upon an implied contract.

In support of their first contention, defendants argue that plaintiff cannot assert ownership in the program methods, devices, or combinations thereof, used in his program because they were already in the public domain. They point out that the practice of soliciting letters from the listening public for use in connection with a radio program, the element of contest between letter writers or the letters themselves, the device of gratifying desires (commonly known as the give-away type of radio program), and the idea of audience participation, had been used in radio prior to plaintiff's use of them, and are similar to such previous programs as "Help Thy Neighbor," "Chan Du, the Magician," "Adventures of Black and Blue," "What's on Your Mind," "Do You Want To Be An Actor," and "Queen for a day." Plaintiff asserts his combination of materials and ideas in a format for a radio program is original and novel.

[1] If a format for a radio program is original and novel, it may constitute a protectible "product of the mind." Civ.Code, sec. 980; Stanley v. Columbia Broadcasting System, 35 Cal.2d 653, 221 P.2d 73; Yadkoe v. Fields, 66 Cal.App.2d 150, 159, 151 P.2d 906; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 561, 90 P.2d 371. "An author who takes existing materials from sources common to all writers, arranges and combines them in a new form, giving them an application unknown before, is entitled to a copyright, notwithstanding the fact that he may have borrowed much of his materials and ideas from others, provided they are assembled in a different manner and combined for a different purpose, and his plan and arrangement are a real improvement upon existing modes; for the labor of making these selections, arrangements and combinations has entailed the exercise of skill, discretion and creative effort. Edwards & Deutsch Lithographing Co. v. Boorman, 7 Cir., 15 F.2d 35. 'If the author has accomplished a unique and useful result through the application of intellectual labor and literary or artistic skill, his work is entitled to a copyright which will protect the plan, arrangement and combination of the materials therein, even though all the materials of such work, or some parts of its plan, or the arrangement and modes of illustrating the subject matter thereof, may be found separately, or in a different form or setting, or in a different combination in other distinct works.' Ball, The Law of Copyright and Literary Property, p. 247. Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App. 2d 556, 90 P.2d 371." Stanley v. Columbia Broadcasting System, 35 Cal.2d 664, 221 P.2d 79.

[2] The question of originality and novelty is one of fact for the jury. Stanley v. Columbia Broadcasting System, 35 Cal. 2d 665, 221 P.2d 80.

[3] This issue having been determined by the jury in favor of plaintiff, the question is whether there is any substantial evidence to support its implied finding that the program was original and novel. Plaintiff's radio program is based on: 1) soliciting letters from the radio-listening public expressing their heart's desires, with no limitation as to the desires to be expressed; 2) using the letters as the founda-

tion of the program; 3) choosing winning letters on a contest basis; 4) granting and broadcasting of the heart's desires of the winners; 5) using the catch phrase "your heart's desire"; and 6) some of the audience participating therein. Concededly, there is nothing new or novel in the practice of soliciting letters on a radio program, or in having an element of contest between letter writers, or in the give-away type of program, or in audience participation; yet the combination of these basic elements, with the additional innovation of soliciting letters from the listening public expressing the writer's heart's desire, and having those letters constitute the very basis of the program—the material for the show—was original and novel and had never before been done on a radio program. Morgan testified (which testimony is important in this connection because of the substantial similarities appearing in the two programs as hereinafter shown) that defendants' program was different from any other program; it was "something that had never happened before in radio." Walter H. Lourie, an executive producer for Mutual, testified that Morgan said defendants' program was one "with a tremendous mail pull and heart appeal"; the idea of fulfilling somebody's wish was "one of the things that we liked" about the program; the idea of fulfilling someone's heart's desire was "warm and friendly"; it had "heart * * * zilch, appeal, warmth." Ben Alexander testified that the defendants' program was different from the average give-away show in that a member of the listening public won, instead of a member of the studio audience. The foregoing evidence, in and of itself (in view of the substantial similarity of the programs), supports the jury's implied finding that plaintiff's program was original and novel. The programs cited by defendants as being similar were shown to be distinguishable in that they merely included one or two elements which were already in the public domain and not the combination of ideas originated by plaintiff.

It is next contended that the evidence is insufficient to justify an implied finding a) of any similarity between the two programs, and b) of access, from which an inference of copying may be drawn.

[4, 5] There was no direct evidence of access. Defendants denied access and copying. Access may, however, be proved indirectly. A charge of piracy does not fail merely because the infringer was not caught in the act of copying. Access may be inferred from the surrounding circumstances or it may be found from similarities in the plan, arrangement and combination of materials, or from the identity of phraseology, or from other evidentiary facts. Ball, Law of Copyright and Literary Property, 601, sec. 263; Wilkie v. Santly Bros., 2 Cir., 91 F.2d 978, 979; Dam v. Kirk La Shelle Co., 2 Cir., 175 F. 902, 907, 41 L.R.A.,N.S., 1002, 20 Ann.Cas. 1173; Christie v. Harris, D.C.N.Y., 47 F. Supp. 39, 40; Simonton v. Gordon, D.C. N.Y., 12 F.2d 116, 123.

In Wilkie v. Santly Bros., supra, 2 Cir., 91 F.2d 978, although there was no direct evidence of access, it was held that access could be inferred, the court saying, 91 F.2d at page 979: "Where similarities or identities are relied upon, they must do more than engender a suspicion of piracy; they must establish piracy with reasonable certainty. There was some evidence here of the possibility of physical access by the appellants; the court below did not so find. But the charge of infringement does not fail merely because the infringer is not caught in the act, for access may be inferred or found circumstantially from the plan, the arrangement, and the combination of materials contained in the composition. Edwards & Deutsch Lithographing Co. v. Boorman [7 Cir.], 15 F.2d 35, certiorari denied 273 U.S. 738, 47 S.Ct. 247, 71 L.Ed. 867. * * * Internal proof of access may rest in an identity of words or in the parallel character of incidents or in a striking similarity which passes the bounds of mere accident. General Drafting Co. v. Andrews [2 Cir.], 37 F.2d 54; W. H. Anderson Co. v. Baldwin Law Pub. Co. [6 Cir.], 27 F.2d 82; Simonton v. Gordon, D.C.S.D.N.Y., 12 F.2d 116 * * * [91 F.2d p. 980] We need not consider the sufficiency of the claim that

the appellant Petkere had opportunity to acquire information as to appellee's composition, since it was played and sung at exhibitions when she visited the Sound Studio, because upon analysis there is ample evidence of identities and similarities justifying the claim of plagiarism."

Plaintiff sought to prove access through several probable sources. One was through Don Lee-Mutual radio station where his transcription had been left with Wray "for a week, two weeks, three weeks." Another source was through radio station KMTR where plaintiff's transcription was left for a period of about five months and where Raisback, a Morgan employee, was in and out of the studio handling publicity and advertising.

[6-8] Proof of substantial similarities gives rise to an inference of both access and copying. Sarkadi v. Wiman, 2 Cir., 135 F.2d 1002, 1003; Wilkie v. Santly Bros., 2 Cir., 91 F.2d 978, 979. The weight to be given the inference as against direct evidence of nonaccess and noncopying is a question for the trier of fact. There can be no copying in the absence of similarity. Whether there are substantial similarities sufficient to give rise to an inference of access and copying is one of fact to be determined by a comparison of the two programs upon the basis of the "impression received by the average reasonable man." Stanley v. Columbia Broadcasting System, 35 Cal.2d 661, 221 P.2d 73; Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F.2d 1, 18; Nichols v. Universal Pictures Corporation, D.C.N.Y., 34 F.2d 145, 147; Hirsch v. Paramount Pictures, D.C.S.D.Cal., 17 F.Supp. 816, 818; Frankel v. Irwin, D.C.N.Y., 34 F.2d 142, 144; Dymow v. Bolton, 2 Cir., 11 F.2d 690, 692; Ball, Law of Copyright and Literary Property, p. 344, sec. 159. The implied finding of the jury of similarity is binding upon a reviewing court if supported by substantial evidence. Golding v. R. K. O. Pictures, 35 Cal.2d 690, 221 P.2d 95.

[9] Plaintiff's transcription and several of defendants' transcriptions were heard by the jury. The jury compared plaintiff's written script and the written script of one of defendants' broadcasts. Upon such comparison the average reasonable man could readily determine that both radio programs are substantially similar in that they are both based on material written by the listening audience expressing their heart's desires (the new and novel innovation originated by plaintiff), revolve around the idea of gratifying "heart's desires," selecting winning letters on a contest basis, and broadcasting the gratification of the heart's desires. The average reasonable man could also readily observe substantial similarity not only in the phraseology employed in the scripts but in the general arrangement and combination of ideas. The evidence "in the form of the two programs alone, shows that there is substantial similarity to support the verdict." Stanley v. Columbia Broadcasting System, 35 Cal.2d 663, 221 P.2d 79. The proof of opportunity of access together with the proof of substantial similarities is sufficient to support the implied finding of access and copying.

There are, of course, certain differences in the two programs. As said in Nichols v. Universal Pictures Corp., 2 Cir., 45 F.2d 119, 121 (quoted with approval in Stanley v. Columbia Broadcasting System, 35 Cal. 2d 662, 221 P.2d 78: "It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations. That has never been the law, but as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that, as was recently well said by a distinguished judge, the decisions cannot help much in a new case. Fendler v. Morosco, 253 N.Y. 281, 292, 171 N.E. 56." Defendants point out that the principal differences in their program from that of plaintiff are 1) the studio audience read, select and advocate the winning letters written by the listening audience (there being an additional contest between these studio advocators, the winners of which are determined by the volume of studio applause), and 2) those who send in the winning letters remain at home where they receive their gifts; while on plaintiff's program the

letter writers themselves are produced at the broadcast. The first item is but the addition of another basic element already used in radio, a contest among the members of the studio audience. Having the studio audience open the letters, defendants concede, is but a "mechanical phase of the production," unimportant insofar as the essence of the program is concerned but important to a sponsor or producer because of the problem and expense attached to the handling of a large volume of mail. With regard to the second claimed difference, it may be said that irrespective of whether the writer of the winning letter remains at home or is brought to the studio to receive his heart's desire, the important feature, originated by plaintiff, is that in both programs the winner is a member of the listening audience.

[10, 11] Appellants' contention that the evidence fails to prove any damages or recovery pleaded in the first cause of action is another way of stating that there is a variance between the pleading and the proof. Where the implied findings of the jury are supported by the evidence and it appears that the case was decided correctly on the merits, objection to a variance between the complaint and the proof which might have been obviated by an amendment of the complaint cannot be urged for the first time on appeal. 2 Cal. Jur. 279, sec. 89. Plaintiff, as owner, testified that the value of his program was $100,000 and that after defendants' use thereof it had no value. This testimony is sufficient to support the award of damages. Golding v. R. K. O. Pictures, 35 Cal.2d 690, 221 P.2d 95; Yadkoe v. Fields, 66 Cal.App. 150, 160–161, 151 P.2d 906; Universal Pictures Co. v. Harold Lloyd Corporation, 9 Cir., 162 F.2d 354, 369; 10 Cal.Jur. 1023, sec. 278; 3 Wigmore on Evidence, p. 48, sec. 716.

Our conclusion renders it unnecessary to consider appellants' contention that the evidence fails to sustain the second cause of action.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

99 Cal.App.2d 266

SOREL v. SMITH et al.
Civ. 14321.

District Court of Appeal, First District, Division 2, California.

Aug. 30, 1950.

Certiorari-mandamus proceeding by Ethel Sorel against Joseph Edward Smith and others to review an order of respondent pension trustees denying plaintiff a pension for the death of her fireman husband. The Superior Court in and for the County of Alameda, Donald K. Quayle, J., held that death had not occurred as a result of injury sustained in course of duty, or arising out of deceased's employment, and petitioner appealed. The District Court of Appeal, Nourse, P. J., held that the evidence supported findings that the injury had not occurred in course of duty or arisen out of deceased's employment.

Judgment affirmed.

1. Mandamus ⇐187(9)

In mandamus proceeding to review order of pension trustees denying fireman's widow a pension, the sole function of the reviewing court was to determine whether the trial court's findings were supported by the evidence.

2. Mandamus ⇐168(4)

In proceedings to review order of pension trustees denying fireman's widow a pension for death of husband due to occlusion of the right coronary artery, evidence supported findings that heart injury had not occurred in course of duty or arisen out of deceased's employment.

Reynald J. Bianchi, San Francisco, for appellant.

John W. Collier, City Attorney, Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued in certiorari-mandamus to review the order of respondent pension trustees denying plaintiff a pension for the death of her deceased husband, a battalion chief in the Oakland City fire department. The cause was heard by the superior court on the transcript of proceedings before the

pension board and on new evidence taken at the trial. Judgment went for defendants.

[1] On the appeal from this judgment no question of law is presented—the sole question is whether the pension board correctly interpreted the evidence and whether the superior court's findings are supported by competent and substantial evidence. Having had two trials of the issue of facts petitioner is not entitled to a third trial of the facts on this appeal. The sole function of the reviewing court under these circumstances is to determine whether the trial court's findings are supported and there our function ends. Moran v. Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20.

[2] The trial court found (and we emphasize that the finding was made on conflicting evidence) that it was not true that deceased "sustained injury to his heart in the course of his duties" or that death resulted from any injury arising out of his employment in the fire department.

To prove her case appellant called two medical witnesses. To disprove it the respondents called the same number. Appellant says her witnesses were heart specialists and better qualified. Respondents say those witnesses were but "internists" and did not meet the learning and experience of the two called for the defense. The trial court believed the testimony of these two and rejected that of appellant's witnesses. That ends the controversy over "qualifications".

One witness testified that in his opinion the work of deceased as a fireman did not play a contributory role in his death. He gave an extensive analysis of his reasons for the opinion. He also testified that the autopsy revealed no occlusion prior to the fatal one. The claim of the applicant was based on an occupational injury in 1942. The deceased died in 1947. Two or three days before his death he was engaged in enameling his kitchen. He was visited by a friend who found the kitchen excessively hot, said to be necessary to make the paint run properly. Deceased was seated in a chair and appeared to be distressed. A day later he was found dead on the kitchen floor with a paint brush and opened can of paint nearby. The autopsy showed a heart occlusion occurring a day or less before the death.

The other witness called by respondents testified that he did not believe that the activities as a fireman recited in previous testimony had anything to do with the death. Asked to give his reasons he stated "he obviously had extensive arteriosclerosis and he had this occlusion of the right coronary artery of a few days duration. I think it has been demonstrated that there is no single occupation which predisposes to coronary arteriosclerosis and as far as I have been able to ascertain through reading the literature and through personal experience, I have seen no occasion that itself singled out men who participated in the occupation of fireman, and I think that this man had this arteriosclerosis of his coronary vessels which developed in him for whatever reason I don't know because I don't think the reason for developing arteriosclerosis is well understood medically. This man had it; I don't think his work had anything to do with it. I think that he had enough reserve to get along fairly well until he had this final occlusion which was found on autopsy, and I believe that that occlusion of the right coronary artery was the final event which precipitated death. And I further believe that there is no evidence in medical literature to indicate that exertion necessarily causes coronary occlusion. In other words, it appears to be an evolutionary process and I don't think it has been shown to be the result of exertion or strain."

This evidence is sufficient to support the findings under attack and it would serve no purpose to recite that which is in conflict or to cite the long list of authorities holding that the conflict in the evidence heard in the trial court is a matter for decision by that court alone.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

PEOPLE v. POWELL et al.

Cr. 2191.

District Court of Appeal, Third District, California.

Aug. 22, 1950.

Rehearing Denied Sept. 6, 1950.

Hearing Denied Sept. 21, 1950.

Ernest Powell and Harold Powell were jointly accused by information in two counts charging a violation of statute making it a crime to wilfully resist, delay or obstruct any public officer in discharge of his duty. The cause was tried to a jury in the Superior Court, Sonoma County, Hilliard Comstock, J., and Ernest Powell was convicted on one count and his codefendant was acquitted on both counts. From the judgment of conviction and an order denying motion for new trial, Ernest Powell appealed. The District Court of Appeal, Van Dyke, J., held that verdict of guilty on one count was properly received and recorded, notwithstanding announcement of court's intention to discharge jury in belief that they were unable to agree on either count, and that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal law ⇐1144(13)

On appeal from conviction, reviewing court must take the facts as impliedly found by jury, disregarding conflicting testimony favorable to appellant.

2. Criminal law ⇐872

Where trial judge, after announcing his intention to discharge jury as unable to agree upon a verdict, but before jury had been permitted to leave the box, discovered that there had been a misunderstanding and that jury had in fact agreed upon a verdict finding defendant guilty on one of two counts of information, trial court was bound to receive and record such verdict.

3. Obstructing justice ⇐7

One who physically attacks a police officer while engaged in quieting a public disturbance and arresting active disturbers of the peace is guilty of "obstructing a public officer" in performance of his duty. Pen.Code, § 148.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Obstructing a Public Officer".

4. Criminal law ⇐878(4)

Conviction on one count charging defendant with obstructing a police officer in discharge of his duty was not necessarily inconsistent with failure of jury to agree as to another count of information arising out of the same transaction and charging the same offense with respect to another officer. Pen.Code, § 148.

5. Criminal law ⇐877

Conviction of one defendant on one count of information jointly charging two defendants with obstructing a public officer in discharge of his duty was not necessarily inconsistent with acquittal of co-defendant on both counts of information. Pen.Code, § 148.

6. Criminal law ⇐1175

Defendant convicted on one of two counts of information jointly charging him and another with obstructing a police officer in discharge of his duty could not complain of acquittal of codefendant or jury's failure to agree as to his own guilt on the other count of information. Pen.Code, § 148.

7. Obstructing justice ⇐16

Evidence of assault upon a police officer while engaged in quieting a public disturbance sustained conviction of obstructing a public officer in discharge of his duty. Pen.Code, § 148.

Martin J. Jarvis, San Francisco, for appellant.

Fred N. Howser, Attorney General, By Gail A. Strader, Deputy Attorney General, for respondent.

VAN DYKE, Justice.

The appellant, Ernest Powell, and his brother Harold were jointly accused by information in two counts charging violation of Penal Code Section 148. That section makes it a crime for anyone to

wilfully resist, delay or obstruct any public officer in the discharge or attempt to discharge any duty of his office. By Count I the two brothers were charged as having committed the crime with respect to one George Wagner, and by Count II the same charge was made with respect to one Rudy Schinkel, both of whom were police officers. The cause was tried to a jury which returned verdicts of not guilty as to Harold Powell on both counts. As to Ernest Powell the jury found him guilty as to Count II, but failed to agree as to Count I. Ernest Powell moved for a new trial which was denied by the court and after judgment was pronounced he took this appeal from the order denying his motion for a new trial and from the judgment.

[1] The testimony produced at the trial was sharply in conflict on many matters, but under the well-known rule we are to take the facts as impliedly found by the jury, disregarding conflicting testimony which favored the appellant. So considered, the record shows the following: In the early morning hours of Sunday, April 17, 1949, the two police officers arrived at the Petaluma Cafe in Petaluma in answer to a police radio call regarding a disturbance at the cafe. Before they had arrived an altercation had taken place between two men in the cafe, but this altercation had died down by the time they reached the scene. There was a goodly number of people in the cafe and as the officers entered two women were then engaged in a second altercation. One of the women was making threatening gestures toward the other and Officer Wagner moved into separate the contestants, at which time the other woman struck a blow, felling her antagonist. Wagner picked up this woman and, after stating she was under arrest, took her to the police car and placed her in it. Officer Schinkel took hold of another woman who seemed to be participating in the affray, and, following Officer Wagner, placed her in the car with Wagner's prisoner. He then observed that Officer Wagner had been struck by a bystander, later ascertained to be appellant, and he pulled appellant away from Wagner. He then started to return to the cafe, and as he turned away appellant struck him, knocking him partially to the ground. Appellant then grabbed the officer's tie, pulled it around to his back, and the two men scuffled around for some time, until two other officers arrived and the altercation ended. Wagner and Schinkel were in uniform and wore badges. Appellant had been in the cafe when the first altercation started, was there when the officers entered, was in a position to observe what occurred and followed Wagner and his prisoner to the car. The jury were justified in finding that he knew the officers were there for the purpose of quelling the disturbance and that they were so engaged at the very moment when he struck Officer Schinkel and continued to scuffle with him, thus, for the time being at least, impeding him in the performance of his duty. There was a considerable crowd at the location of the trouble. They were "milling around" and a general state of excitement prevailed. The situation was plainly one where the soothing presence of uniformed peace officers was desirable.

The jury deliberated over their verdicts for some time and on several occasions were called into court and questioned as to their progress in reaching verdicts. When first called into court the jury stated that they had arrived at a verdict as to one defendant, but as to the other they had not. They were sent back for further deliberations and after some time were again called before the court, took their places in the box, and the foreman told the court it did not seem possible that the jury could agree as to the charges against one of the defendants, but that they had arrived at a verdict as to the charges against the other. The court then said: "I think I will discharge the jury as to the other defendant and you may hand the verdict you have agreed upon to the clerk." The court then stated that as to the matters concerning which the jury had not agreed it considered that they had made a sincere effort, but would ask if there were any of the jurors in the box standing in the majority who thought there was reason-

able possibility of reaching a verdict as to such matters. There was no response from the jury box. The court then stated that apparently it would be impossible for the jury to reach a verdict and that therefore the verdict which had been agreed upon would be read and recorded. This was done and the court then said: "In respect to the issues as to the other defendant in this case, this jury will be discharged as unable to arrive at a verdict." The court then requested that the unused forms of verdict be handed to the clerk, and the foreman then said: "What do we do with this, Your Honor? I have one signed here. Shall I destroy that one?" The court said: "Yes, if it not voted or agreed upon." The foreman replied: "This one has been voted on but it is only on one count." The court thereupon announced its intention to inquire further into the matter and since it appeared there might be an agreement on some issues the court would rescind and revoke what had been said about there being a deadlock as to issues outside the verdict that had been received. Thereupon the following occurred:

"The Court: Now, as to the defendant Ernest Powell in this case, have you agreed on a verdict, ladies and gentlemen, as to either count of the information?

"Foreman: Yes, Your Honor.

"The Court: Now, again, have you agreed as to the defendant Ernest Powell, as to the state of his guilt or innocence on one count?

"Foreman: Yes, Your Honor.

"The Court: As contained in the information?

"Foreman: That's right, Your Honor."

The court then instructed the foreman to hand the verdict as to Ernest Powell to the clerk. It was then read and by that verdict the jury found Ernest Powell guilty of the crime charged in Count II of the information, that is, the resisting and obstructing of Officer Schinkel. At the request of Ernest Powell, through his counsel, the jury was polled and it appeared that the verdict was unanimous. The court then again asked the jury if they had been unable to agree on Count I with respect to Ernest Powell and was informed they had so failed to agree and the court thereupon caused the one verdict as to Ernest Powell to be recorded and discharged the jury. During all the time the foregoing was transpiring the jury were in the box and under the control of the court. They had not separated nor been permitted to leave the box.

[2] Appellant Ernest Powell first contends that the verdict rendered against him was void because received after the jury had been discharged. In support of his contention he cites People v. Lee Yune Chong, 94 Cal. 379, 29 P. 776, and other cases, but the situations under which the verdicts successfully attacked in those cases were received differed materially from the situation in the case before us. For instance, in the Chong case the jury had left the box, had separated, had engaged in conversation with various persons, deeming they had been discharged and might therefore discuss the case, and it was held under such circumstances reversible error had been committed in thereafter re-assembling them and proceeding to receive and record a verdict. While it is true here that the court, laboring under the belief that the jury had not agreed on any verdict as to appellant, preliminarily announced its intention to discharge them, nevertheless the error was discovered before they had been permitted to leave the box and the court was therefore fully justified in rectifying, and, indeed, in the performance of its duties was required to rectify, the misunderstanding and receive the verdict which the jury had unanimously agreed upon. It often happens, due to the reluctance of jury members to speak out, that such misunderstanding as existed here will arise, and a trial court would be remiss in its duties if, before it lost control of a jury, it discovered that such a situation had developed and did not correct it. A fair interpretation of what occurred impels the conclusion that there had, in fact, been here no such discharge of the jury as would prohibit the court

from receiving its verdict as to appellant. We find no error in the court's procedure upon this point.

[3] Appellant next contends that the verdict as to him was inconsistent with the acquittal of his brother on both counts and with the failure of the jury to agree on a verdict with respect to Count I. We think it is unnecessary to follow appellant in his argument, although we have read his briefs with care. We think appellant misconceives the situation. As has been noted, the scene of action was a liquor-dispensing cafe; the hour was late and a goodly crowd had gathered; some tempers were high; insults had been exchanged; two fights had occurred, and, as some witnesses put it, the crowd was "milling. around". Peace officers arriving on call at such a time and place and under such circumstances are continuously in the performance of their duty. A part of that duty consists in moving about among those present, arresting active disturbers of the peace, if such there be, and as to others letting their mere presence have its salutary effect. Anyone who then physically attacks one of them obstructs him in the performance of his duty.

[4] There is no necessary inconsistency in the jury having held appellant on one count while disagreeing as to the other. The evidence was sharply conflicting and some of them may have believed him and others who testified that Wagner made an unjustifiable attack upon him and had been unjustifiably rough in handling the woman he arrested. Others may have believed the opposing testimony that Wagner was struck by appellant while properly and lawfully going about his work as a peace officer. And on the other hand the jury may all have believed that his subsequent attack on Schinkel was an unprovoked and vicious assault done with obstructive purpose.

[5-7] Neither is there anything necessarily inconsistent in the jury's having held appellant as to one count while freeing his brother Harold as to both. Here again, concerning the actions of Harold, the evidence was in conflict and the jury may have concluded that he believed from what he saw that the officers were acting without the law and that he lacked the necessary intent to impede or obstruct them in the performance of duty. All these matters were for the jury. And even if it could be said that they ought to have convicted Harold and appellant on all counts and did not do so, it is still something of which appellant cannot complaint. As for him the question is whether or not the conviction which the jury did impose upon him is supported by substantial evidence. We hold that it was.

The judgment and the order denying motion for new trial are affirmed.

ADAMS, P. J., and PEEK, J., concur.



99 Cal.App.2d 91

KING v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY.

Civ. 14538.

District Court of Appeal, First District, Division 2, California.

Aug. 21, 1950.

Proceeding by Rowland R. King against the Superior Court of the state of California, in and for the County of San Mateo, Alta P. King, real party in interest, for a writ of prohibition to stay the enforcement of the provisions of an interlocutory decree entered by the Superior Court in a divorce action instituted by petitioner's wife. The District Court of Appeal, Dooling, J., held that prohibition would not be granted to prevent the Superior Court from proceeding in the contempt matter merely on ground that court erred in the proceeding out of which the alleged contempt grew and that petitioner's remedy as to provisions of the original decree was an appeal from order denying a motion to strike those portions of the decree on grounds that the court had no jurisdiction.

Alternative writ of prohibition discharged and petition denied.

1. Divorce ⇐78

In a divorce action personal service on a defendant outside of state does not give jurisdiction over person and does not give greater jurisdiction than any other substituted service.

2. Divorce ⇐202, 289

In a divorce action, personal service on defendant outside state brings marital status before court but not person of defendant so that court lacks jurisdiction to award alimony or any allowance for support of children.

3. Prohibition ⇐3(1, 2)

Prohibition will not be granted in an appellate court to prevent superior court from proceeding in a contempt matter merely on ground that court erred in proceeding out of which alleged contempt grew and remedy of petitioner is to first present defense on hearing of contempt proceeding and then if found guilty of contempt, to apply to a higher court for a writ of certiorari or habeas corpus.

4. Prohibition ⇐3(1, 3)

Where husband had been personally served in divorce action with process in another state and thereafter appeared specially in divorce proceeding and challenged jurisdiction of trial court as to certain portions of decree with regard to items of property, and contested jurisdiction of court to make further order as to support and maintenance but motion was denied, and support order issued and thereafter an order to show cause in recontempt for alleged noncompliance, petitioner's remedy was by appeal from an order denying motion and if found guilty of contempt to apply for writ of certiorari or habeas corpus and prohibition would not be granted to stay enforcement of provision of the original decree.

5. Prohibition ⇐3(2)

The existence of a remedy by appeal ordinarily precludes resort to an extraordinary writ.

6. Prohibition ⇐5(1)

Completed judicial action cannot be reviewed by prohibition.

Winston Churchill Black, San Francisco, for petitioner.

Howe & Finch, Palo Alto, for respondent and real party in interest.

DOOLING, Justice.

[1, 2] Petitioner's wife instituted an action for divorce. Pursuant to an order for publication of summons of May 9, 1949 personal service was made on petitioner in the State of Nevada on June 27, 1949. Such personal service outside the state does not give greater jurisdiction than any other substituted service. First National Bank of Riverside v. Eastman, 144 Cal. 487, 490–491, 77 P. 1043, 103 Am.St.Rep. 95, 1 Ann. Cas. 626. It does not give jurisdiction over the person. Frey & Horgan Corp. v. Superior Court, 5 Cal.2d 401, 404, 55 P.2d 203. In divorce matters it brings the marital status before the court but not the person of the defendant so that the court lacks jurisdiction to award alimony or any allowance for the support of children. De La Montanya v. De La Montanya, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82, 53 Am.St. Rep. 165; Comfort v. Comfort, 17 Cal.2d 736, 751, 112 P.2d 259. After default the court granted an interlocutory decree in which it disposed of community property and gave custody of the children to the mother but did not grant any alimony, support of children or attorneys' fees and costs. The decree contains the following final provision: "(T)he Court reserves the further right to adjudge and assess further costs, attorneys' fees or other amounts in this or any further proceeding or proceedings which may be taken." On November 4, 1949 the court upon affidavit of the wife issued an order to show cause why petitioner should not be ordered to pay to the wife moneys for the support and maintenance of herself and the minor children of the parties and on account of attorneys' fees and costs. Petitioner was personally served with that order on November 5, 1949 within the State of California. At the time indicated in the order, November 28, 1949, petitioner, appearing specially, moved to vacate certain parts of the decree as to the disposition of community property and the above-quoted reservation solely on the

ground of lack of jurisdiction and also contested the jurisdiction of the court to make a further order. The court denied the motion to vacate and by order of February 3, 1950 ordered petitioner to pay $200 a month for the support of the wife, $200 a month for the children and $500 on account of fees and $100 on account of costs. The order recites the reservation of determination of the matter of support and fees and costs in the interlocutory decree. On March 20, 1950 the court issued an order to show cause in re contempt based on an affidavit of the wife stating that the above order had been personally served on petitioner in the State of California on February 16, 1950 but that he had not paid any amount in compliance. Petitioner now prays for a writ of prohibition.

Petitioner argues that jurisdiction of the person of defendant to enter a personal judgment for alimony and support could not be obtained by service of an order to show cause since the only method of obtaining personal jurisdiction for the entry of a judgment provided by our law is by service of summons. Code Civ.Proc. secs. 406–416; Hutton v. Dodge, 58 Utah 228, 198 P. 165, 166; Bernard v. Bernard, 79 Cal.App.2d 353, 179 P.2d 625; Nevin v. Pacific Coast & Norway Packing Co., 105 Wash. 192, 177 P. 739; Williams v. Board of Education of Trenton, 124 N.J.L. 380, 12 A.2d 127; Second Nat. Bank v. Prichard, 172 Ky. 190, 189 S.W. 14. Respondent counters with the claim that in his motion to strike portions of the decree petitioner made a general appearance and so submitted his person to the jurisdiction of the court. Raps v. Raps, 20 Cal.2d 382, 385, 125 P.2d 826; Judson v. Superior Court, 21 Cal.2d 11, 13, 129 P.2d 361; Security Loan & Trust Co. of Southern California v. Boston & S. R. Fruit Co., 126 Cal. 418, 58 P. 941, 59 P. 296; Olcese v. Justice's Court, 156 Cal. 82, 87, 103 P. 317.

[3] We need not decide these questions because the recent decisions of our Supreme Court make it clear that prohibition is not the proper remedy. Before the hearing the petitioner might by prohibition have attacked the jurisdiction of the court to proceed. Jardine v. Superior Court, 213 Cal. 301, 2 P.2d 756, 79 A.L.R. 291; Tolle v. Superior Court, 10 Cal.2d 95, 73 P.2d 607. Here however the action of the trial court has proceeded to the making of a judgment and it is the attempted enforcement of that judgment which is under attack. "The courts of this state have repeatedly held that prohibition will not be granted in an appellate court to prevent the superior court from proceeding in a contempt matter merely upon the ground that the court has erred in the proceeding out of which the alleged contempt grew. The remedy of the petitioner in such a case is to first present his defense upon the hearing of the contempt proceeding, and then, if found guilty of contempt, to apply to a higher court for a writ of *certiorari* or *habeas corpus*." Monjar v. Superior Court, 12 Cal.2d 715, 717, 87 P.2d 694, 695; C. S. Smith Metropolitan Market Co. v. Superior Court, 16 Cal.2d 226, 228–229, 105 P.2d 587; State Board of Equalization v. Superior Court, 20 Cal.2d 467, 471, 127 P.2d 4.

[4-6] The attempt to stay by prohibition the enforcement of the provisions of the original decree with regard to certain items of property over which it is claimed that the court had no jurisdiction must likewise fail. There is a plain remedy by appeal from the order denying the motion to strike those portions of the decree on the ground that the court had no jurisdiction over the property, Luckenbach v. Krempel, 188 Cal. 175, 204 P. 591, and the existence of a remedy by appeal ordinarily precludes the resort to an extraordinary writ. Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951. Furthermore completed judicial action cannot be reviewed by prohibition. Big Jim Mines, Inc. v. Superior Court, 9 Cal.2d 503, 71 P.2d 67.

The alternative writ of prohibition is discharged and the petition denied.

NOURSE, P. J., and GOODELL, J., concur.

99 Cal.App.2d 186

GILMORE v. GILMORE.

Civ. 17572.

District Court of Appeal, Second District, Division 3, California.

Aug. 23, 1950.

Amy Lucille Gilmore sued Benjamin Marion Gilmore for a divorce. From an interlocutory judgment of the Superior Court of Los Angeles County, Ray P. Brockmann, J. Assigned, granting plaintiff a divorce, defendant appealed. The District Court of Appeal, Shinn, P. J., held that the trial court's failure to make fact findings and conclusions of law constituted reversible error.

Judgment reversed.

1. Trial ⇐388(1)

The code provision, requiring fact findings by trial court on all material issues raised by pleadings and evidence, is mandatory, and judgment cannot be rendered until such findings are made and filed with court clerk. Code Civ.Proc. § 632.

2. Appeal and eror ⇐1071(1)

The trial court's failure to find on all material issues raised by pleadings and evidence is ground for reversal of judgment, unless such findings are waived. Code Civ. Proc. § 632.

3. Divorce ⇐150(2), 184(12)

Where wife's divorce complaint alleged and husband's answer denied that he was guilty of extreme cruelty, conflicting evidence on such issue would have warranted decision in either party's favor, and there was no waiver of fact findings and conclusions of law by trial court on all material issues raised by pleadings and evidence, court's failure to make such findings and conclusions constituted error requiring reversal of interlocutory judgment granting wife divorce. Civ.Code, § 131; Code Civ.Proc. § 632.

Willedd Andrews, Los Angeles, for appellant.

Jefferson & Jefferson, Bernard S. Jefferson, Martha Malone Jefferson, Los Angeles, for respondent.

SHINN, Presiding Justice.

The defendant appeals from an interlocutory judgment of divorce which, in addition to granting a divorce to plaintiff wife, adjudged that certain community property should be divided between the parties in the manner provided therein.

Plaintiff wife sued for divorce charging extreme cruelty on the part of defendant, praying for support, assignment to her of the community property, and incidental relief. Defendant's answer denied all allegations of the complaint.

On this appeal defendant makes no complaint concerning the division of the community property but contends that the evidence is insufficient to establish that he was guilty of extreme cruelty.

A review of the record shows that no findings of fact and conclusions of law were made, signed or filed by the trial court. In addition to making provision for the division of community property and the payment of attorneys fees, the interlocutory judgment of divorce recites merely that plaintiff is entitled to a divorce from the defendant but does not specify the grounds on which it was granted. Section 632 of the Code of Civil Procedure requires findings and conclusions on all material issues raised by the pleadings and evidence, unless they are waived in the manner provided for by the section. Section 131 of the Civil Code provides that in actions for divorce the court must file its decision and conclusions of law as in other cases. The judgment and record in this case are silent as to any waiver and we can conclude from this and the fact that defendant requested that the findings and conclusions be included in the record on appeal that there was no such waiver.

[1, 2] The code provision requiring findings is mandatory and there can be no rendition of the judgment until they are made and filed with the clerk. Brownell v. Superior Court, 157 Cal. 703, 109 P. 91;

Easterly v. Cook, 140 Cal.App. 115, 35 P.2d 164; Crim v. Kessing, 89 Cal. 478, 26 P. 1074, 23 Am.St.Rep. 491; In re Estate of Dodds, 52 Cal.App.2d 287, 126 P.2d 150; Cuneo v. Cuneo, 40 Cal.App. 564, 181 P. 229. The rule appears to be well settled that the failure to find on all material issues raised by the pleadings and evidence is ground for reversal unless findings have been waived. James v. Haley, 212 Cal. 142, 147, 297 P. 920; Parker v. Shell Oil Co., 29 Cal.2d 503, 512, 175 P.2d 838; Fairchild v. Raines, 24 Cal.2d 818, 830, 151 P.2d 260; Krum v. Malloy, 22 Cal.2d 132, 136, 137 P.2d 18; Petroleum Midway Co. v. Zahn, 62 Cal.App.2d 645, 652, 145 P.2d 371; Hamburger v. Hamburger, 60 Cal.App.2d 530, 141 P.2d 453.

[3] In view of the allegations of the complaint, the denial thereof, the fact that the conflicting state of the evidence on the issue of extreme cruelty would have warranted a decision in favor of either party, and the fact that there was no waiver, we cannot say that the failure of the trial court to make findings of fact and conclusions of law did not constitute reversible error.

The judgment appealed from is reversed.

PARKER, WOOD and VALLÉE, JJ., concur.



99 Cal.App.2d 38

GOMES v. BORBA.
Civ. 7731.

District Court of Appeal, Third District, California.

Aug. 17, 1950.

Rehearing Denied Sept. 16, 1950.

Hearing Denied Oct. 16, 1950.

Action by Frank J. Gomes against Mary Borba, also known as Mary Borba Azevedo, for specific performance of contract to sell realty and damages for loss of rents, profits and issues. The Superior Court, Stanislaus County, B. C. Hawkins, J., entered a judgment decreeing specific performance and awarding damages and defendant appealed. The District Court of Appeal, Peek, J., held that the findings were sufficiently responsive to issue as to fairness and justness of contract to support judgment, that evidence sustained finding that consideration was adequate and that determination as to reasonable value of rents, issues, and profits found support in the record and was binding on appeal.

Judgment affirmed.

1. Pleading ⇐182

In action for specific performance of contract to sell realty, affirmative allegations of answer which put in issue the fairness and justness of contract were deemed denied by plaintiff, though complaint did not allege facts to show that contract was just and reasonable. Civ.Code, § 3391; Code Civ.Proc. § 462.

2. Appeal and error ⇐193(1)
Pleading ⇐403(3)

Failure to allege in complaint facts to show that contract to sell realty was just and reasonable did not justify reversal of judgment decreeing specific performance of contract, where no demurrer was filed and no objection made at trial to sufficiency of complaint, any deficiencies of complaint were supplied by affirmative allegations of answer which put in issue the fairness and justness of contract, and record disclosed that such issues were vigorously contested. Civ.Code, § 3391; Code Civ.Proc. § 462.

3. Appeal and error ⇐931(1)

Trial court's findings and the reasonable inferences deducible therefrom must be liberally construed in support of judgment.

4. Trial ⇐396(1)

Finding that affirmative allegations of answer which put in issue the fairness and justness of contract to sell realty were untrue was sufficiently responsive to the issue so raised and litigated to support a judgment decreeing specific performance of contract, since court thereby inferentially found that contract was fair and just as to vendor. Civ.Code, § 3391.

5. Appeal and error ⇐1008(1)

Findings of fact which are adequately supported by the record are conclusive on appeal.

6. Specific performance ⇐121(8)

In action for specific performance of contract to sell realty, evidence sustained finding that the consideration was adequate. Civ.Code, § 3391.

7. Appeal and error ⇐1008(1)

In action for specific performance, adequacy of consideration is peculiarly a question of fact for trial court to determine in light of all the facts and circumstances of the particular case, and reviewing court will not disturb such a determination, unless trial court's conclusion finds no adequate support in the evidence. Civ.Code § 3391.

8. Specific performance ⇐129

Purchaser entitled to specific performance of contract to sell realty was also entitled to damages for loss of rents, issues and profits.

9. Appeal and error ⇐1013
Specific performance ⇐129

In action for specific performance of contract to sell realty, trial court properly considered both rental paid vendor under lease to her son and rental paid son under sublease in determining reasonable value of rents, issues and profits recoverable by purchaser, and trial court's determination thereof, based upon amount of rental paid under sublease, found support in the record and was binding on appeal.

10. Vendor and purchaser ⇐128

A contract to sell realty contained a condition implied as a matter of law that vendor would transfer to purchaser a title unencumbered and without defect, such as a lease.

J. W. Ehrlich, Roy A. Sharff, and Macklin Fleming, all of San Francisco, for appellant.

John H. Machado, San Jose, Nathan B. McVay, Modesto, for respondent.

PEEK, Justice.

Defendant Mary Borba prosecutes this appeal from a judgment decreeing specific performance by her of a contract to sell real property situated in Stanislaus county to plaintiff Gomes.

Plaintiff's complaint alleged defendant's ownership of the real property involved; the execution of the contract of sale on or about February 2, 1946 whereby defendant agreed to sell and plaintiff agreed to buy the real property involved for a consideration of $53,000.00; the payment of $1,000.00 by plaintiff to defendant upon the execution of the agreement as provided therein and defendant's acceptance thereof; the subsequent tender of the balance of the purchase price by plaintiff in compliance with the agreement and defendant's refusal thereof; the adequacy of the consideration in that "the sum of $53,000.00 mentioned in said agreement as the total purchase price of said property and as the consideration for said agreement is and at all times since the execution of said agreement has been a fair and reasonable value of said property"; the making of a demand by plaintiff upon defendant that she perform in accordance with the agreement, and lastly, that plaintiff was ready, willing and able to perform the contract. The foregoing complaint was subsequently amended to include a cause of action for the recovery of damages for the loss of rents, issues and profits from the time plaintiff was entitled to possession under the contract of sale.

Except for her admission of ownership of the property at the time of the execution of the contract of sale defendant's answer generally denied the allegations of the complaint, and affirmatively alleged that no sum less than $70,000.00 was a fair and reasonable value of the property at the time of said sale. In addition, the amended answer contained several separate and distinct defenses as follows: First, that defendant's consent was induced by means of alleged fraudulent representations made by plaintiff to her and her son; second, that she was a widow over the age of sixty years, without business experience and in ill health and by reason thereof was subject to domination by her son, Frank Borba; that plaintiff persuaded Frank Borba to coerce his mother's signature by falsely

representing to him that $53,000.00 was a high price for the property, and third, that she was not of sound mind at the time of the execution of the contract.

Subsequent to the filing of her answer Mary Borba was adjudged an incompetent person and the foregoing amended answer was filed by her guardians who were her son Frank Borba and her daughter Florence Killian.

Upon the issues thus raised the cause was tried by the court sitting without a jury, and upon the conclusion thereof the court adopted general findings that the allegations of plaintiff were true and specifically that each of defendant's separate defenses were untrue.

Defendant's appeal from the judgment, which was entered accordingly, raises three contentions:

(1) That the judgment is defective for failure of the court to find the contract to be just and reasonable and not the result of harsh practices, (2) that the court applied an erroneous standard in determining the adequacy of the consideration and the consideration was not adequate, and (3) that the court erroneously computed the damages allowed respondent for loss of rent, issues, and profits.

Appellant's first contention is premised upon section 3391 of the Civil Code, which provides that:

"Specific performance cannot be enforced against a party to a contract in any of the following cases:

"1. If he has not received an adequate consideration for the contract;

"2. If it is not, as to him, just and reasonable;

"3. If his assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled; * * *."

[1-5] Defendant specifically states that she is not attacking the sufficiency of the pleadings but what she contends to be the failure of the court to find upon the question of the fairness and reasonableness of the contract as to her, from which she concludes that the judgment must be reversed under the general rule requiring a plaintiff in an action for specific performance to both plead and prove that the contract was just and reasonable. George v. Weston, 26 Cal.App.2d 256, 79 P.2d 110; Joyce v. Tomasini, 168 Cal. 234, 142 P. 67. The rule does not apply to the instant case. Although the complaint did not allege facts to show that the contract was just and reasonable, Civil Code, section 3391; Joyce v. Tomasini, supra, no demurrer was filed and no objection was made at the trial to the sufficiency of the complaint. Moreover, the deficiencies of the complaint were supplied by the affirmative allegations of the answer previously mentioned which put in issue the fairness and justness of the contract. These affirmative allegations were deemed denied by plaintiff under the provisions of section 462 of the Code of Civil Procedure. See Remmers v. Ciciliot, 59 Cal.App.2d 113, 138 P.2d 306. An examination of the record discloses that such issues were the main issues litigated and were vigorously and exhaustively contested. Thus, the judgment may not be reversed on account of the mere defect in pleading. Bonney v. Petty, 125 Cal.App. 527, 13 P.2d 969; Drullinger v. Erskine, 71 Cal.App.2d 492, 163 P.2d 48. Liberally construing, as we must, the findings and the reasonable inferences deducible therefrom in support of the judgment, 2 Cal.Jur. pages 870, 871; Cushing v. Levi, 117 Cal.App. 94, 3 P.2d 958, it is apparent that they are sufficiently responsive to the issues so raised and litigated. Although there is no specific finding that the contract was fair and just the court did find the affirmative matters alleged in defendant's answer to be untrue, thereby inferentially finding the contrary to be true, that is, that the contract was fair and just as to the defendant. Such findings are adequately supported by the record and cannot be disturbed by this court on appeal.

[6, 7] Appellant's attack upon the finding that the consideration was adequate is likewise devoid of merit. Her contention in this regard is that respondent's expert

witnesses based their opinions as to the value of the land on general trends extending over a period of years and did not consider the inflation in land values at the date of execution of the contract to sell. Such contention is not sustained by the record. One of the experts called by defendant testified the value of the property to be $70,000.00, the other testified the fair value was $65,000.00. Against this testimony was that of one of the guardians, Frank Borba, that he believed $53,000.00 was a good price; of another witness, a banker, real estate broker and farmer for many years in Stanislaus county, as well as presently acting as appraiser for the Veterans' Administration and a large life insurance company, who testified that on the date of sale not over $500.00 per acre would be a fair value or $52,500.00, and another witness, an inheritance tax appraiser for many years, who testified that on said date $52,500.00 was the fair market value. Additionally the record shows that approximately a month prior to the date of the contract here in issue, defendant attempted to sell the property for $55,000.00. As stated in Helbing v. Helbing, 89 Cal.App. 2d 224, 200 P.2d 560, since adequacy of consideration is peculiarly a question of fact for the trial court to determine in light of all the facts and circumstances of each particular case, a reviewing court will not disturb such a determination unless it can be said that a trial court's conclusion thereon finds no adequate support in the evidence.

[8-10] In contending that the trial court erroneously computed respondent's damages, appellant does not dispute, nor could she, repondent's right to recover damages for the reasonable value of the rents, issues and profits. 23 Cal.Jur. 508, sec. 64. Rather she contends that the rental reserved in the lease to her son conclusively established the amount thereof and that the trial court erred in considering the rental paid her son under the terms of the sublease. We do not agree. It was proper for the trial court to consider the rental paid under both the lease and the sublease in determining the reasonable value of the rent, issues and profits and hence its determination thereof, based upon the amount of rental paid under the sub-lease, finds support in the record and is binding upon this court on appeal. To hold that the rental paid appellant by her son conclusively established the reasonable value of the rents, issues and profits would deny full effect to appellant's contract to sell the property since such contract contained a condition implied as a matter of law that appellant would transfer to the respondent a title unencumbered and without defect, 25 Cal.Jur. 623, sec. 123, such as appellant's lease. See 57 A.L.R. 1376.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

Hearing denied; SCHAUER, J., dissenting.



99 Cal.App.2d 77

ELLIS v. NATIONAL CASUALTY CO.
Civ. 7710.

District Court of Appeal, Third District, California.

Aug. 18, 1950.

Action by Charles Melville Ellis against the National Casualty Company, to recover moneys allegedly due under an insurance contract. The Superior Court, Solano County, Harlow V. Greenwood, J., entered an order denying the defendant's motion for change of venue, and the defendant appealed. The District Court of Appeal, Peek, J., held that a foreign corporate insurer sued in Solano County on group health and accident policy was entitled to have cause transferred to county of insurer's principal place of business, where complaint did not allege that contract of insurance was made or was to be performed or was breached in Solano County, and did not incorporate the insurance contract by reference.

Order reversed.

1. Corporations ⇐503(1)

The constitutional provision relating to county in which corporation may be sued,

rather than statute providing that all actions must be tried in county in which some of the defendants reside, is applicable to corporations in transitory actions. Code Civ. Proc. § 395; Const. art. 12, § 16.

2. Corporations ⇐666

The venue rules applicable to domestic corporations also apply to foreign corporations. Const. art. 12, § 16.

3. Corporations ⇐503(3)

While a plaintiff has a choice among forums enumerated in constitutional provision relating to county in which corporation may be sued, the propriety of plaintiff's choice is to be determined from pleadings of record at time motion for change of venue is filed. Const. art. 12, § 16.

4. Pleading ⇐45

A plaintiff is required to frame his complaint to establish his right to retain trial of action in county in which action is commenced. Const. art. 12, § 16.

5. Insurance ⇐618

A foreign corporate insurer sued in Solano County on group health and accident policy was entitled to have cause transferred to county of insurer's principal place of business, where complaint did not allege that contract of insurance was made or was to be performed or was breached in Solano County and did not incorporate the insurance contract by reference. Const. art. 12, § 16.

Peart, Baraty & Hassard, George A. Smith, Alan L. Bonnington, all of San Francisco, for appellant.

Millard Smith, Vallejo, for respondent.

PEEK, Justice.

The defendant National Casualty Company, a Michigan corporation, authorized and qualified to transact business in this state prosecutes this appeal from an order denying its motion for a change of venue from the Superior Court in and for the County of Solano to the Superior Court in and for the City and County of San Francisco. The foregoing motion was interposed in an action instituted by plaintiff Charles M. Ellis by which he sought to recover moneys allegedly due him under an insurance contract issued by appellant. The grounds specified in defendant's motion were that the contract was not made or entered into, to be performed, nor breached in Solano county and therefore that appellant was entitled to have the cause transferred to the city and county of San Francisco, its principal place of business.

Turning first to the pleadings, as we must, at the time the motion for change of venue was made (25 Cal.Jur. 907, 909, and cases cited) it appears that respondent's complaint is based upon a group health and accident policy entered into between California State Dental Association and defendant on December 15, 1946, a certificate of which policy was annexed to the complaint and incorporated therein as Exhibit A; that subsequent to the issuance of said policy respondent sustained a total disability resulting from an injury to his spine and that appellant has failed to make payments called for by the policy. Exhibit A, above referred to, which is entitled "Group Disability Policy Certificate", states that the National Casualty Company, Detroit, Michigan, "Has issued Group Disability Policy 998P No. 2010 effective December 15, 1946 Insuring the members of California State Dental Association" and recites therein that respondent "is insured under and subject to all the provisions and limitations of said Group Disability Policy" and further that "This certificate is furnished in accordance with and subject to the terms of the Group Disability Policy, which policy together with the Insured's application therefor and the Member's application, if any, constitute the entire contract of insurance. This certificate is merely evidence of the insurance and contains the essential provisions provided under said Group Disability Policy, * * *". The complaint contained no allegation that the contract of insurance was made, to be performed, or breached in Solano county nor does the certificate of insurance annexed to the complaint as Exhibit A contain any provisions relating to such matters. The Group

Disability Policy, under which the certificate of insurance was issued, was not introduced at the hearing on appellant's motion for change of venue. Thus, in the record before this court, there is nothing to indicate where the Group Disability Policy was entered into, to be performed, or breached.

[1-4] Section 16, Article XII of the California Constitution provides that "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." The foregoing provision, rather than the provisions contained in section 395 of the Code of Civil Procedure, is applicable to corporations in transitory actions. Cook v. W. S. Ray Manufacturing Co., 159 Cal. 694, 115 P. 318; De Campos v. State Comp. Ins. Fund, 75 Cal.App.2d 13, 170 P.2d 60. The rules applicable to domestic corporations also apply to foreign corporations. Bohn v. Better Biscuit Inc., 26 Cal.App.2d 61, 78 P.2d 1177, 80 P.2d 484. Thus under the foregoing constitutional provision a plaintiff has a choice among forums enumerated therein. Clark v. Policy-Holders Life Ins. Assn. 138 Cal. App. 505, 32 P.2d 653; Walker v. Wells Fargo Bank etc. Co., 8 Cal.2d 447, 65 P. 2d 1299. However the propriety of plaintiff's choice is to be determined from the pleadings of record at the time the motion for change of venue is filed. 25 Cal. Jur. 907; Modlin v. Walter's Fur Shop, 83 Cal.App.2d 384, 188 P.2d 805. Necessarily therefore the plaintiff is required to frame his complaint to establish his right to retain the trial of the action in the county in which it is commenced. Neet v. Holmes, 19 Cal.2d 605, 122 P.2d 557.

[5] Applying the foregoing rules to the instant appeal, it is readily apparent that the court erroneously denied appellant's motion for a change of venue. Respondent's complaint did not allege that the contract of insurance was made, to be performed, or breached in Solano county. It did not incorporate by reference the insurance contract but rather the certificate of insurance thereunder. Under such circumstances the appellant was entitled to have the cause transferred to the county of its residence.

The order is reversed.

ADAMS, P. J., and VAN DYKE, J., concur.



99 Cal.App.2d 80

HANCOCK et al. v. WILLIAMS et ux.
Civ. 4202.

District Court of Appeal, Fourth District, California.

Aug. 18, 1950.

H. H. Hancock and Mayme W. Hancock sued John H. Williams and Laura E. Williams for damages for fraudulent representations allegedly made by defendants when defendants sold realty to plaintiffs. The Superior Court of San Diego County, L. N. Turrentine, J., rendered a judgment adverse to defendants and defendants appealed. The District Court of Appeal, Mussell, J., held that evidence sustained findings that specifications of fraud relating to value of crop from avocado trees on realty, the income received from cabins on realty, and availability of the realty for trailer park purposes, were true, and that plaintiffs had suffered damages in amount of $8,000.

Judgment affirmed.

I. Fraud ⇐58(2)

In action for damages for fraudulent representations allegedly made by defendants when defendants sold realty to plaintiffs, evidence sustained findings that specifications of fraud relating to value of crop from avocado trees on the realty, income received from cabins on realty,

and availability of realty for trailer park purposes, were true and that plaintiffs had suffered damages in amount of $8,000.

2. Husband and wife ⇐25(2)

Where wife entrusted her husband with negotiations for sale of realty owned by them as joint tenants, and confirmed acts of husband by joining in deed and escrow when realty was sold to plaintiffs, and wife claimed a portion of proceeds of sale, trial court in action for damages for fraudulent representations properly found that husband acted as agent for wife and that wife was bound by acts of husband as agent of wife, as against contention that judgment adverse to defendants should be reversed as to defendant wife because alleged fraudulent acts and statements were made by husband without knowledge or consent of wife.

3. Fraud ⇐59(3)

The out-of-pocket loss rule is rule of damages to be applied when purchaser of realty suffers damages because of fraudulent representations concerning realty made by vendor. Civ.Code, § 3343.

4. Fraud ⇐59(1)

Damages suffered by purchaser of realty as result of fraudulent representations concerning realty made by vendor are to be assessed as of date of fraudulent transaction. Civ.Code, § 3343.

5. Fraud ⇐59(1)

Where part of purchase price of realty consisted of assumption by purchasers of a trust deed then on realty, and purchasers paid trust deed at a discount, and purchasers suffered damages as result of alleged fraudulent representations by a vendor, amount of discount would not be deducted from amount of damages purchasers suffered in determining amount of damages vendors were required to pay. Civ.Code, § 3343.

Fogarty & Vaughn, Don P. Fogarty, San Diego, for appellants.

H. G. Sloane, San Diego, for respondents.

MUSSELL, Justice.

Action for damages for fraud.

The defendants, John H. Williams and Laura E. Williams, husband and wife, were the owners as joint tenants of certain real property located at Solana Beach in San Diego County, consisting of approximately two acres, improved with seven cabins, a residence and about 135 avocado trees. On January 23, 1948, plaintiffs purchased the property from the defendants, through escrow, for the sum of $50,000. The escrow was closed on or about February 15, 1948, and plaintiffs thereupon took possession. On December 31st plaintiffs commenced this action for damages based upon fraudulent representations made by the defendants by which the plaintiffs were induced to purchase the property.

[1] The trial court found that the specifications of fraud relative to the value of the crop of avocados, the income received and the availability of the property for trailer park purposes were true, and found that the plaintiffs had suffered damages in the amount of $8,000. The evidence was sufficient to support these findings.

The plaintiffs had resold the property prior to the trial of the action for $42,000 and the trial court found that the $8,000 represented the difference between the actual value of the consideration which plaintiffs parted with and the actual value of the real property which they received.

Defendants do not here contend that the evidence is insufficient to support the finding as to the amount of damages but contend

1. That the judgment should be reversed as to the defendant Laura E. Williams because the evidence was that all of the alleged fraudulent acts and statements were made by defendant John H. Williams and without her consent or knowledge.

2. That the amount of damages awarded against defendant John H. Williams should have been reduced by the sum of $3,500.

[2] As to the first contention, the record shows that the defendant Laura E.

Williams did not personally make any representations to plaintiffs with respect to the property. However, it conclusively appears that she entrusted her husband with the negotiations for the sale and confirmed his acts by joining in the deed and escrow and that she now claims a portion of the proceeds of the sale. We conclude that the evidence was sufficient to support the implied finding of the trial court that under the circumstances her husband acted as her agent and that she was bound by his acts as such. Stegeman v. Vandeventer, 57 Cal.App.2d 753, 759, 135 P.2d 186, and cases there cited.

Defendants second contention is likewise without merit. In this connection, it appears that the $50,000 purchase price consisted of the assumption by plaintiffs of a first trust deed for $18,464.75 and a second trust deed for $11,500, then on the property; the execution of another trust deed to the defendants for $12,035.25, and the payment of $8,000 in cash. On or about March 29, 1949, plaintiffs paid the second trust deed at a discount of $3,500 and it is defendants contention that this sum should be deducted from the $8,000 damages allowed. The argument is that the Hancocks never parted with the $3,500 and were never "out of pocket" in that amount.

The amount of damages suffered in cases of this kind is to be computed under section 3343 of the Civil Code, which provides:

"One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction.

"Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled."

[3, 4] The measure of damages set forth in this statute, referred to as the "'out-of-pocket loss' rule", is the rule in this state. Bagdasarian v. Gragnon, 31 Cal.2d 744, 759, 192 P.2d 935, 945. It is also the rule that damages are to be assessed as of the date of the fraudulent transaction. Hines v. Brode, 168 Cal. 507, 511, 143 P. 729; Carter v. Turner, 90 Cal.App. 193, 200, 265 P. 870; Garstang v. Skinner, 165 Cal. 721, 726, 134 P. 329.

[5] The plaintiffs were clearly obligated to pay the full amount of the $11,500 trust deed. The mere fact that they were able to obtain a reduction in the amount of the indebtedness does not mean that the consideration paid by the plaintiff for the property was reduced by that amount. Defendants should not be permitted to be unjustly enriched after the consummation of the fraud by them. Baffa v. Johnson, 35 Cal.2d 36, 39, 216 P.2d 13.

The judgment is affirmed.

MUSSELL, J.

BARNARD, P. J., and GRIFFIN, J., concur.



STONE et al. v. YELLOW CAB CO. OF CALIFORNIA.
Civ. 17317.

District Court of Appeal, Second District, Division 1, California.

Aug. 25, 1950.

Hearing Granted Oct. 23, 1950.*

Acquanetta Stone, a minor, by her guardian ad litem, Jewel Stone, and Jewel Stone, sued Yellow Cab Company of California, a corporation, for injury to the minor which resulted when defendant's taxicab in which the minor was a passenger made a sudden stop. The Superior Court of Los Angeles County, Charles E. Haas, J., rendered a judgment adverse to plaintiffs and denied plaintiffs a new trial and plaintiffs appealed. The District Court of Appeal, Drapeau, J.,

* Dismissed March 22, 1951.

held that inquiry as to whereabouts of father of minor was irrelevant and prejudicial to interests of minor.

Judgment reversed and attempted appeal from order denying motion for new trial dismissed.

1. Infants ⇐90

Where minor is party to an action he must appear either by his personal guardian or by a guardian ad litem appointed by court for that purpose. Code Civ.Proc. §§ 373, 376.

2. Parent and child ⇐7(1)

The parent entitled to services of child has cause of action for injuries to child, and he may recover value of child's services during period of minority and expenses of medical care. Code Civ.Proc. § 376.

3. Infants ⇐72(2)

An injured child, unless emancipated, has a cause of action only for general damages for physical and mental suffering, and for future loss of earning power after majority. Code Civ.Proc. §§ 373, 376.

4. Infants ⇐77

The statutes regarding appointment of guardians ad litem were enacted to protect minors and not to preclude minors from their legal rights.

5. Infants ⇐77

A mother who as guardian ad litem of minor sued for injuries to minor was not a "party" to action, the court being in effect the guardian and the guardian ad litem being but an officer and representative of court. Code Civ.Proc. §§ 373, 376.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Party".

6. Infants ⇐105

Where mother as guardian ad litem of minor brings action for injuries to minor, court should look to best interests of minor and render a decree establishing and preserving rights of minor. Code Civ.Proc. §§ 373, 376.

7. Trial ⇐125(1)

Where action for injury was brought in name of injured child by mother of child as guardian ad litem, inquiry by defendant as to whereabouts of father of child was irrelevant and was prejudicial to interests of child where inquiry elicited information that father was in prison. Code Civ.Proc. §§ 373, 376.

8. Parties ⇐88(1)

Where action for injuries was brought in name of injured child by mother of child as guardian ad litem, and mother was joined in her individual capacity, any question regarding impropriety of joinder of mother in her individual capacity was waived by defendant when it was not objected to by special demurrer or answer.

9. Appeal and error ⇐110, 782, 870(6)

An attempted appeal from order denying motion for new trial would be dismissed since such order is reviewable upon appeal from judgment.

Morris Lavine, Los Angeles, for appellants.

James L. Ronnow and Harry B. Ellison, Los Angeles, Glenn R. Seavey, Los Angeles, of counsel, for respondent.

DRAPEAU, Justice.

The minor plaintiff, Acquanetta Stone, was injured when defendant's taxicab in which she was a passenger made a sudden stop on Wilshire Boulevard near LaBrea in the City of Los Angeles. Her mother, Jewel Stone, individually, and as guardian ad litem for the child, instituted this action to recover damages for such alleged injuries.

The cause was tried with a jury which brought in a verdict for defendant. Plaintiffs appeal from the judgment based thereon and from the order denying their motion for a new trial.

It appears from the record that about two o'clock in the afternoon of July 12, 1947, Mrs. Stone accompanied by her 3½ year-old child and a woman friend (since deceased) boarded defendant's cab at Wilshire and LaCienega. The child entered first and sat directly behind the driver, with the friend in the middle and Mrs. Stone on the right. The latter was feeling ill

and so advised the driver. The cab proceeded easterly on Wilshire Boulevard in heavy traffic which was controlled by automatic light signals.

Mrs. Stone testified that the driver "would just barely make the signal. We would get it on the light. * * * We were going from one lane to the other and we were passing cars." And had to stop from time to time. Just before they reached LaBrea, the driver "threw the brakes on * * *. We were all thrown forward. * * * My child went out of the seat and her head hit the seat that turns up in back. Then she slumped down. * * * I reached and picked my child up. * * * She had a cut over the eye * * *. She came to and started to cry. The blood was all over my clothes. * * * She was semiconscious."

They proceeded easterly to a medical center at Wilshire and Muirfield. The driver stopped and gave Mrs. Stone his handkerchief to "catch part of the blood" ran around the cab and said "You are ill. Let me carry the child."

Mrs. Stone also testified that the speed of the cab at the time of the accident was 45 miles per hour; that just before it occurred the driver "ran one red light and he caught two signals on the change."

On cross-examination, she stated that as the cab traveled in the middle lane about half a block west of LaBrea, she observed a car ahead stopped at the signal; that she "looked up and saw the red light and saw the car in front of us and I knew we were going to have an accident * * * because of the rate of speed we were traveling"; that the driver "threw the brakes on and made a sudden stop"; that her child was leaning against the back of the seat with her feet straight out and all three passengers were thrown out of the seat.

The witness, Mrs. Diamond, stated that at the time in question she was riding in an automobile proceeding easterly on Wilshire within five blocks of LaBrea; that she observed a Yellow cab go "through a red light as he passed us. We stopped at the red light and he went through"; that later the car in which she was riding caught up with the taxi; that she glanced into the cab and saw the injured child; that her car stopped near the medical center where she saw the cab driver carrying the child into the medical building.

The driver of the Yellow cab here involved testified that at the time of the accident he was traveling twenty or twenty-five miles per hour easterly "on Wilshire Boulevard in very heavy traffic. I stopped at stop and go signs and continued behind a car to LaBrea, and applied the brakes and the child went forward"; that when he first applied his brakes to make the stop at LaBrea, he was twenty-five or thirty feet behind the car ahead of him; was then going about twenty miles per hour, and stopped in ten feet. That when the sign changed to "go" he proceeded to a medical center about twelve blocks east of LaBrea; that when he carried the child into the doctor's office she was bleeding over the left eye, but was conscious and crying.

Dr Yonchar testified that the minor plaintiff was brought to his office about three o'clock in the afternoon of July 12, 1947, suffering from a straight-line laceration in the area of the left brow extending slightly beyond the hair margin; that the laceration was sutured "using two deep sutures and two superficial sutures"; that the child was given a general anesthetic and remained in his office for about three hours. A subsequent examination of the child showed a normal recovery insofar as the cut over the eye was concerned.

There is also evidence to the effect that after the accident the minor plaintiff would arouse from sleep crying aloud and apparently terror stricken; that she complained of headaches and pain around the eye; that her appetite was disturbed; and that she had a fear of intersections, of yellow taxicabs and of the color yellow.

Dr. Sonneland, a neuropsychiatrist who examined her, testified that in his opinion the child was suffering from a traumatic or fright neurosis which might continue indefinitely; that she would require observation and treatment twice a week for eighteen months to free her from these obsessions.

Appellants predicate prejudicial error upon the following inquiry during the cross-examination of Mrs. Stone over the objection of their counsel:

"By Mr. Ellison: Q. Where do you live? A. Now?

"Q. Yes. A. 731 South Crenshaw.

"Q. And what is your business or occupation? A. Manager of a private school and teaching.

"Q. Are you married? A. Yes.

"Q. What is your husband's name? A. William Stone.

"Q. Are you living with him? A. No.

"Q. Are you divorced? A. No.

"Q. Is he alive? A. Yes.

"Q. Does he live here in Los Angeles? A. No.

"Q. Where does he live?

"Mr. Lavine: Object to that as incompetent, irrelevant and immaterial.

"The Court: Cross examination.

"Mr. Lavine: Nothing asked about it on direct examination.

"Mr. Ellison: Section 376 vests in the father—

"The Court: She is a minor.

"Mr. Lavine: Only one guardian ad litem appointed.

"The Court: May be both involved. Objection overruled.

"Q. By Mr. Ellison: Where does your husband live? A. My husband is in San Quentin.

"Q. Then you are separated from your husband, is that right?

"(Witness cries.) The Court: Don't show any emotion.

"Mr. Ellison: Do you want to stop for a few minutes? (Mr. Lavine gives witness a drink of water.)

"Q. By Mr. Ellison: Are you feeling better now or do you want to take a little recess. A. I am all right.

"Q. I want to ask you a few questions. Don't want to embarrass you. A. I am all right.

"Q. All right. Where were you living at the time of this accident in July, 1947? A. July 12, 1947 I was living at 921 North Central, El Monte.

"Q. Were you living with your husband at that time? A. No."

It is here urged that the prejudicial effect of such inquiry constituted a denial of the fair trial guaranteed by the state and federal constitutions.

Respondent argues that since Mrs. Stone sued "in her capacity as mother of the child as well as guardian ad litem" the questions asked were justified under section 376 of the Code of Civil Procedure, which at that time provided:

"A father of a minor, or if the father is dead or the parents of said minor are living separate or apart and the mother of the minor then has care or custody of said minor, then the mother, may maintain an action for the injury or death of said minor child, *and a guardian for the injury or death of his ward,* when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury, or death, or if such person be employed by another person who is responsible for his conduct, also against such other person."

[1] Here the action was prosecuted in the name of the injured child, and as held in Hughes v. Quackenbush, 1 Cal.App.2d 349, 362, 37 P.2d 99, 105: "It is elementary that, when a minor is a party to an action, he must appear either by his general guardian or by a guardian ad litem appointed by the court for that purpose. Code Civ.Proc. sec. 372."

Section 373 of the Code of Civil Procedure details the procedure for appointment of guardians ad litem, to-wit: "1. When the infant is plaintiff the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant." The foregoing makes no mention as to which relative shall be given preference in such appointment, but the order of right to appointment of general guardian outlined in sections 1407 and 1408 of the Probate Code,

gives priority to "a parent" and "if the child is of tender years, it should be given to the mother".

The complaint herein alleges that "Jewel Stone has been appointed guardian ad litem of Acquanetta Stone, a minor, for the purposes of this action." Said allegation is admitted by the answer.

Section 376, Code of Civ.Proc., hereinbefore quoted, gives a right of action to the father, or under certain conditions to the mother, for injuries sustained by a minor child. It also gives a right of action to a guardian for the injury or death of his ward.

Said section clearly contemplates that such action may be maintained by a parent or by the child through his guardian. In this connection see Witkin's Summary of California Law, Vol. 1, page 700, sec. 133:

[2, 3] "*Personal Injury to Child.* (a) *Action by parent.* The parent entitled to the services of the child (i. e., usually the *father*) has a cause of action for injuries to the child. He may recover (1) the value of the child's services during the period of minority, and (2) the expenses of medical care. C.C.P. § 376; Bauman v. San Francisco, 1940, 42 Cal.App.2d 144, 160, 108 P.2d 989; Edgar v. Citraro, 1931, 112 Cal.App. 183, 297 P. 653; Finnerty v. Cummings, 1933, 132 Cal.App. 48, 22 P.2d 37; Durkee v. C. P. R. R. Co., 1880, 56 Cal. 388, 38 Am.Rep. 59; 6 So.Cal.L.Rev. 170; Rest., Torts, sec. 703. (b) *Action by Child.* The child, unless emancipated, has a cause of action only for 'general damages' for physical and mental suffering, and for future loss of earning power *after majority.* See Rest., Torts, sec. 703, Comment h. However, it has been held that where the parent sues as guardian ad litem of the child, recovery may be had for loss of earnings or services and medical expenses, on the theory that the parent is thus giving the right to the child. Bauman v. San Francisco, 1940, 42 Cal.App.2d 144, 160, 108 P.2d 989; McManus v. Arnold Taxi Corp., 1927, 82 Cal.App. 215, 223, 255 P. 755; Girard v. Irvine, 1929, 97 Cal.App. 377, 386, 275 P. 840."

[4] When a guardian ad litem is appointed and brings an action in the name of the ward, it must be assumed that the guardian has qualified as such. Consequently, any preference given to the father of the minor under section 376, supra, can have no further application to the situation. As was stated in Doyle v. Loyd, 45 Cal.App.2d 493, 497, 114 P.2d 398, 400: "The statutes regarding the appointment of guardians *ad litem* were enacted for the purpose of protecting the minors and not for the purpose of precluding them from their legal rights."

[5, 6] Also, the mother here as guardian is not a party to the action. Ocean Acc. & Guar. Corp. v. Industrial Acc. Comm., 88 Cal.App. 369, 372, 263 P. 823; O'Shea v. Wilkinson, 95 Cal. 454, 456, 30 P. 588. "The court is, in effect, the guardian of the minor and the guardian *ad litem* is but an officer and representative of the court. Cole v. Superior Court, 63 Cal. 86, 89, 49 Am.Rep. 78. In such a case it will be presumed that the court will look to the best interests of the child and will render a decree that will establish and preserve her rights." Serway v. Galentine, 75 Cal. App.2d 86, 89, 170 P.2d 32, 34.

[7] It follows that the inquiry in the presence of the jury as to the whereabouts of the father was completely irrelevant and out of place. Appellants' objection thereto should have been sustained. There is little doubt that this immaterial but harmful evidence created such a prejudice in the minds of the jurors that they failed to fully consider the material issues presented for their determination, i. e., (1) negligence of the taxicab driver, and (2) the extent of the injuries sustained by the little girl. In the words of appellants' opening brief: "Unquestionably the asking of this question and the answer to the question was a controlling factor in bringing about a verdict which otherwise never would have been rendered."

[8] Any question regarding the impropriety of the joinder of the mother in her individual capacity was waived by respondent when it was not objected to by special

demurrer or answer. Barnett v. Garrison, 93 Cal.App.2d 553, 557, 209 P.2d 426, citing House v. Pacific Greyhound Lines, 35 Cal. App.2d 336, 343, 95 P.2d 465.

In addition to the contention that the evidence established negligence of the taxicab driver as a matter of law, there are several claims of error in connection with (1) the admission and exclusion of evidence; (2) instructions given and refused; (3) conduct of the trial. Since these errors may not again arise upon retrial, it would serve no useful purpose to pass upon them at this time.

[9] The attempted appeal from the order denying the motion for a new trial is dismissed for the reason that such an order is reviewable upon an appeal from the judgment. The judgment is reversed and the cause is remanded for a new trial.

WHITE, P. J., and DORAN, J., concur.



98 Cal.App.2d 733

HARRIS et al. v. NATIONAL UNION OF MARINE COOKS & STEWARDS et al.

Civ. 14359.

District Court of Appeal, First District, Division 2, California.

Aug. 1, 1950.

Rehearing Denied Aug. 31, 1950.

Hearing Denied Sept. 25, 1950.

Alex Harris and others, brought suit against National Union of Marine Cooks and Stewards, an unincorporated association, and others to recover damages for loss of earnings resulting from their expulsion from the union and for a writ of mandate to compel the defendants to reinstate the plaintiffs in the union. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered an order granting the writ and awarding damages, and the defendants appealed. The District Court of Appeal, Dooling, J., held that the expulsions were made in violation of the union's constitution, and that therefore the plaintiffs were entitled to reinstatement and to recover damages for loss of earnings.

Affirmed.

1. Trade unions ⇐4.9

Where constitution of unincorporated labor union provided that members could be expelled only by vote of supreme quorum "after such action has been recommended by trial committee" and majority of trial committee had not recommended expulsion, expelled members were entitled to reinstatement after expulsion by supreme quorum which accepted recommendation of minority report of trial committee, notwithstanding that under Rules of Order, which had been adopted under by-laws as standard of procedure by union, adoption of minority report was provided for.

2. Trade unions ⇐3, 4.7

Constitution of unincorporated labor union constitutes contract with members and is measure of authority conferred upon organization to expel or otherwise discipline its members.

3. Trade unions ⇐4.10

Provision of constitution of unincorporated labor union stipulating under heading "Fines and Punishments" that expelled members could be reinstated only by referendum vote, could not properly be considered remedy within meaning of rule that member must exhaust his remedies within association before appealing to courts.

4. Associations ⇐7

Where organization has violated its own laws and arbitrarily violated members' property rights, rule of exhaustion of remedies by appeal to higher body within organization need not be adhered to before direct resort to judicial tribunal.

5. Trade unions ⇐4.9

Where constitution of unincorporated labor union in prescribing procedure for expulsion of members provided that charges should be investigated by trial committee elected by membership, members who were expelled on recommendation of trial committee drawn by lot were entitled to

reinstatement, notwithstanding custom of union to choose committees other than by election by membership.

6. Administrative law and procedure ⇐496 Associations ⇐5

Clearly erroneous administrative construction of definite and unambiguous provision of constitution of unincorporated association cannot operate to change its meaning.

7. Mandamus ⇐187(4)

In suit by former members of union for writ of mandate to compel their reinstatement in union, where defendant union did not raise in its answer the defense that the former members had waived their right to trial by properly constituted trial committee of union membership by their failure to object during expulsion proceedings, defense of waiver was not thereafter open to union on review of order granting writ.

8. Estoppel ⇐110

Waiver is affirmative defense which is itself waived if not pleaded in answer.

9. Trade unions ⇐4.12

Members who are wrongfully expelled from trade union are entitled to recover damages for loss of anticipated earnings because of wrongful interference with their right to work.

10. Trade unions ⇐4.12, 9

In action by former members of unincorporated trade union to recover damages for loss of earnings resulting from wrongful order expelling them from the union, union was in no position to complain that evidence did not clearly establish that plaintiff members would have been continuously employed even if not expelled from union.

11. Damages ⇐6

One whose wrongful conduct has rendered difficult ascertainment of damages cannot escape liability because damages cannot be measured with exactness.

12. Trade unions ⇐4.12, 9

In action by former members to recover damages for loss of earnings resulting from wrongful expulsion from union, where expulsion occurred and action was filed before adoption of Taft-Hartley Act, there was no merit to suggestion that trial court lacked jurisdiction to award damages for period after effective date of Taft-Hartley Act. Labor Management Relations Act 1947, § 1 et seq., 29 U.S.C.A. § 141 et seq.

Gladstein, Andersen, Resner & Sawyer, George R. Andersen, Ewing Sibbett, all of San Francisco, for appellants.

Aaron Sapiro and G. C. Ringole, Los Angeles, for respondents.

DOOLING, Justice.

Plaintiffs were members of defendant union and were purportedly expelled. The trial court issued a writ of mandate commanding their restoration to the union and awarding them damages for their loss of earnings which resulted from the orders expelling them. From this judgment the defendants have appealed.

Plaintiffs were members of a minority group in the union who opposed the adoption of a new constitution. They joined with an expelled member of the union to publish a paper which was extremely outspoken in its criticism of the union's officers and its activities. Written charges were filed against them which resulted in their expulsion by vote of the members.

The constitution of the union then in effect contained the following pertinent provisions:

"Article VIII, Section 1. In case of an accusation brought by one member against another, the membership shall elect a committee of five (5) members, two (2) of whom, in so far as possible, shall be of the same classified grade as the accused, the balance to be selected at large, whose duty it shall be to investigate and try such charges and report their findings together with recommendations for disposition of the case at the next regular meeting of the Headquarters or Branch electing such committee. The punishment to be administered shall be finally determined by the decision of such meeting at Headquarters or at

Branches except as otherwise provided in this Constitution.

* * * * * *

"Article XIV, Section 5. Members may be expelled from this Union only by vote of a Supreme Quorum, after such action has been recommended by a Trial Committee. To expel a member requires a two-thirds majority of the Supreme Quorum."

[1] As to three of the plaintiffs, Harris, Kaplan and Antons, we need go no further than the first sentence of Art. XIV, sec. 5 above quoted to find ample support for the judgment. A majority of the Trial Committee did not recommend the expulsion of these three. Their expulsion was recommended in a minority report signed by only two of the committee's five members. The provision quoted is clear: "Members may be expelled from this Union only * * * after such action has been recommended by a Trial Committee."

The union voted to substitute the minority report for the majority report and to concur therein. That this was a violation of the rule making the recommendation of a Trial Committee a condition precedent to expulsion is so clear that further comment is unnecessary. The fact that under the by-laws Roberts' Rules of Order were adopted as the standard of procedure and that those rules provide for the adoption of a minority report cannot change the plain requirement of the constitution nor convert by procedural sleight of hand the minority report into the recommendation of the committee which the constitution requires.

[2] The constitution of the union constitutes a contract with the members and is the measure of the authority conferred upon the organization to expel or otherwise discipline them. Smetheram v. Laundry Workers' Union, 44 Cal.App.2d 131, 136–137, 111 P.2d 948; Dingwall v. Amalgamated Ass'n etc., 4 Cal.App. 565, 569, 88 P. 597; Bush v. International Alliance, 55 Cal.App.2d 357, 364, 130 P.2d 788; Weber v. Marine Cooks' & Stewards' Ass'n, 93 Cal.App.2d 327, 334–335, 208 P.2d 1009.

[3] Appellants argue that plaintiffs did not exhaust their remedies within the union before appealing to the courts. They rely on section 7, Article XIV of the constitution, which reads: "No member expelled from this Union shall be reinstated to membership except by a referendum vote of Headquarters and Branches taken at three (3) consecutive regular meetings."

Rather than supplying a remedy for a wrongful expulsion this section imposes a strict limitation on the manner in which a member who has been once expelled may thereafter be reinstated to membership. It offers no relief to the wrongfully expelled member, but seems designed instead to make it difficult for a rightfully expelled member to regain his lost membership. In order to avail themselves of this section the expelled members must recognize the validity of their expulsion and ask for reinstatement. We agree with plaintiffs that this section provides a penalty (it appears in an Article headed "Fines and Punishments") and may not properly be considered a remedy within the meaning of the rule that a member must exhaust his remedies within the association before appealing to the courts.

[4] Furthermore this case falls within the rule announced in Weber v. Marine Cooks' & Stewards' Ass'n, supra, at p. 338 of 93 Cal.App.2d at page 1016 of 208 P.2d, that "where an organization has violated its own laws and arbitrarily violated a member's property rights the rule of exhaustion of remedies by appeals to a higher body within the organization need not be adhered to before direct resort to a judicial tribunal."

The suggestion that the expulsion must be upheld, however much the procedure violated the rights guaranteed to the members by the constitution, under the rule of Neto v. Conselho Amor etc., 18 Cal.App. 234, 122 P. 973, is answered by the fact that in the Neto case a member was forbidden to belong to a rival society under express penalty of expulsion and the plaintiff even at the trial in which she sought reinstatement persisted in her intention to retain her membership in the rival organization. There the only penalty provided was expulsion and plaintiff's persistence in

violating the rule being clear the court saw no purpose to be served in reinstating her. Here, conceding but not deciding, that plaintiffs' conduct justified discipline that discipline might be less drastic than their expulsion. Indeed under section 5, art. XIV it must needs be something less drastic than expulsion as to the three plaintiffs because the Trial Committee did not recommend expulsion in their case as required by the express language of that section.

[5, 6] As to the other two plaintiffs it is admitted that the Trial Committee which heard the charges against them was not elected by the union as expressly required by section 1 of art. VIII above quoted. The original members of that committee were drawn by lot and later some members were succeeded on the committee by others who were selected by a single officer of the union. The provision of the constitution that "the membership shall elect a committee" is too clear to need construction and was as clearly violated. No custom of the union to choose the committee in another fashion can alter the plain meaning of the plaintiffs' contract right to be tried by a committee *elected by the membership*. A clearly erroneous administrative construction of a definite and unambiguous provision of the constitution cannot operate to change its meaning. See Trabue Pittman Corp. v. County of Los Angeles, 29 Cal.2d 385, 399, 175 P.2d 512; Twaits v. State Board of Equalization, 93 Cal.App.2d 796, 801, 210 P.2d 40; Connell v. Stalker, 21 Misc. 609, 48 N.Y.S. 77, 79.

[7, 8] The claim that plaintiffs waived the right to trial by a properly constituted Trial Committee by failure to object, and in the case of one plaintiff to appear, is not now open to appellants. Waiver is an affirmative defense which is itself waived if not pleaded in the answer. Pohle v. Christian, 21 Cal.2d 83, 90, 130 P.2d 417; Mitchell v. Cheney Slough Irr. Co., 57 Cal.App.2d 138, 144–145, 134 P.2d 34; Wood v. Jotham Bixby Co., 29 Cal.App.2d 294, 299, 84 P.2d 204; Wienke v. Smith, 179 Cal. 220, 225, 176 P. 42.

[9-11] Plaintiffs' right to damages for loss of anticipated earnings is clear. Dotson v. International Alliance, etc., Employes, 34 Cal.2d 362, 374–375, 210 P.2d 5; Smetheram v. Laundry Workers' Union, supra, 44 Cal.App.2d 131, 139, 111 P.2d 948. Appellants are in no position to complain that it is not certainly established by the evidence that if plaintiffs had not been expelled from the union their employment would have been continuous. "One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness." Zinn v. Ex-Cell-O Corp., 24 Cal.2d 290, 297–298, 149 P.2d 177, 181.

[12] We find no merit in the suggestion that the court was without jurisdiction to award damages for the period after August 22, 1947, the effective date of the Taft-Hartley Act, 29 U.S.C.A. § 141 et seq. The damages were the result of a completed wrong, the illegal expulsion of the plaintiffs, and incidental to the court's admitted jurisdiction to give judicial relief for that wrong. The expulsions occurred, the wrong was complete and the action was filed all in 1945, long before the adoption of the Taft-Hartley Act.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

98 Cal.App.2d 723

PEOPLE v. SMITH.
Cr. 2652.

District Court of Appeal, First District, Division 1, California.

Aug. 1, 1950.

George E. Smith was convicted in the Superior Court, Santa Clara County, William F. James, J., of burglary in the second degree, and he appealed. The District Court of Appeal, Wood, J., held that evidence sustained the conviction.

Judgment and order appealed from affirmed.

1. Burglary ⇐41(1)

Evidence sustained conviction of burglary in second degree.

2. Criminal law ⇐761(13)

In burglary prosecution, instruction correctly defining crime of burglary, discussing elements of entry and of intent to commit theft and concluding with statement that it was up to jury whether defendant entered building "with intent of stealing, committing larceny" was not erroneous on alleged ground that instruction assumed guilt of defendant.

3. Burglary ⇐46(7)
Criminal law ⇐1186(4)

In burglary prosecution, instruction which failed to advise jury as to evidentiary significance of possession of defendant of stolen property was erroneous, but in view of record was not prejudicial error. Const. art. 6, § 4½.

4. Criminal law ⇐1186(4)

Where evidence of guilt is clear and convincing and it appears that a different verdict would not otherwise have been probable, ordinarily a judgment of conviction will not be reversed solely for error in or failure to give an instruction. Const. art. 6, § 4½.

5. Criminal law ⇐1186(4)

An incomplete instruction is not deemed ground for reversal if on examination of entire record it appears to court improbable that jury would have given a different verdict but for error. Const. art. 6, § 4½.

6. Criminal law ⇐824(1)

It is duty of trial court in a criminal case to instruct jury of its own motion, charging it fully and fairly on law relating to facts of case.

7. Criminal law ⇐824(8)

In burglary prosecution, where only testimony in any way bearing on a prior conviction was that voluntarily given by defendant, and he was not cross-examined as to any of his statements, failure of trial court on its own motion to instruct jury that evidence of defendant's prior conviction should be considered only as affecting defendant's credibility and not for other purposes did not constitute error, certainly not prejudicial error.

8. Criminal law ⇐1144(10)

In burglary prosecution, where only testimony bearing on a prior conviction was that voluntarily given by defendant, on which testimony he was not cross-examined, and there was no reference to a prior conviction except that information charged a prior conviction, and upon arraignment defendant admitted prior conviction, and record disclosed that after jury was impaneled information was read to jury and jury was informed defendant entered a plea of not guilty, it would be presumed, in absence of anything in record to contrary, that in reading information to jury clerk observed statutory requirements and omitted all thereof that related to previous conviction. Pen.Code §§ 1025, 1093.

9. Criminal law ⇐1144

There is a presumption of regularity in criminal proceedings.

Van H. Pinney, San Francisco, for appellant.

Fred N. Howser, Attorney General, David K. Lener, Deputy, N. J. Menard, District Attorney, Allan P. Lindsay, Deputy, County of Santa Clara, San Jose, for respondent.

WOOD, Justice.

Defendant was convicted of burglary in the second degree,—entry of a building, the

office of the Santa Clara County Building Inspector, Hall of Records, San Jose, with intent to commit theft therein. A charge of a prior conviction of a felony was found to be true. The appeal is from the judgment and from the order denying his motion for a new trial.

Two points are made upon this appeal: (1) Insufficiency of the evidence to support the verdict and (2) error in the giving of instructions to the jury.

As to the Sufficiency of the Evidence.

A typewriter belonging to the county and used in the county building inspector's office was removed, without permission, sometime between 5:30 p. m. of May 18, 1949, and 8:00 a. m. of the next day.

At about 7:30 p. m. of May 18, defendant took this typewriter to a tavern at 13 South Market Street, San Jose, offered it for sale, and sold it to the tavern proprietor for $28, stating that he was selling it for a finance company that had repossessed it, selling it for the balance due. He executed a receipt therefor in the name of "Russell Eggert," but did at the time exhibit identification cards which showed his true name, and on the witness stand he said he signed Eggert's name because it was Eggert's typewriter.

At about 5:20 p. m. of May 18, defendant went to this tavern, spoke to an employee there, offered a typewriter for sale, was told to telephone the proprietor at his house about the typewriter, apparently did telephone him, and then returned with the typewriter about 7:30 of that evening.

The proprietor, suspecting that the typewriter may have been stolen, called the police department and asked if it was all right if he bought it, and was told it would be, so long as he got a receipt for it.

In response to a call, two city police officers arrived at the tavern about 8:00 p. m. The receipt for the sale of the typewriter had already been executed. They asked defendant where the typewriter came from and he stated he got it from Russell Eggert, that Russell was parked opposite a firehouse about 100 yards from the tavern, in a '37 Dodge coupe, with Washington license plates; that Russell was parked there waiting for defendant; that it was Russell's typewriter—it had come from Dohrman's in Seattle; that defendant could prove it if he could get hold of Russell; that it was in the car when Russell was driving; that they left San Francisco that afternoon around 4:00 o'clock; that they were in need of money; that Russell asked defendant if he would go and sell it, and was waiting for defendant on the street; that the typewriter was in the car when they left San Francisco—in Russell's car, in the back.

The officers took defendant around in their car in an attempt to locate Eggert. Defendant stated that if Russell was not there he could locate him at the De Anza Hotel. After they made a tour of the district in the vicinity of the tavern looking for Eggert and were unable to find him, they went to the De Anza Hotel and checked, but no one by that name had signed up for a room. They again checked, but nobody had signed in at the hotel under the name of Eggert. The officers testified that they checked at the hotel as late as 2:00 a. m. of the following morning and could not find Russell Eggert or the Dodge coupe.

After they were unable to locate Eggert, defendant told the officers he did not come down with Eggert that afternoon, but came down on a bus. When asked when he last saw Eggert, he told the officers "yesterday," which would be May 17, and that he had not seen him since. Defendant testified that he did not tell anyone that the typewriter was in the automobile that he came down in, and that so far as he knew he did not tell the officers he came down in the car. He testified that he left San Francisco on a bus at 3:00 p. m., or a little after, and must have arrived at San Jose after 5:00 p. m.

The officers found but $26.02 upon the person of the defendant, aside from some loose change which was upon the bar and which, at their suggestion, he put in his pocket; defendant had told them he was broke and this was why he was selling the typewriter. Defendant testified that on that day, about four hours before he was put in jail, he drew $47 from his employer in

Daly City, paid about $15 of it for his board at Daly City, in advance, retaining the balance thereof; that he thought the policeman gave it back to him at the bar; that he received $28 from the tavern proprietor; that he did not know how much the proprietor gave him; that he did not give him any; that when the police took defendant the proprietor took the money; that defendant had the money in his hands; that beside that defendant did not have $30 or $35; that he had just what he turned over to the police, $26.02; that he laid it on the bar; that he had all of his paycheck except what he paid for board.

Concerning his possession and sale of the typewriter, defendant testified upon direct examination that Eggert was in the business of buying and selling service stations, including the equipment; that Eggert had this and another typewriter and an adding machine, told defendant he purchased them legitimately, and otherwise than this defendant did not know. Asked, upon cross-examination, if he told them at the tavern that he was repossessing the typewriter for a finance company, defendant said "That was all the information I had."

When defendant was apprehended by the officers at the tavern, there were two pencils found on his person, of the same kind as those used by the county building inspector's office, though not identified as having come from that office. At the trial, defendant stated he stole those pencils from San Quentin; that he did not steal them, that he took them with him, that they had a whole batch and he filled his pockets up.

The officers testified that defendant hold them the evening he was arrested that he had been earlier that evening to the county jail in an attempt to locate Charles Hambaugh, to ask him a favor. Hambaugh, the county jailor, testified that a few days before the trial defendant said he was down that way at possibly 5:30 in the evening, that he came with the possibility to stay all night, to sleep in the jail, and that defendant spoke to Deputy Sheriff King, who was the jailor at midnight. Defendant, on direct examination, referring to Officer Cannell's statement with reference to Hambaugh, said that Cannell got it turned around; that defendant came down to see the district attorney's office; that he did not come down to see Mr. Hambaugh, and that he came to ask if they would recommend that defendant go back to Carolina. But upon cross-examination defendant stated that shortly after he first went to the tavern to offer a typewriter for sale he went to the county jail, talked with Mr. King, deputy sheriff, asked if Hambaugh was working; that defendant wanted a place to spend the night, and told King he had the money but could not afford to spend it. The jail was situated about 25 feet from the county building inspector's office.

There is testimony that defendant had knowledge of means of access to the room where the typewriter was kept and used. The county building inspector's office was in a group of four rooms in the basement of the Hall of Records: an anteroom, the deputy building inspector's office, the building inspector's office, and a central equipment room. The anteroom had a door to the street which contained a small sliding panel which could be opened from the street side, an arm put through and the door unlocked. The deputy's office was next to the anteroom. The door from the anteroom to the deputy's office was never locked. The inspector's office was next to the deputy's office. The door between them was locked, but the key to it was kept in the top drawer of a desk near the door in the deputy's office. Another door from the anteroom opened into the central equipment room.

From about January 1 to March 11, 1948, defendant, a trusty in the county jail, worked for the county superintendent of buildings in the central equipment room. They worked the whole room, putting in counters and refinishing desks. One week-end the superintendent asked the defendant if he wanted to come in and work, and asked defendant if he needed a key, and defendant said no, he could get in. When asked how, he said, "I have a way to get in there." The superintendent did not know how defendant actually got in there; nevertheless, on week-ends defendant did work in the place and the superintendent was not there.

[1] The evidence amply supports the verdict. That a burglary was committed by someone appears without conflict. Defendant's possession and sale of the stolen property soon after its taking, while not sufficient of itself for a conclusion by the jury that he entered the building with intent to commit theft, is a circumstance which, taken with the corroborating evidence of defendant's offer to sell a typewriter shortly before the taking, his presence near the building thereafter and early in the two-hour period during which the building was entered, and his knowledge of the means of access to the office from which the property was taken; his conflicting statements concerning his movements on the day of the entry, the manner in which he acquired possession, for whom and for what purpose he sold the property, and what funds if any he had in addition to the money paid him for the property; and the nonavailability of the person from whom he said he obtained the property though search was made for that person, constituted evidence before the jury sufficient to connect defendant with the crime, amply sufficient in law to support the verdict of guilty. People v. Machabie, 33 Cal.2d 67, 69, 198 P.2d 681; People v. Russell, 34 Cal.App.2d 665, 669, 94 P.2d 400; People v. McCann, 34 Cal. App.2d 376, 377, 93 P.2d 643; People v. Golembiewski, 25 Cal.App.2d 115, 117, 76 P.2d 717; People v. Morris, 124 Cal.App. 402, 404, 12 P.2d 679; People v. Russell, 120 Cal.App. 622, 625, 8 P.2d 209; and cases therein cited.

As to Asserted Errors in Instructing the Jury.

Defendant claims that by instruction No. 9 the trial court erroneously told the jury that proof of possession of the stolen property by defendant was sufficient evidence that he entered the building with intent to commit theft, and assumed the guilt of defendant; and that error occurred in the asserted failure of the court upon its own motion to give instructions (1) to the effect that unexplained possession of stolen property soon after the taking, is not sufficient to justify conviction, and (2) that the evidence of defendant's prior conviction should be considered only as affecting defendant's credibility and not for other purposes.

Instruction No. 9 was as follows:

"The charge made against the defendant is that of burglary. Burglary is defined in Section 459 of the Penal Code of this State as follows, at least in so far as it refers to this particular case:

" 'Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, railroad car, mine, or any underground portion thereof, with intent to commit grand or petit larceny, or any felony is guilty of burglary.'

"In other words, in so far as this particular case is concerned, the element necessary to be proved is the defendant entered a building with intent to commit larceny. Larceny is stealing. This defendant in this case is not charged with stealing anything. Larceny is an entirely different offense. Burglary does not involve stealing at all. The principal charge of burglary is the unlawful entering of a building with that intent. If a person intending to steal breaks into a house, or building, whatever structure it may be, with intent, the minute he enters he is guilty of burglary, even if he does not take anything at all. Intent is a thing that exists in the mind of course is not susceptible of direct proof. There is no way of putting a witness on the stand, saying this man intended this or that, because that is in his mind, we can't open his skull and read it like a book, intent has to be proved, but may be proved by circumstances. You see every crime consists of an act and intent.

" 'The intent or intention,' says Section 21 of the Penal Code, 'is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused.' You determine what a man intends to do by what he does. If, for instance, a man breaks into your house and takes your money, there is no way of proving what was in his mind as to intent, but if proven he broke in the house and is caught with money, he hasn't any right to it, you have a right to draw the inference when he went in he intended to steal, because

after he went in he did steal. As I say, we are not charging this man with stealing this typewriter, but with entering the office of the Santa Clara County Building Inspector, located in the Hall of Records in the Court house of Santa Clara County with the intent to commit theft. And the basis, the method by which the People undertake to prove it is by showing from their testimony that this typewriter was in that building at a certain time, and that thereafter was in the defendant's possession, was sold by him, at least disposed of, and under the various circumstances shown in the evidence of this case. It is up to the jury to determine whether or not the defendant entered this building with the intent of stealing, committing larceny. I think that is about as clear a definition as I can give you."

[2] We do not derive from this instruction an assumption of guilt upon the part of the defendant. It correctly defines the crime of burglary, discusses the elements of entry and of intent to commit theft, and concludes with the reminder that "It is up to the jury to determine whether or not the defendant entered this building with the intent of stealing, committing larceny." The court had by other instructions properly advised the jury on such matters as the function of the jury as exclusive judges of the facts, the presumption of innocence, and the burden and degree of proof required.

[3] We consider this instruction uncertain and inadequate concerning possession of stolen property by a defendant. It tells the jury that the "method by which the People undertake to prove" entry by defendant with intent to commit theft is by testimony that this "typewriter was in that building at a certain time," and "thereafter was in the defendant's possession, was sold by him, at least disposed of, and under the various circumstances shown in the evidence of this case." This was a statement, in effect, that evidence of possession and "the various circumstances shown in the evidence of this case," were for the consideration of the jury in determining whether or not defendant entered the building and did so with the intent of stealing. This was not an instruction that mere possession of the stolen property by the defendant was sufficient to prove that he committed the burglary, but it did fail to advise the jury as to the evidentiary significance of such possession. There should have been an instruction framed upon the principle, expressed in People v. Russell, supra, 120 Cal.App. 622, at page 625, 8 P.2d 209, at page 210, that possession of stolen property "is a circumstance which may be considered by the jury in connection with other evidence," that there must be in addition to such possession "shortly after the commission of the crime, corroborating circumstances, acts, conduct, or declarations of the defendant tending to show his guilt," and that "failure of the accused to account for such possession upon a theory inconsistent with his guilt of the offense charged, or to show that the possession was honestly obtained, is itself a circumstance tending to show guilt." See, also, People v. Johnson, 85 Cal.App.2d 240, 244, 245, 192 P.2d 483; People v. Arbaugh, 82 Cal.App.2d 971, 987, 988, 187 P.2d 866; People v. Azbill, 134 Cal.App. 616, 619, 25 P.2d 1010.

[4, 5] But it does not necessarily follow that error in this regard requires a reversal of the trial court. The Constitution declares that "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Const., Art. VI, § 4½. Where the evidence of guilt is clear and convincing and it appears that a different verdict would not otherwise have been probable, ordinarily a judgment of conviction will not be reversed solely for error in or the failure to give an instruction. People v. Kelso, 25 Cal.2d 848, 853, 155 P.2d 819. Similarly, an incomplete instruction is not deemed ground for reversal if upon examination of the entire record it appears to the court improbable that the jury would have given a different verdict but for the error. People v. Bender, 27 Cal.2d 164, 177, 163 P.2d 8; People v. Koenig, 29 Cal.2d 87, 93, 173 P.2d 1. We have examined the entire rec-

ord, including the evidence, in the instant case and are convinced that no prejudicial error occurred, and that the same verdict would have been returned had the instruction been complete, clear, and correct in every respect.

The failure of the trial court upon its own motion to instruct the jury that evidence of defendant's prior conviction should be considered only as affecting defendant's credibility and not for other purposes, did not constitute error, certainly not prejudicial error.

[6] It is the duty of the trial court in a criminal case to instruct the jury of its own motion, charging it fully and fairly upon the law relating to the facts of the case. People v. Warren, 16 Cal.2d 103, 116, 104 P.2d 1024; People v. Putnam, 20 Cal.2d 885, 890, 129 P.2d 367.

[7-9] It does not appear that the facts of the instant case required the giving of any such cautionary instruction. The only testimony in any way bearing upon a prior conviction was that voluntarily given by the defendant. Upon direct examination he said, "they will bring it up, the prosecution will, pertaining to, we will say, a record from San Quentin. I doubt if I am the first one that ever went, or the last one. I was there for using a car without the owner's consent." Prior to taking the witness stand, he volunteered an explanation of his possession of certain pencils, stating, "I stole them from San Quentin, I know where they come from, I didn't steal them, took them with me, they had a whole batch, I filled my pockets up * * *." He was not cross-examined as to either of these statements, nor do we find elsewhere in the entire record any comment concerning or any reference to a prior conviction except that (1) the information charged a prior, and (2) upon arraignment defendant admitted the prior conviction. The record discloses that after the jury was impaneled the information was read to the jury and the jury was informed that the defendant entered a plea of not guilty. It is presumed, in the absence of anything in the record to the contrary, that in reading the information to the jury the clerk observed the requirements of sections 1025 and 1093 of the Penal Code and omitted all thereof that related to the previous conviction. There is a presumption of regularity of the proceedings. People v. Hickok, 96 Cal.App.2d 621, 216 P.2d 140; People v. Gonzales, 88 Cal.App. 245, 247, 262 p. 1115.

This is quite unlike People v. Blanks, 67 Cal.App.2d 132, 153 P.2d 449, upon which defendant relies. In that case the defendant, while on the witness stand, was asked as to certain prior convictions and admitted that he had been convicted of burglary and of receiving stolen property in other states. He requested, and was refused, an instruction that the admission of testimony with reference to prior convictions was for the sole purpose of impeachment and that such evidence was to be considered only in relation to the credibility of the defendant as a witness and as to the weight which should be given to his testimony. This request was made after a juror stated he did not understand a certain instruction "about the testimony being impeached, if they had been convicted of a felony previously." 67 Cal. App.2d at pages 136-137, 153 P.2d at page 452. The appellate court deemed the giving of the requested instruction "an important matter in view of the appellant's admissions as to prior convictions and the meager nature of the evidence connecting him with the crime." 67 Cal.App.2d at page 137, 153 P.2d at page 452. The instant case is more like People v. Owens, 79 Cal.App.2d 290, 299, 179 P.2d 401, in which no request was made for such an instruction and the evidence of prior conviction was offered by defendant as a part of his case in chief, in view of which it was held that the defendant should not be heard to complain. It cannot be the law that when a prior conviction is charged in the information, admitted upon arraignment, and never mentioned in the presence of the jury by the prosecution or the court, a defendant by voluntarily testifying or commenting concerning it can cast a duty upon the court of its own motion to give an instruction concerning it.

The judgment and order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

98 Cal.App.2d 755

WESTWOOD TEMPLE et al. v. EMANUEL CENTER.

Civ. 17563.

District Court of Appeal, Second District, Division 2, California.

Aug. 1, 1950.

Rehearing Denied Aug. 16, 1950.

Hearing Denied Sept. 25, 1950.

Westwood Temple, a corporation, and another sued Emanuel Center, a corporation, also known as Temple Emanuel of Beverly Hills and Westwood, for specific performance of a contract to convey five lots to plaintiff corporation. From a judgment of the Superior Court, Los Angeles County, Henry M. Willis and Arnold Praeger, JJ., for plaintiffs, defendant appealed. The District Court of Appeal, Moore, P. J., held that the consideration passing to defendant for the deed was adequate, that the contract was not void as made for the purpose of distributing a substantial portion of defendant's assets to a small minority of the members of its congregation in an illegal manner, and that proof of allegations of an amendment to defendant's answer for the purpose of establishing that defendant held the lots in trust for all such members was properly excluded.

Judgment affirmed.

1. Appeal and error ⇐1009(2)

In suit for specific performance of contract to convey realty, trial court's findings, supported by substantial evidence, that contract was just and reasonable, that its purpose was good, and that defendant received adequate consideration for realty cannot be upset on appeal from decree for plaintiffs.

2. Specific performance ⇐49(2), 121(2)

In suit for specific performance of contract to convey realty, necessity of adequate consideration for deed does not mean that value of things be given in exchange for realty must measure up to defendant's appraisement, but merely requires that consideration be just and fair under all circumstances and that its sufficiency be addressed solely to trial court's sound discretion and be supported by substantial evidence.

3. Specific performance ⇐49(2)

Adequacy of consideration for contract to convey realty, as required to authorize decree for specific performance thereof, must be determined as of date of contract.

4. Religious societies ⇐29

Compromise settlement of controversies between a rabbi's followers and adversaries in his congregation by dismissal of action, brought by some of such followers against incorporated synagogue and certain directors and members thereof for judgment declaring parties' rights, was a valid consideration for corporation's contract to convey city lots owned by it to another ecclesiastical corporation to be organized by rabbi and his adherents.

5. Religious societies ⇐12(5)

Dismissal of action, brought by some members of incorporated synagogue against corporation and certain directors and members thereof, for judgment declaring parties' rights, pursuant to compromise settlement of controversies between its rabbi's followers, including plaintiffs, and adversaries in congregation, was act of corporation, though signed by its attorney, and conclusive against collateral attack in suit for specific performance of corporation's contract to convey lots owned by it to another religious corporation to be organized by rabbi and his adherents. Code Civ.Proc. §§ 283, 1908.

6. Religious societies ⇐29

An incorporated synagogue, taking over and retaining all benefits awarded it under its contract to convey certain lots to another such corporation as consideration for settlement of all controversies between followers and adversaries of promisor's rabbi and making no offer to restore such benefits to rabbi, waived all claims of inadequacy thereof as consideration for deed.

7. Appeal and error ⇐169

An argument first made on appeal is not entitled to consideration.

8. Religious societies ⇐29

While plaintiff in derivative suit on corporation's behalf stands in relation of guardian ad litem and disposal of suit must be approved by court, plaintiffs' attorney's dismissal of action by members of incorporated synagogue against corporation and

divers directors and other members thereof for judgment declaring parties' rights constituted consideration for corporation's contract to convey realty to another such corporation, pursuant to compromise settlement of controversies between followers and adversaries of promisor's rabbi, as against contention that plaintiffs could not effect dismissal and compromise of action by their ex parte act without court's approval, where judge, participating as member of three-judge court in hearing of one plaintiff's application for receiver, ordered dismissal.

9. Religious societies ⇐29

Compromise settlement of controversies between rabbi's followers and adversaries in his congregation by resolution of conference of incorporated congregation's directors, committee of Jewish community council, such rabbi, and lawyers of parties to action by some members of congregation against corporation directors and other members for judgment declaring parties' rights, that corporation should keep its synagogue and transfer certain lots to council for conveyance to nonprofit corporation for religious purposes and that rabbi should resign and release all his claims against corporation and its members, constituted adequate consideration for corporation's contract to convey lots.

10. Religious societies ⇐29

A religious corporation's contract to convey city lots to nonprofit corporation, to be organized by promisor's rabbi and his adherents among members of his congregation, as consideration for settlement of all controversies between his followers and adversaries therein, was not void as made for purpose of distributing substantial portion of promisor's assets to small minority of its members in manner forbidden by law, as no dissolution was involved, contract was not a distribution of assets, and transfer was to be made to another religious corporation for conduct of worship according to same faith. Corporation Code, §§ 5000, 9800.

11. Pleading ⇐258(4)

In suit for specific performance of religious corporation's contract to convey city lots to nonprofit corporation, to be organized by promisor's rabbi and his adherents in its congregation, for religious purposes, in consideration of settlement of all controversies between his followers and adversaries in congregation, court properly refused promisor's request to file, and offer of proof under, amended answer, alleging that promisor held lots in trust for all members of congregation and hence had no power to convey them, after plaintiffs had introduced their evidence and defendant had made progress in making its proof.

12. Appeal and error ⇐959(3)
Pleading ⇐236(3)

Allowance or rejection of amended pleading, offered during trial, is within discretion of trial court, whose ruling disallowing amendment will not be disturbed on appeal, in absence of showing that it thwarted justice.

13. Religious societies ⇐20

A nonprofit ecclesiastical corporation has power, under statute, to dispose of all real property held by it in fee ownership. Corporation Code, § 9501.

14. Religious societies ⇐20
Trusts ⇐63¾

A nonprofit ecclesiastical corporation, purchasing city lots, to which title was taken in name of one who executed personal note secured by trust deed and transferred title to corporation, which reduced balance due on purchase price by monthly payments and discount to sum which certain members of congregation borrowed to pay off trust deed, after which note was liquidated with sums taken from building fund and corporation's general fund, held lots in outright ownership, not in resulting trust for all members of its congregation, and hence had power to convey them to another such corporation. Civ.Code, § 593; Corporation Code, § 9501.

Harry G. Sadicoff, Los Angeles, Henry S. Dottenheim, Beverly Hills, of counsel, for appellant.

Zuckerman, Edmunds & Francis, Arthur E. Edmunds, all of Los Angeles, Myron

W. Curzon, Los Angeles, and Norman Pittluck, Beverly Hills, of counsel, for respondents.

MOORE, Presiding Justice.

Appeal from a decree of specific performance of a written agreement made by an ecclesiastical body with its retiring rabbi. The contract was executed December 19, 1947. By its terms appellant agreed to convey five lots situate on Comstock Avenue in Westwood, a residential area of Los Angeles, as a consideration for the settlement of all controversies between the two factions in Emanuel and for the dismissal of a lawsuit which had been instituted by one Cytron and others in the superior court against appellant and certain of its members for a declaration of the rights of the parties. It was provided also that a nonprofit corporation should be organized on behalf of the rabbi and his adherents; that it should take title to the Comstock lots as soon as 150 members of Emanuel had resigned and joined the ranks of the Westwood congregation.

In order to reconcile the factions of Emanuel and to effect a settlement of the Cytron case, the Community Relations Committee of the Los Angeles Jewish Community Council[1] participated in the conference of the Cytron litigants and their attorneys. Although a settlement was agreed upon and was embodied in the contract here involved appellant refused to perform. All efforts of respondents and the Community Relations Committee to induce performance having been rejected, this action was commenced and resulted in a judgment against Emanuel, whence this appeal.

As grounds for reversal appellants assert:

(1) Respondents did not prove that the consideration for the contract was just and reasonable;

(2) The contract was illegal and void, having been made for the purpose of distributing a substantial portion of the assets of the corporation to a small minority of its members in an illegal manner;

(3) The court erred in excluding proof of the allegations of the "Amendment to the Answer" for the purpose of establishing that Emanuel held the Westwood property in trust for all members of the congregation.

Contract Was Just

[1] The trial court found the contract to be just and reasonable; its purpose good; its means of adjusting the several involved controversies to be reasonable and appellant to have received adequate consideration for the property. Such finding being abundantly supported by substantial evidence cannot be upset except by a repudiation of long established usages in appellate procedure. Haddock v. Knapp, 171 Cal. 59, 62, 151 P. 1140; Wilson v. White, 161 Cal. 453, 465, 119 P. 895. Conceding the property to be conveyed was worth $75,000, the rights surrendered by the rabbi were of no mean value. Their potential worth exceeded the last named sum. Had the plaintiffs prevailed in the Cytron case Mr. Trattner would have been made secure in his life tenure as rabbi of Emanuel at an annual salary of $15,000 with privileges that supplemented his income and opened a wider field for service. Also, he might have recovered by appropriate action the value of the slanderous utterances of his assailants. He would have been enabled to prosecute his spiritual and intellectual pursuits in peace and would have had to endure no more the taunts and resentments of his enemies at the altar. Even though the Cytron case was a representative suit instituted on behalf of Emanuel, none of the foregoing advantages to the rabbi would have been depreciated by reason thereof.

[2–6] The necessity for an adequate consideration in a specific performance action does not mean that the value of the things to be given in exchange for the

1. The Council is composed of representatives of over 300 Jewish organizations —as an overall Jewish group to carry on certain activities for the general good of Los Angeles Jewery. It maintains as its public relations arm "The Community Relations Committee of the Los Angeles Jewish Community Council," referred to herein as C R C.

property to be conveyed must measure up to the appraisement placed upon them by the defendant. The doctrine merely requires that such consideration be just and fair under all the circumstances and that its sufficiency be addressed solely to the sound discretion and determination of the trial court and be supported by substantial evidence. Cushing v. Levi, 117 Cal.App. 94, 102, 3 P.2d 958. Its adequacy must be determined as of the date of the contract. O'Connell v. Lampe, 206 Cal. 282, 285, 274 P. 336; Baran v. Goldberg, 86 Cal.App. 2d 506, 510, 194 P.2d 765. Even the dismissal of the Cytron action was a compromise of the controversies between the rabbi and his followers on the one hand and Emanuel and the rabbi's adversaries on the other. Such settlement was a valid consideration for the contract. Rohrbacher v. Aitken, 145 Cal. 485, 488, 78 P. 1054; Silver v. Shemanski, 89 Cal.App.2d 520, 531, 201 P.2d 418; Hart v. Kanaye Nagasawa, 218 Cal. 685, 695, 24 P.2d 815. Moreover, the dismissal, though signed by its attorney, was the act of Emanuel (Code Civ.Proc. sec. 283) and is conclusive against collateral attack. Code Civ.Proc. sec. 1908; Woodward v. Superior Court, 95 Cal. 272, 30 P. 535; Lieberman v. Superior Court, 72 Cal.App. 18, 34, 236 P. 570. But since appellant took over all the benefits awarded it by the contract it thereby waived all claims of their inadequacy. Peters v. Binnard, 219 Cal. 141, 150, 25 P.2d 834. Moreover, it has retained them all, made no offer to restore them to the rabbi and by reason of their nature restoration is impossible.

More About the Consideration

Temple Emanuel is a conspicuous center of Jewish worship in Beverly Hills on Wilshire boulevard, the main thoroughfare leading westward from the heart of the city of Los Angeles. It was organized in 1939 by 25 families with Mr. Trattner as its rabbi. He was then employed for the duration of his life to devote his entire time to the welfare of Emanuel to the exclusion of all other matters except literary, academic and lecture pursuits when not occupied with the labors of his pastorate. Such employment was pursuant to a section of Emanuel's by-laws which gave Trattner life tenure. Smooth sailing and pacific seas attended the course of the good ship Emanuel for about seven years. Then a tempest rose. Critics of the rabbi were emboldened to denounce him as not qualified. Discontent grew apace with the congregation which by 1947 was comprised of 650 families. The directors attempted to remove their pastor and the entire Jewish community of Los Angeles was disturbed. Some questioned the validity of the synagogue's agreements with their rabbi; some accused him of having accepted gifts from members, forbidden by his contract of employment; others challenged his authority and denied his right to act as Rabbi of Emanuel. Upon such issues the congregation became divided into hostile camps with his opponents bending every effort to discourage and discredit him. False charges were circulated against the rabbi by officers of the congregation to the pastor's detriment. They accused him of being insulting and domineering to some members; of having been gracious to those he thought wealthy; of having ignored those he thought poor; of having solicited members for gifts; of having fought a member; of having failed to perform his duty as rabbi; of having required some members to pay more dues than were required of others; of having caused 50 per cent of the members to resign. Some asserted that he had never been ordained pursuant to the canons of any branch of the Jewish faith. And for the purpose of effectuating their endeavors to remove him from his position at the head of the congregation in October, 1947, certain members employed private detectives to prevent the rabbi from attending the regular services and by physical force undertook to prevent him from entering the Temple. Failing thus to bar his entrance, they changed the locks on the doors and thereby prevented his entering until interrupted by an order of court in the Cytron action.

Basing their complaint upon such words and acts of those who had participated in the opposition to the rabbi, one Samuel D. Cytron and five other members instituted their action in the superior court for a declaration of their rights in the premises.

The settlement and compromise of that controversy formed the consideration for the contract here in suit. The Los Angeles Jewish Community Council having attempted a mediation of the internecine strife, brought about a meeting of Emanuel's directors at which the president presided, a committee of the Community Council were present as well at Trattner and the lawyers of the litigants in the Cytron case. The purpose of the meeting was to effect a settlement of all controversies which had agitated the Jewish community of Los Angeles and which had culminated in the Cytron case to the dismay of Trattner's enemies. The contract was the fruitage of such conference. Those participating seemed to have striven with a unanimity to silence forever the hostile contest which had raged. In the course of the deliberations one of the C R C committee in an attempt to establish a basis for compromise asked the attorney for Emanuel whether the latter would give the Temple to Trattner. The definite and emphatic negative was followed by an offer to give the Comstock lots to Trattner for the new synagogue and its communicants. Upon the acceptance of such offer, a resolution was unamimously adopted by the conference that (1) Emanuel keep the Wilshire synagogue; the Comstock lots be transferred to the Community Council to be by it conveyed to a nonprofit corporation to be used solely for religious purposes; (2) Trattner resign from Emanuel and release every conceivable claim against it and its members for libel and slander or for any other cause; (3) Emanuel's attorney prepare a draft of the contract with the assistance of Trattner's counsel, all points of disagreement to be referred to a committee of three specified members of the conference; (4) the completed draft be submitted to the directors of Emanuel for approval and authorization to execute the contract and any other document necessary to "carry out the letter and spirit of the agreement."

The adoption of that resolution was the effectual settlement of all controversies. However, in the course of the preparation of the draft the parties agreed that as a condition precedent to the final transfer of the Comstock lots a minimum of 150 members of Emanuel must resign and join Westwood Temple prior to April 1, 1948. The filing of the articles of incorporation of Westwood Temple on December 30, 1947, had been preceded by the execution of the final draft of the contract by all the necessary officers, by Trattner and Westwood and by the attorneys of the parties. That ceremony was followed by the formal dismissal of the Cytron case. The C R C of the Community Council having certified that 150 members had withdrawn from Emanuel and joined Westwood, respondents demanded conveyance of the Comstock lots. A deed was refused by Emanuel on the grounds that its officers were not authorized to execute the contract "as drafted" and it had never been approved by Emanuel's directors.

[7, 8] Appellant contends that inasmuch as the Cytron case was a derivative suit, instituted by members of the Emanuel congregation against the corporation and divers directors and members thereof the filing of the dismissal of the action by the plaintiffs' attorneys was meaningless and constituted no consideration for the contract. The basic theory of such contention is that by virtue of its derivative nature the plaintiff's could not by their *ex parte* act effect a dismissal and a compromise of the action without the court's approval, citing Whitten v. Dabney, 171 Cal. 621, 630, 154 P. 312; Spellacy v. Superior Court, 23 Cal.App.2d 142, 147, 72 P.2d 262; Russell v. Weyand, 5 Cal.App.2d 259, 260, 42 P.2d 381. Such argument appears for the first time on appeal and therefore is not entitled to consideration. However, in order that all claims may be disposed of, answer is now made to appellant's proposition. While it is true, as the last cited cases hold, that the plaintiff in a derivative suit on behalf of a corporation stands in the relation of a guardian ad litem and that a disposal of the action must be protected by the court's approval, there is no ground for complaint on that account. Pursuant to the order for dismissal signed by the attorneys of the parties, Judge Mosk ordered the dismissal. As a member of a three-judge court he had participated in the hearing of the applica-

tion of Cytron for a receiver and was therefore cognizant of the significance of the issues and of the meaning of a dismissal of the action.

[9] The foregoing narrative should suffice to establish the adequacy of the consideration passing to Emanuel for a deed to the Comstock lots. It is manifest that from the recited facts appellant's advantages were enlarged by its undisturbed occupancy of Temple Emanuel. The happiness of its members has necessarily increased by a riddance of their chief annoyance. They are freed forever from his claims for damages and from the unsavory notoriety created by the prosecution of the Cytron action.

On the other hand, what did respondents under the contract receive for their releases and their dismissal of the Cytron case? By agreement duly authorized and executed they were to get the Comstock property to be held in trust for religious uses. If used otherwise it must revert to Emanuel. The value of the lots so held was not by any means equivalent to the value of their unrestricted use. Their ownership and improvement of the lots by Westwood Temple is itself a benefit to every sincere follower of Israel for as a result of the conveyance a vacant property in one of the choicest communities on earth will be transformed into a center for Hebraic culture for the spread of rabbinical influences and for the extension of the morality and teachings of Moses and Elijah. The charters of both Emanuel and Westwood declare identical purposes.

The court below found on all issues as contended by respondents. Also, it determined that all the charges made by the members of Emanuel against the rabbi were false and slanderous. Such finding enhances the value of the concessions and releases made by the rabbi for the contract.

The Contract Is Not Void

[10] Appellant contends that the contract is void in that it was made for the purpose of distributing a substantial portion of Emanuel's assets to a small minority of its members in a manner forbidden by law. There is no basis, factual or legal, for such contention. A dissolution is not involved. The agreement to convey the Comstock lots is based upon a valid consideration advanced on behalf of an entirely separate corporate entity. In no sense is it a distribution of assets; hence neither section 9800 [2] nor section 5000 of the Corporation Code is in point. Neither is section 824 of the same code applicable. That statute inhibits the distribution of its assets among its shareholders except as provided by law. The transfer to be made by appellant is not only for an adequate consideration but it is to go to another religious corporation to be used for the conduct of worship according to the Jewish faith and in harmony with the program of appellant. Thereby the transferor itself gained the advantage of converting its waste places into a center of light and learning. The case of O'Dea v. Hollywood Cemetery Association, 154 Cal. 53, 97 P. 1, is not pertinent. It involved an attempt to divide and distribute the corporate capital. Such act was forbidden by Civil Code section 309.

No Error in Excluding Proof of the Amendment to the Answer

[11] After the trial had proceeded several days appellant offered an amendment to its answer for filing. The tardy pleading in substance alleged: defendant is a nonprofit corporation; it is not within its powers to enter into a contract to convey the Comstock lots; it purchased the lots for $73,750, paid it all except $45,000 which amount it requested its members and friends to pay so that appellant might build a synagogue wherein to engage in the ministration of Jewish rites and to teach the Jewish faith; to accomplish such purpose appellant established a "building fund" with which to pay the balance on the Comstock lots and erect an edifice; many persons paid money into the fund to be used as promised; a special bank account was opened for the purpose of receiving and

2. "A nonprofit corporation may dispose of all or substantially all of its assets, or may be wound up or dissolved, or both, in the same manner and with the same effect as a stock corporation, under the General Corporation Law."

holding the building fund to which was subscribed in excess of $50,000 and prior to December 18, 1947, the sum of $36,000 had been paid into the fund; such sum was used by defendant in paying the balance on the Comstock lots; the persons who subscribed to the building fund would not have done so except for the purposes announced by defendant; the money was subscribed and paid for the sole and exclusive purpose of clearing the Comstock property and erecting a building thereon and not for the purpose of obtaining a dismissal of the Cytron action or of settling any litigation against defendant; therefore the conveyance of such lots to Westwood would constitute a breach and violation of the purposes for which payments to the "building fund" were made.

The trial judge allowed the amendment to be filed solely "for the purpose of judicially acting upon it * * * of testing out its validity."

In the first place appellant by such a pleading attempted to intervene on behalf of other unnamed parties who evidently were not concerned about the disposition of the Comstock lots, or if so, cared too little to present their grievances. But, conceding the right of a defendant to file such a plea, the court was, under the circumstances disclosed, warranted in refusing a request to file it or in denying the offer of proof under it. The respondents had introduced their own evidence and rested and appellant had made progress in making its proof. To allow appellant under the circumstances to raise an utterly new issue such as that contained in its "amendment to the answer" could justifiably have been charged as an abuse of discretion. The complaint was filed July 9, 1948, after appellant had provoked the action by a flagrant repudiation of its promises while holding on to the entire consideration it had received. It must be deemed already to have researched the problems to be presented by the threatened suit. The trial commenced on March 15, 1949, and the amendment was not offered until seven days had passed. No valid reason is proposed and none has been ascertained why appellant should have been so favored. Diligence is a duty of one who creates a controversy and readiness to go forward at all times is an indispensable virtue.

[12] The allowance or rejection of an amendment offered in the midst of a trial is within the discretion of the trial court. Its ruling thereon will not be disturbed in the absence of a showing that the disallowance of the pleading thwarted justice. Neher v. Kauffman, 197 Cal. 674, 686, 242 P. 713; Salmon v. Rathjens, 152 Cal. 290, 296, 92 P. 733; Burr v. Pacific Indemnity Company, 56 Cal.App.2d 352, 360, 133 P.2d 24; Sullivan v. Richardson, 119 Cal.App. 367, 370, 6 P.2d 567; Estate of Goldman, 86 Cal.App. 125, 129, 260 P. 586; Johnson v. Johnson, 134 Cal.App. 460, 461, 25 P.2d 538.

The Amendment Is Considered

[13] There is nothing sacrosanct in the proposed amendment. It makes the archaic claim that Emanuel held the Comstock lots in trust for all the members of its congregation; that by virtue of the nature of an ecclesiastical corporation it is a trustee and each member is a beneficiary, citing Wheelock v. First Presbyterean Church, 119 Cal. 477, 483, 51 P. 841; Bomar v. Mount Olive M. B. Church, 92 Cal.App. 618, 628, 268 P. 665; Baker v. Ducker, 79 Cal. 365, 373, 21 P. 764; Los Angeles Holiness Band v. Spires, 126 Cal. 541, 545, 58 P. 1049. The cited authorities do not apply. They were all decided when former section 598, Civil Code, forbade a religious corporation to sell its property without first having obtained an order of court authorizing the sale. Giffen v. Christ's Church, 48 Cal.App. 151, 154, 191 P. 718.[3] In 1931 the General Non-

3. "The nonprofit corporation law as enacted in 1931 * * * extended and made more general the provisions for incorporation and increased flexibility of organization by optional provisions which were permitted to be included in the articles or in the by-laws. It provides that nonprofit corporations may amend their articles, sell their assets, and be dissolved or wound up in the same manner and with the same effect as stock corporations under the General Corporation Law. * * *" Ballantine & Sterling, California Corporation Laws, 1949 edition, section 418.

profit Corporation Law was enacted providing that every corporation may buy, sell, lease, mortgage and deal in real and personal property in the same manner that a natural person may. See Civ. Code, sec. 593. At the time of the Wheelock decision section 593 provided for the administration of the temporalities and for the management of the property and estate of any church; any church may become an incorporation. The court held that, 119 Cal. at page 483, 51 P. at page 843, "incorporation [of religious bodies] is only permitted as a convenience to assist in the conduct of the temporalities of the church." Such limitation upon the powers of the nonprofit corporation was removed by the corporation act of 1931. Section 9501 of the Corporation Code (1947) authorizes every nonprofit corporation to "convey, exchange, lease, mortgage, * * * transfer upon trust, or otherwise dispose of all property, real or personal." That statute leaves no doubt of the power of a nonprofit corporation *to dispose of all real property* held in fee ownership.

[14] Reverting now to appellant's contention made by the offer of the "Amendment to the Answer," the facts otherwise developed show that the Comstock lots were purchased by Emanuel in February, 1946, the title taken in the name of one Gold. The sum of $28,750 was the down payment, and a trust deed secured Gold's note for $45,000. The latter transferred title to Emanuel which by monthly payments and a discount reduced the balance due to $40,000 in August, 1946. At that time certain members of the congregation borrowed $40,000 on their personal note and paid off the trust deed. A drive was then made for a building fund whereby $36,245 was collected. This was supplemented with sums taken from the Temple's general fund and thereby the personal note of $40,000 was liquidated. The only document signed by the contributors to the building fund contained their agreement to subscribe the designated sum and these words: "in consideration of the subscription of others." In making its offer of proof of that writing and the names of the persons who subscribed, appellant's counsel stated that they "were told that their money would be used in connection with" the Comstock lots. Thus there was no proof made and none was offered that the Comstock lots were held on an express trust. No writing of Emanuel appears anywhere promising to hold the property in trust. No transfer was shown to have been made conveying it in trust. On the contrary the proof is clear that the lots were held in outright ownership by Emanuel which fact appellant had already admitted by its answer. As proof that the lots were not held in a resulting trust they were purchased with Emanuel's money and subsequent contributors made unconditional gifts.

Judgment affirmed; also order denying motion to disallow costs affirmed.

McCOMB and WILSON, JJ., concur.



98 Cal.App.2d 605

KERRIGAN v. MALOOF.
Civ. 14217.

District Court of Appeal, First District, Division 1, California.

July 26, 1950.

Rehearing Denied Aug. 25, 1950.

Hearing Denied Sept. 21, 1950.

John F. Kerrigan, as referee in partition, brought action under statute against Zerefa Maloof, a defaulting bidder, to recover difference between the sale price as bid by defendant and confirmed by the court, and the price obtained on a second partition sale, wherein the defendant cross-complained for the amount of her deposit. An order granting a new trial upon insufficiency of evidence and errors in the law after entry of a judgment for plaintiff on a directed verdict was entered by the Superior Court in and for the City and County of San Francisco, Melvyn I. Cronin, J., and the plaintiff appealed. The District Court of Appeal, Peters, P. J., held that trial court was in error when it struck the defenses involved from defendant's pleadings on ground that such issues

were res judicata and properly granted the new trial because of an error in law at the trial.

Order affirmed.

1. Judgment ⇐619, 713(2)

Defenses and causes of action between same parties once presented and considered cannot be again asserted in another action without a violation of the principles of "res judicata", and such rule includes not only all matters directly decided in the first action but also all matters in issue that could have been or might have been decided.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Res Judicata".

2. Partition ⇐104(2)

A defaulting purchaser at a partition sale cannot be held for the loss occasioned by a resale at a lower price when the conditions of the resale are different from those prevailing at the original sale. Code Civ.Proc. § 785.

3. Judgment ⇐735

Prior adjudications that original partition sale was valid, that successful bidder was bound by terms of that sale, that resale after bidder wrongfully refused to carry out her contract was properly noticed and conducted, and that any legal loss caused by the resale should be recovered from successful bidder, were not "res judicata" of issue as to whether terms of the two sales were substantially identical, so as to render successful bidder liable for difference in amount of her bid and amount received on the resale. Code Civ.Proc. § 785.

4. Partition ⇐35

The statute providing that no deficiency judgment shall lie in any event after any sale of real property for failure of purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to secure payment of balance of purchase price of real property does not impliedly repeal specific provisions of statute directly authorizing referees to bring action against defaulting purchaser in a partition proceeding for loss occasioned on the resale. Code Civ.Proc. §§ 580b, 785; Pol. Code, §§ 4481, 4482.

5. Statutes ⇐158

Repeals of statutes by implication may occur under certain circumstances, but such repeals by implication are never favored.

6. Partition ⇐35

The evils sought to be remedied and purposes sought to be effected by statute providing that no deficiency judgment shall lie in any event after any sale of real property for failure of purchaser to complete his contract of sale, or under a deed of trust, or mortgage given to secure payment of balance of purchase price of real property must be considered in determining whether such statute impliedly repealed specific provisions of statute directly authorizing referees to bring action against a defaulting purchaser in a partition proceeding for loss occasioned on the resale. Code Civ.Proc. §§ 580b, 785; Pol.Code, §§ 4481, 4482.

7. Mortgages ⇐375, 559(2)
Vendor and purchaser ⇐291

The purpose of statute providing that no deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to secure payment of balance of purchase of real property was to prevent creditors from buying in property for a nominal sum, after debtor has defaulted, and then holding the defaulting debtor for a large deficiency judgment. Code Civ.Proc. § 580b.

Knight, Boland & Riordan, F. Eldred Boland, John H. Riordan, F. J. Kilmartin, Burton L. Walsh, Oswald A. Hunt, all of San Francisco, for appellant.

Leo R. Friedman, San Francisco, for respondent.

PETERS, Presiding Justice.

This is an action brought under section 785 of the Code of Civil Procedure by Kerrigan, referee in partition, against Zerefa Maloof, a defaulting bidder, to recover the difference between the sale price as bid by Maloof and confirmed by the court, and the price obtained on a second partition

sale. Maloof cross-complained for $8,000, the amount of her deposit. At the close of the trial before a jury the trial court directed a verdict in favor of Kerrigan on all issues, and judgment was entered accordingly. Thereafter, on motion of Maloof, a new trial was granted "on insufficiency of evidence and errors in law." By the same minute order the court provided: "Orders striking out certain defenses and portions of cross-complaint set aside." From this minute order Kerrigan appeals.

The motion for a directed verdict and the motion to strike out certain defenses and a portion of the cross-complaint were granted on the theory that the basic issues involved were *res judicata* by reason of this court's decision in Hirschberg v. Oser, 82 Cal.App.2d 282, 186 P.2d 53. Maloof was the appellant in that action. The facts of that case, as set forth in the opinion, are as follows, 82 Cal.App.2d at page 283, 186 P.2d at page 54:

"Appellant was the successful bidder at the referee's sale of certain real property in the above entitled partition action. After the property had been sold to her, she refused to pay the purchase price, claiming misrepresentations to her by her own attorney. The validity of the sale is in nowise attacked. She contends that the proceedings for confirmation and subsequent proceedings are invalid.

"The sale took place July 3, 1946. On July 10 a 'Return and Account of Sale of Referee in Partition' was filed. After reciting the notices given of the sale, the proceedings at the time of sale the fact that the bid of appellant in the sum of $75,000 was the highest and best bid, that appellant deposited with the referee the sum of $8,000 of such bid, the fact that the property which is therein described was sold to appellant as the highest and best bidder, the return prays that after hearing the court, 'if it so determines, approve said sale and order said Referee to make a deed conveying said property upon the payment of the balance of the purchase price.' "

The opinion then points out that, in the manner provided by law, on July 20, 1946, the sale to Maloof was confirmed; that "Up to this point, the appellant was apparently satisfied with the sale and proceedings, and made no objections thereto. In fact, her attorney was present at the hearing, evidently for the purpose of making certain that the sale was confirmed to her." 82 Cal.App.2d at page 284, 186 P.2d at page 54. The opinion continues 82 Cal.App.2d at page 284, 186 P.2d at page 54: "On August 29 appellant filed a 'Petition to Vacate Sale and Relieve Bidder and Return Money' in which she asked that the sale be vacated because of alleged misrepresentations by her own attorney. The hearing of this petition was had on September 11 and denied by the court. The same day appellant filed a 'Dismissal Without Prejudice' of that petition."

On October 8, 1946, there was filed by the trial court a combination order confirming sale and a final decree in partition. The order recites that the property was sold to Maloof for $75,000, that the sale was legally made and conducted, and then confirmed the sale and ordered the referee to convey the property to Maloof upon receiving the balance of the purchase price.

The opinion continues, 82 Cal.App.2d at page 285, 186 P.2d at page 55:

"On October 25 there was filed a 'Supplemental Report of Referee and Petition for Instructions.' Notice of its filing and the date set for hearing was given to all parties, including appellant. This report set forth the fact that the referee on October 11 had tendered to appellant a properly executed deed of the property purchased by her at the sale and that she had refused to accept it and had notified him that she did not intend to complete the sale. It asked the court to order a resale, and to authorize the referee to recover from appellant any loss that might be occasioned by the resale, and asked for further instructions.

"At the hearing of this petition the court instructed the referee to resell and to retain appellant's deposit, and institute suit to collect from her any loss from the resale. On November 18, after notice given, appellant moved the court to 'Vacate and/or Modify Order of Resale.' This motion was denied by minute order on November 27.

"After reselling there was filed a 'Report and Return of Referee in Partition on Resale of Premises,' in which the referee set forth the proceedings by which he resold the property for $55,000. Notice of motion to confirm this report was given to appellant and all the parties. On December 18 appellant filed 'Objections to Confirmation of Resale of Real Estate.' On December 20 the court made and entered its order overruling appellant's objections and confirming the resale of the real estate. On December 27 the court signed and on December 28 filed an 'Order Denying Objections to Confirmation of Resale of Real Estate.'

"Appellant has appealed from (1) the final decree in partition; (2) the order denying the motion to vacate and/or modify the order of sale; (3) the order denying the objections to confirmation of the resale; and (4) the order confirming the resale."

This court affirmed all the orders appealed from. Among other things, it was held that the sale to Maloof had been validly confirmed, and that she was in default when she failed to pay the purchase price and to carry out the terms of the contract.

As pointed out above, Maloof's bid was $75,000, while on the resale the referee was able to secure but $55,000. Maloof had made an $8,000 deposit. Thus, the loss, occasioned by Maloof's default, was $12,000, plus $43 costs. The present action was commenced by the referee on April 22, 1948. The complaint sets forth the history of the case substantially as set forth above and asks for judgment for $12,043, with interest from the date of default. Maloof answered, denying the material allegations of the complaint, set forth some affirmative defenses, and cross-complained for the $8,000 deposit. On motion of the referee the trial court struck from Maloof's answer certain paragraphs which denied that the terms of the second sale were the same as those of the original sale, and further denied that the referee had suffered any damage by the failure of Maloof to pay the price bid by her. Certain paragraphs of the cross-complaint were also stricken on motion. These paragraphs alleged that Maloof's attorney was unauthorized to make a bid of $75,000 at the original sale, that no loss was incurred by the owners of the property by reason of the default because those who bid at the resale were part owners of the property sought to be partitioned, and because at the time of resale the property was reasonably worth $75,000 and should not have been sold for $55,000, and because the conditions and terms of the resale differed from those of the original sale. These motions to strike were granted on the theory that all such defenses already had been determined adversely to Maloof in the prior actions.

What issues are res judicata?

There can be no doubt but that, by the prior decision of this court, most of the issues sought to be raised by Maloof, and stricken by the trial court, have already been decided adversely to Maloof. The prior decision adjudicated the validity of the first sale, determined that that sale had been legally made and conducted, determined that Maloof had been the highest bidder at that sale and had bid $75,000, and deposited $8,000 on the purchase price, and that this bid had been validly confirmed by the court. It also finally determined that a proper tender of a deed had been made by the referee, but that Maloof had refused to accept it and defaulted in the purchase. It also finally determined that upon petition of the referee the court instructed the referee to resell, to retain the $8,000, and to institute suit to collect from Maloof any loss from the resale. The validity of the resale has also been adjudicated.

[1] The point need not be labored that defenses and causes of action between the same parties once presented and considered cannot be again asserted in another action without a violation of the principles of *res judicata*. This includes not only all matters directly decided in the first action, but also all matters in issue that could have been or might have been decided. 2 Freeman on Judgments (5th Ed.), p. 1646, § 774; Servente v. Murray, 10 Cal. App.2d 355, 364, 52 P.2d 270; In re Estate

of Clark, 190 Cal. 354, 360, 212 P. 622; Sutphin v. Speik, 15 Cal.2d 195, 202, 99 P.2d 652, 101 P.2d 497; Borland v. Borland, 56 Cal.App. 638, 641, 206 P. 478; Crew v. Pratt, 119 Cal. 139, 149, 51 P. 38.

It follows, of course, that all matters heretofore litigated are *res judicata*. They have been enumerated above. The only serious question is whether the issue as to whether the terms of the second sale were the same as those of the first sale was decided in the prior proceedings.

In the instant case, in her answer, Maloof alleged that the sale was not made upon the same terms and conditions as the original sale "in that said sale was made subject to whatever rights the said defendant [Maloof] may or might have had by virtue of an appeal filed prior to the date of said sale." In her cross-complaint Maloof alleges that the offer of resale "contained the condition that said property was resold subject to her [Maloof's] rights, which may or might accrue by virtue of her appeal * * *; that [on the resale] no independent bidders bid on said property and that * * * the only bidders * * * were A. Hirschberg and Dwight Gaylord, attorney for the estate of Amelia Waterland, deceased, both of whom were co-owners of the property under the original sale." The cross-complaint also contains an averment very similar to the one contained in the answer and quoted above. In addition, at the trial, Maloof made an offer to prove that the referee at the resale "announced to the assembled persons that the sale was made subject to any right existing in the defendant and cross-complainant by reason of the appeal then pending before the District Court of Appeal. * * * that the consensus of opinion at that assembled gathering was that the purchasers of the property, they were purchasing a lawsuit; and that the bid of Mr. Hirschberg in the sum of $55,000, as compared to his partner and co-plaintiff at the previous sale, which proof will show that the said David at the previous sale bid $74,000, was—the bid of $55,000 was made due to the fact that there was an appeal pending that had not been determined as to whether the property would have any cloud on its title, or just exactly what the purchaser was buying." The trial court, on motion, struck the quoted paragraphs from the pleadings, denied the offer of proof, and also refused to allow Maloof to prove that the purchasers at the resale were the owners of a four-fifth's interest in the property purchased by them. These rulings were based on the theory that all of these issues were *res judicata*.

Of course, without now considering the doctrine of *res judicata*, the mere fact that Maloof had an appeal pending when the resale was had, would not make the terms and conditions of the resale different from those of the original sale, because, as a matter of law, that appeal could have had no effect upon the title to the property. Maloof, on that appeal, was not claiming title, but was seeking to avoid the transaction. Certainly, a defaulting purchaser cannot, by simply appealing from the confirmation of the sale, prohibit a resale until the appeal is decided, or prohibit a judgment against him for the loss occasioned, on the ground that because of an appeal, in no way affecting title, the terms of the resale are different from those of the original sale. But here the pleadings, and particularly the offer of proof, went further than merely to offer to prove that an appeal was pending—the offer was that the referee represented to the prospective bidders, and the bidders believed, they were buying a lawsuit that would be a cloud upon the title. If the referee made any such representations, then, the resale would have been held under conditions radically different from those prevailing at the original sale. It must be remembered that the original sale was had in July, 1946, and the resale was made on December 2, 1946. At the original sale Maloof bid $75,000, and there was an offer to prove that a man by the name of David was a partner of Hirschberg and that he bid $74,000 at that sale. Yet, less than six months later, Hirschberg bid but $55,000, and apparently David made no bid. It is a possible inference that the difference between the bids was caused by reason of the fact, if it be a fact, as Maloof offered to prove, that the referee represented

that the purchaser at the resale was purchasing a lawsuit, and that the appeal was a cloud on the title.

[2] Considering this point on its merits, there can be no doubt that, if the referee represented that the appeal constituted a cloud on the title and that the bidder at the resale was purchasing a lawsuit, then the referee would be barred from successfully maintaining this action. Ever since the decision of the Supreme Court in Hammond v. Cailleaud, 111 Cal. 206, 43 P. 607, 52 Am.St.Rep. 167, it has been the law that a defaulting purchaser at a partition sale cannot be held for the loss occasioned by a resale at a lower price when the conditions of the resale are different from those prevailing at the original sale. In that case, the defendant purchased at the original sale for $7,500, paying in cash ten per cent of the purchase price as a down payment. He subsequently defaulted, claiming that the title to the property was defective. Over his objections on this ground the sale was confirmed. He defaulted. Thereafter, at a resale, the highest bid was $5,000. The plaintiff instituted the action for the amount of the loss occasioned by the resale. The defense was that at the resale the referee made it clear to all bidders that they had to take title as it stood, and that there was no warranty of title, while at the original sale, every one thought that a clear title was offered. The court refused to allow defendant to prove these facts. This was held to have been error. At page 219 of 111 Cal., at page 610 of 43 P. the court stated: "These authorities clearly show that for any error, irregularity, or misrepresentation of the officer, whether intentional or otherwise, whereby the purchaser has been misled to his prejudice to such extent as to make it unconscionable that his contract of purchase should be enforced against him, the sale will not be confirmed. But in this case, as here presented, it is not necessary to go further than to hold that if, by the alleged terms and conditions of the sale to appellant, he was led to bid more for the property—to any material extent, at least—than he would if he had been informed, as the purchaser was, at the second sale, that he must take the title as it was, whether defective or not, it is obvious that the resale did not furnish any just measure of damages. No fact or circumstance is disclosed by the record, other than the different conditions under which these sales were made, which tends in any degree to account for the difference between the final bids at these two sales; and, under such circumstances, we must conclude that all above the amount of the second sale which was bid at the first was induced by the condition that the purchaser took no risk as to the title. The owners are estopped from saying that the price obtained upon the second sale was inadequate, since they are not shown to have opposed confirmation upon that ground, and therefore the presumption is strengthened that the higher price obtained at the first sale was secured by the more favorable conditions given to appellant."

Under the rule of this case it is quite clear that, in the instant case, the trial court should have permitted Maloof to prove, if she could, that the terms of the two sales were substantially different. If she could prove that such was the fact, she had a complete defense to the action for the claimed loss. The referee does not attack the rule of Hammond v. Cailleaud, supra, and does not deny that, if it was permissible to raise the point, the trial court was in error in striking this defense from the pleadings and in refusing to permit the offer of proof, but simply contends that the issue was decided adversely to Maloof in the prior proceedings.

This claim of *res judicata* is based upon the following facts: After the resale Maloof objected to its confirmation on the ground that the resale had been made subject to the appeals in the Hirschberg case. Over these objections the court, on December 20, 1946, confirmed the resale, on December 28th filed an "Order Denying Objections to Confirmation of Resale of Real Estate," and also entered an order denying the motion to vacate or to modify the order of resale. Thus, so it is claimed, there were three separate adjudications of the very issue here involved.

[3] We do not think that by these orders the court was passing upon, or could then pass upon, the amount of the loss that could be recovered from Maloof occasioned by the resale. The court did adjudicate that the original sale was valid, that Maloof was bound by the terms of that sale, that the resale was properly noticed and conducted, and was valid, and that any legal loss caused by the resale should be recovered from Maloof. But at that time there was and could be no issue as to whether the terms of the two sales were substantially identical. Whether they were or were not identical did not affect the validity of the sales, nor did it determine the amount of the loss that could be recovered. That issue was appropriately raised for the first time in the present action.

Thus, the trial court was in error when it struck the defenses involved from Maloof's pleadings, and when it denied the offer of proof. The verdict was improperly directed, and the trial court properly granted the new trial because of an error in law at the trial. For this reason the order granting the new trial must be affirmed.

[4] It is necessary for the guidance of the court on the retrial, to pass on another question raised by the parties. Maloof contends that, under present law, under no circumstances may a court grant a judgment against a defaulting purchaser at a partition sale for the loss occasioned by the resale, because, so it is argued, such is a deficiency judgment "for failure of the purchaser to complete his contract of sale" within the meaning of section 580b of the Code of Civil Procedure, and that such deficiency judgments are prohibited by that section. This presents a most interesting problem.

Section 580b was first added to the code in 1933, Stats.1933 p. 1673, Chap. 642, as part of the depression relief legislation. As then passed, the section provided: "No deficiency judgment shall lie in any event after any sale under a deed of trust or mortgage given to secure payment of the balance of the purchase price of real property." The section was re-enacted in 1935, Stats. of 1935, p. 1806, Chap. 650, and also amended in that year, Stats. of 1935, p. 1869, Chap. 680. As finally enacted in 1935, and as the section now reads, it is provided: "No deficiency judgment shall lie in any event after any sale of real property *for failure of the purchaser to complete his contract of sale,* or under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property." (Italics added.) Maloof vigorously argues that, by this 1935 amendment, the Legislature put all contracts for the purchase and sale of real property on precisely the same footing as mortgages or deeds of trust given to secure the balance of the purchase price, and that a resale in a partition proceeding and a suit for the loss is an attempt to recover a deficiency judgment in violation of this section. It should be mentioned that section 580b is found in Title VIII, Pt. 2 of the Code of Civil Procedure, entitled "Trial and Judgment in Civil Actions."

The referee relies upon the specific provisions of section 785 of the Code of Civil Procedure, directly authorizing referees to bring an action against a defaulting purchaser in a partition proceeding for the loss occasioned on the resale. This section is found in Title X of that Code entitled "Actions in Particular Cases," and in Chap. IV of that title entitled "Actions for Partition of Real (and Personal) Property." The section reads as follows: "If the sale is confirmed by the court, an order must be entered directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale. *If the purchaser, after the confirmation of the sale, refuses to pay the amount of his bid the referees may again sell the property at any time to the highest bidder, and if any loss is occasioned thereby the referees may recover the amount of such loss and the cost from the bidder so refusing,* or the referees, without making a resale, may maintain an action against the purchaser for the amount of his bid." (Italics added.) This section was originally enacted in 1872 and was amended in 1907.

The basic premise of Maloof's argument is that, insofar as section 785 authorizes the referee to obtain a judgment against a defaulting purchaser at a partition sale for the amount of the loss occasioned by the resale, it has been repealed by implication by the 1935 amendment to section 580b. According to this argument, the only remedy now available to the referee against a defaulting purchaser at a partition sale is to maintain an action against him for the full amount of his bid. If this argument is sound it also prohibits such actions in sheriff's sales, § 695, Code of Civ.Proc., probate sales, § 788, Probate Code, and other types of judicial sales.

The argument of Maloof is interesting and ingenious, but unsound. Section 4481 of the Political Code provides that, in construing the various provisions of the Code, "If the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject matter of such title." Section 4482 extends the same rule to conflicts between chapters of the codes. See 23 Cal.Jur. p. 792, § 170; In re Kennerly, 190 Cal. 774, 776, 214 P. 857. Maloof tries to avoid the obvious application of this statutory rule of construction by the contention that this is not an action brought under the partition provisions of the Code of Civil Procedure, but is a simple action for damages brought under the provision of code relating to money judgments, and is therefore controlled by section 580b. The point need not be labored that the present action was brought under and by virtue of section 785. The Political Code section quoted requires that the provisions of each title must control "all matters and questions arising out of the subject matter of such title." Thus, the particular provisions of section 785 must be held to control the general language of section 580b.

[5] That this is the proper interpretation of the section is demonstrated by several other rules of construction. While repeals by implication may occur under certain circumstances, Assets Reconstruction Corp. v. Munson, 81 Cal.App.2d 363, 184 P.2d 11, such repeals by implication are never favored. Fay v. District Court of Appeal, 200 Cal. 522, 254 P. 896; Rexstrew v. City of Huntington Park, 20 Cal.2d 630, 128 P.2d 23.

[6, 7] Moreover, the evils sought to be remedied and the purposes sought to be effected by the emergency legislation of 1933 and 1935 must be considered in construing section 580b. That section, and the related sections passed at the same time, were intended to prevent creditors from buying in property for a nominal sum, after the debtor had defaulted, and then holding the defaulting debtor for a large deficiency judgment. See 22 Cal.L.Rev. 170, 180; Hatch v. Security-First Nat. Bank, 19 Cal.2d 254, 259, 120 P.2d 869; Winklemen v. Sides, 31 Cal.App.2d 387, 409, 88 P.2d 147. The 1935 amendment extended this protection to purchasers under a contract of sale. Undoubtedly, in private transactions, under this section there can be no deficiency judgment involving purchase money deeds of trust or mortgages, or contracts of sale. Mortgage Guarantee Co. v. Sampsell, 51 Cal.App.2d 180, 185, 124 P.2d 353; Peterson v. Wilson, 88 Cal.App.2d 617, 631, 199 P.2d 757, 6 A.L.R.2d 258. But none of the evils sought to be overcome by section 580b existed in the case of partition or other types of judicial sales. The natural and normal construction of section 580b is that it only applies to contracts of sale where credit is involved. In the instant case the order confirming both the original and second sales provided the sale was for cash. It would require a strained construction indeed to hold that section 580b, obviously aimed at private credit sales, was applicable to a cash judicial sale. It is significant, although not conclusive, that since 1935 no court, so far as our research discloses, has ever held that section 580b applies to judicial sales.

For these reasons we are of the opinion that section 580b of the Code of Civil Procedure has no application to sales held by virtue of section 785 of that code.

The order granting the new trial is affirmed.

BRAY and SCHOTTKY, J. pro tem., concur.

PEOPLE v. VINSON.
Civ. 17370.

District Court of Appeal, Second District, Division 3, California.

Aug. 21, 1950.

Hearing Denied Oct. 19, 1950.

Action in eminent domain by the People of the state of California, acting by and through the Department of Public Works, against Alice Vinson to acquire a parcel of realty owned by defendant, for highway purposes. The Superior Court, Los Angeles County, Stanley Mosk, J., awarded the defendant $70,000 and the defendant appealed from the judgment and from an order denying her motion for a new trial. The District Court of Appeal, Shinn, P. J., held that defendant's testimony and offer of proof as to reasons why defendant purchased the property, were properly excluded.

Judgment affirmed. Attempted appeal from order denying motion for new trial dismissed.

1. Appeal and error ⇐110

Order denying motion for a new trial is not appealable. Code Civ.Proc. § 963.

2. Evidence ⇐558(8)

In eminent domain proceeding by state to acquire realty for highway purposes, permitting state's counsel to cross-examine defendant's expert witness as to price paid by defendant for property some three years previous was proper.

3. Eminent domain ⇐201

In eminent domain proceeding by state, excluding defendant's testimony as to reason for her purchase of the realty involved and sustaining of objection to defendant's offer of proof as to her purpose in acquiring realty was not error.

4. Eminent domain ⇐134

The value of realty taken in eminent domain proceeding is determined by taking into account highest possible use to which realty is or may be reasonably put, and what a purchaser would be willing to pay for it in view of such highest possible use.

5. Eminent domain ⇐201

In eminent domain proceeding by state to acquire realty for highway purposes, rejection of defendant's offer of proof that she purchased realty at a time when both she and owner knew that freeway would take at least a portion of it, which offer was made to prove both defendant's purpose in buying realty and other facts which she claimed would tend to prove that price she paid was less than market value was not error.

6. Eminent domain ⇐219

In eminent domain proceeding by state to acquire realty for highway purposes, interruption of defendant's counsel during course of his argument to jury when he sought to argue defendant's purpose in buying realty and use for which it was to be put, evidence of which had been excluded by trial court, was not error.

7. Eminent domain ⇐202(1)

In eminent domain proceeding by state to acquire realty for highway purposes, evidence of an oral agreement by state to purchase her realty at a value to be fixed by two or three named appraisers would not have been admissible.

8. Evidence ⇐142(1)

In eminent domain proceeding by state to acquire realty for highway purposes, evidence with respect to offers and purchases made by division of highways of other realty in vicinity would not have been admissible.

9. Appeal and error ⇐977(5)

An order denying a motion for new trial may not be reversed in absence of a clear showing of abuse of discretion.

Russell E. Parsons, Morris Lavine, Los Angeles, for appellant.

George C. Hadley, Hodge L. Dolle, Thomas G. Baggot, all of Los Angeles, for respondent.

SHINN, Presiding Justice.

[1] This is an action in eminent domain instituted by plaintiff State to acquire a parcel of property owned by defendant. The property is to be used for highway purposes. The only issue involved was the fair market value of the property on

March 11, 1948. After a trial by jury, appellant was awarded $70,000 which was subsequently deposited with the clerk of the court and the State took possession of the real property. Defendant appeals from the judgment and purports to appeal from the order denying her motion for a new trial. No appeal lies from an order denying a motion for a new trial, Code Civ.Proc. sec. 963, and the purported appeal therefrom must be dismissed.

[2] Defendant was ably represented at the trial. She has additional counsel on the appeal. She complains that the court erred in permitting plaintiff's counsel to cross-examine her expert witness as to the price of $57,500 paid by her for the property some three years before. No authority is cited which furnishes even slight support for this proposition and we find it to be devoid of merit. It is established practice on cross-examination to inquire of an expert witness the prices which are asked or have been paid for other similar lands, for the purpose of testing his knowledge and the weight to be given his opinion. In re Estate of Ross, 171 Cal. 64, 151 P. 1138; Palladine v. Imperial Valley Farm Lands Ass'n, 65 Cal.App. 727, 756, 225 P. 291; City of San Luis Obispo v. Brizzolara, 100 Cal. 434, 437, 34 P. 1083; City of Los Angeles v. Deacon, 119 Cal.App. 491, 7 P.2d 378. Such cross-examination as we have here was held permissible in East Bay Municipal Utility Dist. v. Kieffer, 99 Cal. App. 240, 251, 278 P. 476, 481, 279 P. 178, where it was said: "For the purpose of testing the knowledge of such witnesses and impeaching their opinions as to values, the court permitted the plaintiff to ask them, on cross-examination, to state their knowledge of other sales of land in the vicinity and of prices recently paid by the defendant for the lands taken. This was not error." Both reason and common sense support the view that if selling prices of comparable property are properly taken into account in forming expert opinions as to value, a recent purchase of the identical property would be of first importance. If, as in the present case, a witness has given consideration to a purchase which took place three years before, the time element goes merely to the weight of his opinion. It is scarcely necessary to add that the widest latitude is allowed in such cross-examination. City of Los Angeles v. Deacon, 119 Cal.App. 491, 7 P.2d 378.

Defendant sought to testify as to the circumstances under which she bought the property, in explanation of the purchase price disclosed in the cross-examination of her expert, Mr. Freeman. After plaintiff's objection had been sustained, defendant made an offer of proof. The offer was to prove by her testimony that at the time she purchased the property she knew the freeway was going through, examined the map in the office of the Division of Highways, believed that only a portion of the property would be taken, and that she intended to erect a hotel on the remainder of the property. Another phase of the offer was stated as follows: "She bought the property from the owner, the owner having knowledge that the freeway was going through and would take a portion of the property * * * that the property was sold not at its fair market value but was sold by the seller under threat of condemnation; he the seller knowing that at least a portion of the property would be taken by the freeway." Objection to the offer of proof was sustained.

[3, 4] Defendant had testified to having purchased several other properties in the vicinity upon which she had made extensive hotel and apartment improvements and which she had later sold. She was questioned by her counsel as to the purpose she had in acquiring the instant property; plaintiff's objection to the question was sustained. This was not error, nor was it error to sustain objections to the offer of proof as to her purpose in acquiring the property. She had given her opinion that the fair market value of the property at the time it was taken was $150,000. The offer to prove her purpose in buying the property was wholly unrelated to the opinion she expressed as to its value. It would have served no purpose whatever other than to prove that her purpose had been frustrated. The criterion is not the value of the use of the property to the owner. Central Pacific Ry. Co. v. Feldman, 152

Cal. 303, 92 P. 849; 10 Cal.Jur. 358. The value is determined by taking into account the highest possible use to which the land is or may be reasonably put, and what a purchaser would be willing to pay for it in view of such highest possible use. City of Napa v. Navoni, 56 Cal.App.2d 289, 132 P.2d 566; People v. Ricciardi, 23 Cal.2d 390, 401, 144 P.2d 799. The fact that defendant's plan to improve the property for hotel purposes had been frustrated would have presented to the jury a false element of compensation.

[5] We discover no error in the rulings which rejected defendant's offer of proof that she had purchased the property at a time when both she and the owner knew that the freeway would take at least a portion of it. Although the offer was to prove both her purpose in buying the property and other facts which she claimed would tend to prove that the price she paid was less than the market value, she did not make separate offers of proof. Her purpose in buying the property, as we have seen, was not a proper subject of proof. The offered testimony, insofar as it was an attempt to prove the price paid was below market value, was inadmissible because of its insufficiency. Defendant's offered testimony as to the knowledge of the seller of the proposed condemnation would have been hearsay and a mere guess as to the motive of the owner in making the sale. The jurors should not have been asked to speculate as to what he may have been thinking. The court did not err in sustaining an objection to the offer of proof.

[6] Defendant also contends that the trial court committed error when it interrupted the argument to the jury made by her counsel. Defendant's counsel sought to argue defendant's purpose in buying the property and the use for which it was to be put. This was an attempt to argue matter not in evidence, and which we have held was properly excluded. There was no error.

[7] In an affidavit filed in support of a motion for a new trial defendant alleged acts which she contended amounted to an agreement by the State to purchase her property at a value to be fixed by two of three named appraisers. She claimed that after she was served with summons an employee in the Division of Highways gave her a list of appraisers and promised that the State would pay her the value of her property agreed to by any two of the appraisers; that an appraisement was made of $102,000, and that the employee informed her that the State would not pay that sum. Although defendant argues the matter as if the State had entered into a valid agreement to purchase her property, she says in her brief: "When the price was not that suitable to the agents of the State they backed out, but the facts and circumstances of the transaction—like any other transaction—were surely properly admissible before the jury for whatever weight the jury wished to give to it." Even on a retrial this evidence would have been inadmissible. The printed argument on the point cites wholly irrelevant cases, discusses the powers of the State in eminent domain and complains that defendant has been deprived of equal protection of the law. The insincerity of the argument is manifested by the fact that it ignores the following matters: The so-called agreement consisted only of an alleged oral promise for the purchase of real estate; it was not claimed to have been made by one who had authority to contract for the State; the alleged agreement was not pleaded by defendant and there had been no effort made to prove it at the trial; the matters alleged were obviously not newly discovered, and no excuse was offered for the delay in asserting claims founded upon them.

[8, 9] Other affidavits were filed on the motion stating in detail information alleged to have been received by defendant, some of it after the trial of the case, with respect to offers and purchases made by the Division of Highways of other property in the vicinity. Such evidence would have been inadmissible under the rules we have stated. It is insisted in defendant's brief that this court can take judicial notice of the fact that property on Vine Street, in Hollywood, where defendant's property is located, is more valuable than that on Argyle where plaintiff made some of its pur-

chases. The record discloses no abuse of discretion in the denial of the motion. The ruling evidences the trial judge's belief that the verdict was a just one and that, even if the facts stated in the affidavits would have been admissible upon a retrial of the case, the evidence would not have brought about a different result. The order may not be reversed in the absence of a clear showing of abuse of discretion. Montaldo v. Hires Bottling Co., 59 Cal.App. 2d 642, 139 P.2d 666; Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 163 P. 2d 756; Dry v. City and County of San Francisco, 83 Cal.App.2d 790, 189 P.2d 761.

A large part of defendant's brief is devoted to a discussion of the conflicting testimony of the witnesses as to value, and we are requested to reverse the judgment with directions to the trial court to enter judgment in favor of defendant for the sum of $102,000. The argument does not present any question of law.

The judgment is affirmed. The attempted appeal from the order denying motion for new trial is dismissed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



99 Cal.App.2d 86

JOHNSON v. SNYDER.
Civ. 14319.

District Court of Appeal, First District, Division 2, California.
Aug. 21, 1950.

Action by Les Johnson against Bella Snyder for damages resulting from alleged constructive eviction of plaintiff from premises rented by plaintiff in building owned by defendant. The Superior Court, Contra Costa County, Benjamin C. Jones, J., entered a judgment for plaintiff, and defendant appealed. The District Court of Appeal, Dooling, J., held that the evidence supported a finding of constructive eviction.

Judgment affirmed.

1. Landlord and tenant ⇐172(2)

Where tenant operated restaurant business in stall of owner's market building and other tenants quit building and building was allowed to become dirty and unsanitary, as a result of which city health inspector ordered tenant to close restaurant business and tenant closed business and removed fixtures, there was a "constructive eviction".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Constructive Eviction".

2. Landlord and tenant ⇐172(2)

Any interference by the landlord by which the tenant is deprived of the beneficial enjoyment of the premises amounts to a "constructive eviction" if the tenant so elects and surrenders possession.

3. Landlord and tenant ⇐134(1), 172(2)

Where landlord leased part of building and permitted unsanitary conditions amounting to nuisance to exist in portion of building remaining under his control, which operated to deprive tenant of his beneficial enjoyment, tenant could treat such condition as a constructive eviction, and covenant of tenant to comply with requirements of municipal, state and federal authorities pertaining to premises, referred only to premises and not to tenant, and put on him no duty to enter stalls to which he had no right of occupancy to abate nuisance, and fact that landlord expressly covenanted to furnish janitor service in aisles and passageways did not excuse maintenance of nuisance in other parts of building under landlord's exclusive control.

4. Landlord and tenant ⇐190(1)

Where landlord leased part of building and permitted unsanitary conditions amounting to nuisance to exist in portion of building under his control, which deprived tenant of his beneficial enjoyment of leased premises, upon eviction, tenant was entitled to recover amount advanced

for future rent, under doctrine of unjust enrichment.

5. Landlord and tenant ⇐180(4)

Where landlord leased part of building and permitted unsanitary conditions amounting to nuisance to exist in portion of building under his control which deprived tenant of his beneficial enjoyment, upon eviction, tenant was entitled to recover for loss of good will.

6. Damages ⇐6

One whose wrongful conduct has rendered difficult the ascertainment of damages cannot escape liability because damages cannot be measured with exactness.

7. Landlord and tenant ⇐180(5)

Where landlord leased part of building and permitted unsanitary condition amounting to nuisance to exist in portion of building under his control, which deprived tenant of his beneficial enjoyment, and there was no direct evidence of value of good will of business, but business had been netting tenant $200 per month, including compensation for his own labor, award therefor of $500 was not an abuse of discretion.

8. Trial ⇐367

For services of a common-place or non-technical character, the trial judge can call on his own general knowledge of their value, in determining amount of tenant's damages by way of cost of removal of fixtures upon eviction.

9. Landlord and tenant ⇐180(5)

Award of $400 to tenant as cost of removing fixtures of restaurant business after eviction by landlord was not excessive.

Gladstein, Andersen, Resner & Sawyer, Lloyd E. McMurray, all of San Francisco, for appellants.

Hoey, Hoey & Fenstermacher, Sam W. Hall, Jr., all of Martinez, for respondents.

DOOLING, Justice.

Defendant appeals from a judgment for plaintiff based on a finding of constructive eviction. Defendant is the owner of a building in Pittsburg designed as a market building for the occupancy of several tenants. Plaintiff rented a stall in this building for the conduct therein of the restaurant business. The other tenants of the building, except a retail liquor dealer, for reasons undisclosed quit the building. The building was allowed to become dirty and unsanitary and as a result the city health inspector ordered plaintiff to close his restaurant business which plaintiff did, removing his fixtures from the premises. A brief excerpt from the testimony of the city inspector will point up the discussion of the case. The inspector testified:

"They moved out and left everything just as it was. That is what I mean. They left their vegetables and bread and everything contained in a grocery store in the building. I asked Mrs. Snyder several times if she couldn't clean up the building, because after all, if it stood very long and stayed in the building very long, it would attract flies and rodents and gnats, etc., and being there is a restaurant in the building where they serve food, we had to keep the entire building clean. Mr. Johnson's restaurant itself, we found, was always in a satisfactory condition, that is, his little corner of it. But, as time went on, day to day, these vegetables started to decay, and each day that we visited the place we found it in a worse condition than it was the day before, and this went on for about a week. The dust in the building was getting terrible. You could rub your hand over any fixture in there and your hand would come out black. And the floor was in a horrible condition. I tried to prevail upon Mrs. Snyder many, many times, and every time I went to the building I made it a point to take Mrs. Snyder with me, and her answer was the same every time. * * * She had no interest in the restaurant. She didn't care how the building was. And if Mr. Johnson didn't like the condition he would have to move or not. It was immaterial to her whether they had a restaurant in the building or not. So, they went on for about four or five days, and the flies and gnats got so terrible we just had to take drastic steps and close the restaurant."

[1, 2] We are satisfied that this evidence supported the finding of a constructive eviction. "Any interference by the landlord by which the tenant is deprived of the beneficial enjoyment of the premises amounts to a constructive eviction if the tenant so elects and surrenders possession * * *." Kulawitz v. Pacific, etc., Paper Co., 25 Cal.2d 664, 670, 155 P.2d 24, 27; Aaker v. Smith, 87 Cal.App.2d 36, 46, 196 P.2d 150; 15 Cal.Jur. 679.

[3] Where the landlord leases part of a building and permits unsanitary conditions amounting to a nuisance to exist in the portion of the building remaining under his control which operate to deprive the tenant of his beneficial enjoyment the tenant may treat this as a constructive eviction. Ray Realty Co. v. Holtzman, 234 Mo.App. 802, 119 S.W.2d 981 and cases cited at pp. 984–985; Washington Chocolate Co. v. Kent, 28 Wash.2d 448, 183 P.2d 514 and cases cited at pp. 516–517; Everson v. Albert, 261 Mich. 182, 246 N.W. 88; Blaustein v. Pincus, 47 Mont. 202, 131 P. 1064, Ann.Cas. 1915C, 405; 52 C.J.S. Landlord and Tenant, § 458, p. 175; and cf. Riechhold v. Sommarstrom Invest. Co., 83 Cal.App. 173, 256 P. 592; McDowell v. Hyman, 117 Cal. 67, 48 P. 984.

The fact that the nuisance occurred in a portion of the building over which (after the other tenants departed) the landlord had exclusive control distinguishes the cases relied upon by appellant having to do with conditions arising in the premises occupied by the tenant himself under his lease. The covenant of plaintiff in the lease to comply with all the requirements of Municipal, State and Federal authorities "pertaining to said premises" referred only to the premises let to him and put on him no duty to enter stalls as to which he had no right of occupancy to abate the nuisance which his landlord was there permitting to exist. Nor did the fact that the appellant had expressly covenanted to furnish janitor service in the aisles and passageways operate to excuse the maintenance of a nuisance in other parts of the premises which were under appellant's exclusive control. The wilfulness of appellant's conduct is attested by her statement, as testified to by the inspector that "if Mr. Johnson didn't like the condition he would have to move."

The court allowed three items of damages: $450 advance payment of rent; $400 for the cost of removing the fixtures of the restaurant; and $500 for loss of good will.

[4] Upon eviction plaintiff was entitled to recover the $450 advanced for future rent, under the unjust enrichment doctrine. Everson v. Albert, supra, 261 Mich. 182, 246 N.W. 88, 90; Henry Rahr's Sons Co. v. Buckley, 159 Wis. 589, 150 N.W. 994, 996; Schienle v. Eckels, 227 Pa. 305, 76 A. 15.

[5] Loss of good will is a proper item of damage. Schuler v. Bordelon, 78 Cal. App.2d 581 and cases cited at p. 585, 177 P.2d 959. There was no direct evidence of the value of the good will of the business, but it had been netting the plaintiff $200 per month and as said in Schuler v. Bordelon, supra, 78 Cal.App.2d at p. 586, 177 P.2d at p. 962, "In determining the amount of damages * * * the jury was entitled to estimate as best they could from the evidence before them * * * the good will * * *." That court added: "Undoubtedly, in cases like this entire accuracy is impossible, and some difficulty is encountered in accurately assessing the damages * * * but it must not be forgotten that such difficulty would have been avoided had appellant taken care that no occasion should arise through his tort requiring such assessing of damages."

[6] "One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness." Zinn v. Ex-Cell-O Corp., 24 Cal.2d 290, 297–298, 149 P.2d 177, 181.

[7] It might be difficult to get opinion evidence of the value of the good will of a small restaurant netting the owner $200 per month including compensation for his own labor, but the court certainly did not exceed the bounds of discretion in fixing a value of $500 for that item, a value upon which a purchaser would recoup his invest-

ment in two and one-half months. Cf. Elsbach v. Mulligan, 58 Cal.App.2d 354, 365, 367, 136 P.2d 651.

[8] There is no express testimony of the cost of removing the fixtures but for services of a common-place or nontechnical character the trial judge can call on his own general knowledge of their value. In re Estate of Reinhertz, 82 Cal.App.2d 156, 160, 185 P.2d 858, 186 P.2d 755, and cases cited.

[9] The trial judge filed a memorandum in which he stated concerning this item: "Being evicted he had to get out with no opportunity to dispose of his fixtures in the place. The lease being ended he had to remove and is entitled to a reasonable award for this purpose. From the facts proved it is not an unwarranted inference that the sum of $400 is reasonable in this respect."

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.



99 Cal.App.2d 218

Ex parte PAGE.
Cr. 2211.

District Court of Appeal, Third District, California.

Aug. 25, 1950.

Henry E. Page filed an application for a writ of habeas corpus. The District Court of Appeal, Adams, P. J., held that since petitioner had been convicted of burglary and had been adjudicated an habitual criminal, but one of the prior convictions was not available to support an adjudication of habitual criminality, petitioner was entitled to have his sentence corrected to eliminate adjudication of habitual criminality.

Writ of habeas corpus previously issued discharged and petitioner remanded to custody.

Habeas corpus ⇐112

Where petitioner had been convicted of burglary, and had admitted two prior convictions and had been adjudicated an habitual criminal, but one prior conviction was not available to support adjudication of habitual criminality because prior offense charged as grand larceny had involved taking of goods valued at but $25, petitioner was entitled on petition for writ of habeas corpus to have sentence corrected to eliminate adjudication of habitual criminality. Pen.Code, § 644.

Thomas W. Olson, Jr., Assistant Public Defender, of Sacramento, for petitioner.

Fred N. Howser, Attorney General, Doris H. Maier, Deputy, for respondent.

ADAMS, Presiding Justice.

On August 9, 1943, an amended information was filed against petitioner in Riverside County, charging him with burglary, and with two prior convictions, to-wit, assault with a deadly weapon and grand larceny, committed in North Carolina. He was found guilty of the substantive offense, admitted the two prior convictions, was adjudicated an habitual criminal and sentenced to life imprisonment. No appeal was taken.

In this proceeding it is urged by petitioner that the judgment against him, in so far as it adjudges that he is an habitual criminal should be amended, because at least one of the two prior convictions was not within the provisions of Section 644 of our Penal Code. In re McVickers, 29 Cal. 2d 264, 176 P.2d 40.

In support of petitioner's claim there have been filed in this court properly authenticated copies of the records of the North Carolina court in which his prior convictions were had, and upon these records it is conceded by respondent that one of the prior convictions was not available to support an adjudication of habitual criminality, the prior offense charged as grand larceny having been shown to involve the taking of goods valued at but

$25.00, and the sentence to have been to the county jail to work on the road.

It therefore follows that petitioner is entitled to have his sentence corrected to eliminate the adjudication of habitual criminality, and to be accorded the rights of one not so adjudged; and it is so ordered.

It does not follow, however, that petitioner is entitled to his present discharge nor does he so claim. The writ of habeas corpus heretofore issued is accordingly discharged, and petitioner is remanded to custody.

VAN DYKE and PEEK, JJ., concur.



99 Cal.App.2d 170

BOGART v. BOARD OF MEDICAL EXAMINERS et al.

Civ. 17867.

District Court of Appeal, Second District, Division 1, California.

Aug. 22, 1950.

Mandamus proceeding by Esther P. Bogart against the Board of Medical Examiners of the State of California and others, to review revocation of license to practice medicine. From judgment of the Superior Court, the petitioner appealed. Her petition for writ of supersedeas pending the appeal was denied by the District Court of Appeal of California, Second Appellate District. Petitioner was granted a rehearing and the District Court of Appeal, Doran, J., held that possible loss of practice would not justify granting the writ of supersedeas.

Petition denied on rehearing.

1. Appeal and error ⇐458(1)

Purpose of writ of supersedeas is to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him.

2. Appeal and error ⇐479(2)

Supersedeas is writ resting in discretion of appellate court.

3. Appeal and error ⇐478

Applicant for writ of supersedeas must show that substantial questions will be presented upon appeal.

4. Supersedeas ⇐1

Writ of supersedeas is, like other original writs, to be made use of only in those cases where some unusual situation is presented which cannot well be handled otherwise.

5. Mandamus ⇐187(6)

Where physician was found guilty by state board of medical examiners of committing abortion and her license was revoked, fact that she might suffer possible injury through loss of practice while appeal from denial of mandamus to review the administrative order was pending, did not entitle her to writ of supersedeas. Code Civ.Proc. § 1094.5(f).

Sidney W. Kaufman, Los Angeles, for petitioner.

Fred N. Howser, Attorney General, Bayard Rhone, Deputy Attorney General, for respondents.

DORAN, Justice.

As set forth in the petition, on December 17, 1945 the respondent Board issued a Physician's and Surgeon's Certificate to petitioner; on July 8, 1949 complaint was filed charging petitioner with having committed an abortion upon the person of one Gayle Rubin, and on August 16, 1949 said Board, after a hearing, found petitioner guilty and revoked the license to practice medicine in the State of California.

On September 28, 1949 petitioner filed in the Superior Court a petition for Writ of Mandate to review the administrative order hereinbefore mentioned, which writ was denied on May 10, 1950. From this judgment petitioner has appealed, alleging that "the accusation and complaint failed to state facts sufficient to constitute

a cause for disciplinary action", and that "said accusation was so indefinite and uncertain * * * as to the alleged means or method of conduct of petitioner that she was unable to properly prepare her defense; that a demurrer to the accusation was overruled by said respondent Board". Petitioner further claims that the Board's finding of guilt "is not supported by any evidence whatsoever * * * and is contrary to law".

It is alleged that "The issuance of a writ of supersedeas or stay, pursuant to Section 1094.5(f) C.C.P. is necessary to protect petitioner's rights to bring this appeal". In this connection it is averred that since the Board's order revokes petitioner's certificate to practice medicine which order will become effective before the appeal can be heard and determined, petitioner "will suffer great financial detriment" by reason of a loss of patients, "even though this Court may see fit to reverse the trial Court". It is further stated "That it is not against the public interest to permit the petitioner to continue to practice, pending the outcome of this appeal".

Objecting to the issuance of supersedeas as prayed for by petitioner, respondents point out that since petitioner is also licensed to practice medicine and surgery by the State Board of Osteopathic Examiners, which license has not been revoked, petitioner can still continue practice, and hence that there is no necessity for a writ of supersedeas.

Petitioner filed no answer to the objections of respondent; the petition for Writ of Supersedeas was denied by the appellate court. A petition for a rehearing was then filed explaining that no answer to the objections had been filed because "this petitioner was under the belief that there was no provision in law to answer said objections of respondents".

A rehearing having been granted, petitioner now contends that the respondents' statement that no writ of supersedeas was necessary for the reason that petitioner could continue to practice as a physician and surgeon under the unrevoked license of the State Board of Osteopathic Examiners, and hence would suffer no deprivation of rights pending the appeal, is incorrect. It is then alleged that "petitioner has always practiced as a doctor of medicine (M. D.)"; and all of her patients know her as a doctor of medicine and consult her for treatment as a doctor of medicine; all of her business cards, stationery, and office lettering bear the designation of 'M. D.' In the event petitioner is unable to practice as a doctor of medicine, * * * she will undoubtedly lose her patients who consulted her, not as an osteopath but as a doctor of medicine; any explanation she might make to said patients to the effect that she had lost her license would destroy the confidence of her patients in her and would result in her loss of livelihood".

[1-3] As stated in West Coast Home Improvement Co. v. Contractors' State License Board, 68 Cal.App.2d 1, 5, 155 P.2d 863, 866, the purpose of a writ of supersedeas "is to preserve to an appellant the fruits of a meritorious appeal, where they might otherwise be lost to him." However, "supersedeas is not a writ of right, but is one resting in the discretion of the appellate court to be issued in proper cases * * *. Since issuance of a writ of supersedeas is discretionary, it is incumbent upon the applicant therefor to show that substantial questions will be presented upon the appeal; that such special reason exists, differing from the ordinary case revoking a contractor's license, why the decree of the registrar and the judgment of the trial court sustaining it should be stayed pending the appeal." Moreover, "It will always be presumed that another court acting within its jurisdiction has acted with judicial discretion."

[4, 5] Nothing is presented by way of the instant petition for rehearing which entitles petitioner to issuance of the writ of supersedeas. As set forth in the West Coast case cited above and other cases, the writ is "one resting in the discretion of the appellate court". It is, like other original writs, to be made use of only in those cases where some unusual situation is presented which cannot well be handled other-

wise. If supersedeas is to issue in every case where an appeal is pending and where appellant might possibly suffer injury due to the lapse of time or other reason, its use would become well nigh universal. That such is not the legitimate purpose of the writ is made clearly evident from a reading of the cases and all pertinent text passages. The writ is in no sense a matter of right.

Without in any manner passing upon the merits of the appeal from the order denying a writ of mandate to review the proceedings which resulted in a revocation of petitioner's license to practice medicine, it need only be said that the showing on rehearing is again deemed insufficient to warrant issuance of supersedeas pending the appeal.

The petition is denied.

WHITE, P. J., and DRAPEAU, J., concur.



99 Cal.App.2d 47

JEWELL et al. v. NEW HOTEL U. S. GRANT et al.
Civ. 3980.

District Court of Appeal, Fourth District, California.

Aug. 17, 1950.

Action by Arthur C. Jewell and Anna C. Jewell against The New Hotel U. S. Grant and others for injuries allegedly sustained by plaintiff wife when she fell on stairway leading from lobby to basement. The Superior Court, San Diego County, Robert B. Burch, J., entered judgment for plaintiffs, and the defendants appealed. The District Court of Appeal, Barnard, P. J., held that giving of instruction that every stairway should have at least one handrail and if a stairway was five feet or more in width it should have one handrail on each side, if error, was not prejudicial error.

Judgment affirmed.

Appeal and error ⇐1066

Where hotel guest fell on stairway leading from lobby to basement and action against hotel for injuries was brought and tried entirely on question whether there was negligence in permitting certain conditions at bottom of stairway to exist at time and whether guest acted properly in view of existing conditions, and there was no dispute as to existence of handrail, giving of instruction regarding necessity of handrail, if improper, was not prejudicial.

James C. Henderson, San Diego, Sidney A. Moss, Henry F. Walker, Los Angeles, for appellants.

Bodkin, Breslin & Luddy, S. V. O. Prichard, all of Los Angeles, John Coker, San Diego, for respondents.

BARNARD, Presiding Justice.

The plaintiffs were guests at the U. S. Grant Hotel in San Diego. A banquet room, some rest rooms, and a bar in the basement were reached by a stairway from the lobby. This stairway had a handrail on each side which stopped two steps from the bottom. A covered chain was kept across the entrance "when the management did not want people to go down." At the time here involved the bar was not open and the full lights were not on, but the chain was not in place.

About 1:00 o'clock P. M. on January 31, 1947, Mrs. Jewell inquired for a rest room and was directed down this stairway by an employee of the hotel. She fell just before reaching the bottom and was injured. In this action for damages, the complaint alleged that this stairway was carelessly maintained in that the handrail did not extend all the way but stopped two steps from the bottom; and that the area around the foot of the stairway was so dimly lighted that the precise situation could not be discerned by a person passing from the stronger light above into this dimmer area. The answer denied these allegations and alleged contributory negligence. There was ample evidence supporting the allegations of the complaint. Mrs. Jewell testified that she passed down the stairway hanging onto one

rail; that "it was dark there and it seemed like the carpets and everything all ran together"; that "where the banister stopped" she thought she was on the last step; and that believing she had reached the bottom she stepped out and fell. A jury returned a verdict for the plaintiffs, and the owners of the hotel have appealed from the judgment.

The only point here raised is that one instruction was prejudicial. It reads: "Every stairway shall have at least one handrail and if a stairway is five feet or more in width it shall have one handrail on each side." It is argued that no statutory provision requiring handrails existed when this building was erected; that while such a provision was later adopted and subsequently became section 16413 of the Health and Safety Code, it was not retroactive and was not applicable; that the court thus told the jury, as a matter of law, that the defendants were required to have "certain handrails"; and that this was prejudicial since the issue as to the manner in which the handrail was "maintained" was a question of fact.

Assuming that this instruction should not have been given, we are unable to see how it could have been prejudicial. There is nothing in the statutory provision, whether applicable or not, as to the length or extent of such a handrail. There is nothing about this in the instruction, and it did not tell the jury, as a matter of law or otherwise, that the defendants were required to have any "certain handrails." This handrail was admittedly there, whether required or not, and the action was brought and tried entirely on the question as to whether or not there was negligence in permitting certain conditions at the bottom of the stairway to exist at the time, and whether Mrs. Jewell had acted properly in view of the existing conditions. The defendants having furnished this handrail, whether or not it was required by law is immaterial and could have no effect either way on the issues involved.

There being no dispute as to the existence of the handrail the only question for the jury was as to whether the accident happened through the fault of Mrs. Jewell or was caused by the defendants' negligence in permitting an improper and dangerous condition to exist. The instruction complained of had nothing to do with this question, in no way confused the issue or misled the jury, and could have had no effect, prejudicial or otherwise, on the verdict.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



99 Cal.App.2d 204

SCHMIDT v. SEARS et al.
Civ. 7725.

District Court of Appeal, Third District, California.

Aug. 25, 1950.

John Richard Schmidt, a minor, by and through his guardian ad litem, Virgil Schmidt, sued John B. Sears and others for personal injuries sustained as the result of being struck by a semi-tractor truck driven by named defendant. From a judgment of the Superior Court, San Joaquin County, R. M. Dunne, J., on a jury's verdict for defendants, plaintiff appealed. The District Court of Appeal, Adams, P. J., held that certain instructions to the jury were not erroneous as implying that plaintiff was negligent and assuming, contrary to evidence, that plaintiff was in the roadway, rather than on sidewalk, at street intersection, at the time of the accident.

Judgment affirmed.

1. Negligence ⇐138(2)
Trial ⇐191(7), 296(9)

In personal injury suit, instruction that contributory negligence presupposes plaintiff's failure to exercise due care for his own safety, thereby proximately contributing to his injuries, that such negligence is affirmative defense and must be proved by preponderance of evidence, unless shown or inferable from plaintiff's evidence, and that jury must find against plaintiff, if they

found him guilty of negligence proximately contributing to accident, was not erroneous as implying that plaintiff was negligent and placing burden on him to establish lack of contributory negligence, especially when considered with preceding and following instructions.

2. Trial ⇐191(7)

In action for injuries to boy struck by defendants' truck, alleged to have been negligently driven across sidewalk in making right turn at street intersection, instruction to find for defendants, if jury found from evidence that accident might have been caused in several different ways, but could not determine proximate cause thereof, was not erroneous as assuming, contrary to evidence, that there might have been more than one cause, in view of evidence warranting inference that plaintiff was in roadway, not on sidewalk, at time of contact. Vehicle Code, § 83.

3. Trial ⇐260(1)

The trial court's refusal of proposed instruction, adequately covered in other instructions given jury by court, was not error.

4. Appeal and error ⇐1005(3)

Where jury apparently resolved conflicts in evidence in defendants' favor and trial court denied plaintiff's motion for new trial, based partly on alleged insufficiency of evidence to justify verdict for defendants, District Court of Appeal is bound by such conclusions on plaintiff's appeal from judgment on verdict.

Joseph C. Tope, Harry C. Stanley, Stockton, for appellant.

Neumiller, Ditz, Beardslee & Sheppard, Stockton, for respondents.

ADAMS, Presiding Justice.

This action was brought by John Richard Schmidt, a minor about eleven years old, by his father as guardian ad litem, to recover damages for injuries sustained by said minor, when, as he alleges, he was struck, hit and run over by a semi-tractor truck owned by defendants Ben and John F. Vogel, and driven by defendant John B. Sears, their employee. The accident occurred about 7:45 P. M., October 24, 1944, when the semi-tractor was making a right turn from East Lindsay Street onto Eugenia Street in Stockton. Plaintiff alleged and contended at the trial that he was walking in the space provided for pedestrians at the southwest corner of the intersection, and that in making the turn the driver of the truck negligently operated his vehicle and caused it to run over his left foot and leg, crushing the foot and also injuring his right leg and hip.

Defendants denied negligence on their part, and alleged contributory negligence on the part of plaintiff. Trial of the issues before a jury resulted in a verdict for defendants, a new trial was denied, and plaintiff has appealed from the judgment which followed.

[1] Appellant's first assignment of error is that the trial court erred in giving the following instruction:

"In this case the answer of the defendants denies negligence and sets up the defense of contributory negligence. Contributory negligence presupposes that the plaintiff did not exercise due care for his own safety and that his failure so to do proximately contributed to his own injuries. It is an affirmative defense and must be proved by a preponderance of the evidence, unless it can be shown or inferred from the evidence given in support of plaintiff's case. But when it has been established it is a complete defense to the action. If you find, therefore, that the plaintiff in this case was negligent and that his negligence proximately contributed in any degree to the accident, then and in that event, you must find against the plaintiff. And this is true even though you should find that the defendant was also negligent, or that he was more negligent than the plaintiff."

Appellant argues that the word "presupposes" in such instruction carried the implication that plaintiff was negligent, and that the jury were in effect told by the court that he was negligent, that it placed the burden of establishing lack of contributory negligence upon plaintiff and did not

state that such an affirmative defense must be proven by defendants.

While not commending the instruction as a model, we do not think that it implied that the boy was negligent, especially when considered in connection with the instructions which preceded and followed it. The court had previously stated that in applying the law to the facts of the case it was necessary that the jury fully understand certain legal terms and definitions. It then advised them that before a plaintiff could recover damages for the negligence of another he must show, not only that the other was negligent, but that such negligence proximately caused his injuries; what constitutes proximate cause; the necessity that plaintiff prove negligence by a preponderance of the evidence; the meaning of preponderance of the evidence, and that of negligence and ordinary care. Then followed the paragraph which appellant attacks. Apparently the court there was defining or attempting to define "contributory negligence." It is obvious that there could not be contributory negligence without negligence, or, as the court said, a failure to exercise due care for his own safety; but the instruction then continued to assert, in effect, that to constitute contributory negligence such failure to exercise due care must have proximately contributed to his own injuries. It was then stated that contributory negligence is an *affirmative defense* which must be proven by a preponderance of the evidence, unless shown or inferred from evidence given for plaintiff. Then the court, by what followed in the paragraph, left it to the jury to find, first whether the boy was negligent, and second whether his negligence proximately contributed to the accident. We cannot assume that the jurors did not know the meaning of affirmative defense, or that it must be shown by the defendants, especially since the words "unless it can be shown or inferred from the evidence given in support of plaintiff's case," so indicated. Furthermore, the jury were instructed immediately thereafter that where negligence is not predicated upon the violation of a statute it devolves upon a party asserting it to show that the other party failed to act as a reasonably prudent person would have acted, and that failure to do so proximately caused or contributed to the accident; also that if defendant obeyed the law applicable and did all that an ordinarily prudent person would have done in the circumstances to avoid the accident, he was not chargeable with negligence; and that "the same rule applies to plaintiff with reference to the charge of contributory negligence."

[2] Such instruction was then followed by further instructions as to the duties of persons driving motor vehicles upon public streets, the right of one, himself upon a highway and proceeding in a lawful manner, to assume that others will obey the law, and what constitutes a highway, a roadway, a sidewalk and an intersection. The jury were then advised that if they found that plaintiff was a pedestrian on the sidewalk, and using due care, and that the driver of the truck drove his vehicle upon the sidewalk and struck and injured plaintiff, it would be their duty to find for plaintiff; that "If, after considering all the evidence in this case, you find that the accident might have been caused in several different ways but you cannot determine what was the proximate cause of said accident and the resulting injuries, if any, to plaintiff, then your verdict must be in favor of defendants." It also stated that the instructions should not be understood as conveying any intimation whatever that in the opinion of the court plaintiff had or had not made out a case.

Appellant also purports to find reversible error in the latter above quoted language, saying that it assumes that there may have been more than one cause of the accident, and that the evidence showed but one cause, to wit, that Sears drove his vehicle across the sidewalk as "the only other possible cause would have to be the doubtful inference based on the assumption that plaintiff was in the roadway as defined by Vehicle Code Section 83 at the time the contact occurred." But we cannot say that such an inference could not have been drawn from the evidence. It was not contended by plaintiff that the front end of defendants' equipment crossed the sidewalk, but only that the semi-trailer portion did so. Sears

testified that he made the turn so as to bring the rear end of his equipment out so it would clear the curb or the corner; also that there were trucks parked on both sides of the street into which he turned, which made it more necessary for him to "hit the center" than it would have been otherwise. He drew upon the map introduced in evidence the position of his equipment when it came to rest, and stated that the truck could not have been turned as plaintiff contended or he could not have got through the street, and gave his opinion that the right rear wheels were five or six feet from the sidewalk when he made the turn.

Plaintiff's own evidence showed that at the time of the accident he and his father were returning from a trip to a market on Lindsay Street, that the boy was proceeding some 10 or 12 feet in front of his father, and that they were bound for their home on the opposite side of Eugenia Street when Sears made his turn into that street. All that the criticised instruction advised was that if the jury were satisfied that there was no negligence on the part of defendant Sears, and that the accident did not result from his negligence, and they were satisfied that there was an accident but could not determine the proximate cause of same, under such circumstances they must find for defendants. This was but another way of saying that under such circumstances plaintiff had not met the burden cast upon him of proving by a preponderance of the evidence that Sears was negligent. We cannot see how the giving of such instruction caused injury to plaintiff's cause.

[3] Appellant's next assignment of error is that the court failed to give the following instruction proposed by him: "You are instructed that contributory negligence is not based upon a possibility of avoiding an accident. The plaintiff, John Richard Schmidt, cannot be charged with contributory negligence simply because he might have avoided the accident had he acted differently. If said John Richard Schmidt did all that an ordinarily prudent person would have done under the circumstances to avoid the accident, then I instruct you that the plaintiff, John Richard Schmidt, was not guilty of any contributory negligence." The matter stated in said proposed instruction was adequately covered in other instructions given by the court, particularly by the following:

"If you find from the evidence presented in this action by a preponderance thereof that plaintiff herein, John Richard Schmidt, was a pedestrian on the sidewalk of East Lindsay Street in the City of Stockton, County of San Joaquin, State of California, on the 24th day of October, 1944, and while he was such a pedestrian, and using due care, the defendant herein, John B. Sears, did then and there drive and operate a semi tractor truck from the roadway on said Lindsay Street to and upon the sidewalk on which said John Richard Schmidt was at said time a pedestrian and thereby said semi tractor truck struck and injured said John Richard Schmidt, then it will be your duty to find for the plaintiff and against the defendants."

This stated the exact contention of appellant and his father, that Sears drove his vehicle over the sidewalk, and there struck and injured plaintiff. We think that the instructions as a whole fairly and adequately instructed the jury.

And as to plaintiff's contention that the evidence is insufficient to support the judgment it is inferable that the jury did not accept the testimony of plaintiff and his father as to how the accident occurred, and that they found no negligence on the part of the driver. There was evidence regarding the nature of the boy's injuries which rendered his story of how they were sustained doubtful. The medical report showed that injuries to his foot, the left one, were fractures of three small bones on the outside thereof; that there was no fracture of the big toe nor of the ankle. The equipment and its load weighed approximately 31 tons, and had same run over the boy's foot undoubtedly it would have severely crushed same and broken his ankle. Also originally no complaint was made to the doctor about any injury to the right hip, nor did that doctor note any, though he made a thorough examination to determine the extent of plaintiff's injuries. Some months later there was complaint of pain in the right knee, but it was not until April,

1946, that plaintiff told a different doctor that he had been struck a blow on the right hip in the accident; but that doctor stated that pain in that leg may well have been attributable to the extra burden imposed upon it because of the injuries to the left foot.

[4] The jury apparently having resolved conflicts in the evidence in favor of defendants, and the trial court having denied plaintiff's motion for a new trial, which was based in part on alleged insufficiency of the evidence, we are bound by those conclusions.

The judgment is affirmed.

VAN DYKE and PEEK, JJ., concur.



99 Cal.App.2d 35

HURT v. BASALT ROCK CO., Inc., et al.
Civ. 7694.

District Court of Appeal, Third District, California.

Aug. 17, 1950.

Action by E. P. Hurt against Basalt Rock Company, Inc., a corporation, and A. B. Streblow. The Superior Court, Napa County, Mervin C. Lernhart, J., entered an order vacating a judgment entered by the clerk of the Superior Court of Napa County, and the plaintiff appealed. The District Court of Appeal, Peek, J., held that, where defendant was granted new trial conditioned on plaintiff's acceptance of $300 damages in lieu of $12,500 award, the reviewing court's decision on former appeal affirming order and holding that appeal did not convert original conditional order into unconditional order granting new trial but that order required performance of conditions on demand, became law of case, and when, after the going down of the remittitur, the plaintiff refused on demand to elect to accept the reduction, the order granting new trial became operative as an unconditional order to that effect, and clerk of trial court could not enter judgment on $12,500 verdict.

Order affirmed.

Appeal and error ⇐1195(3)

Where defendant was granted new trial conditioned on plaintiff's acceptance of $300 damages in lieu of $12,500 award, reviewing court's decision on former appeal affirming order and holding that appeal did not convert original conditional order into unconditional order granting new trial but that order required performance of conditions on demand, became law of case, and when, after the going down of the remittitur, plaintiff refused on demand to elect to accept the reduction, the order granting new trial became operative as unconditional order to that effect, and clerk of trial court could not enter judgment on $12,500 verdict. Code Civ.Proc. § 660.

King & Ghidella, Napa, Fink & Keyston, San Francisco, for appellant.

Coombs, Dunlap & Blanckenburg, Clarence N. Riggins, all of Napa, for respondents.

PEEK, Justice.

On a former appeal this court confirmed an order of the Superior Court of Napa County conditionally granting the motion of defendant Basalt Rock Company for a new trial. See Hurt v. Basalt Rock Co., 84 Cal.App.2d 81, 190 P.2d 240, 241. The present appeal is a sequel to the former, presenting issues arising out of events transpiring subsequent to our decision in the former appeal and in particular from an order of the trial court vacating a judgment entered by the clerk of the Superior Court of said county.

The facts pertinent to a determination of the issues presented herein are that on October 26, 1946 a jury verdict in the sum of $12,500.00 was entered in favor of plaintiff Hurt. The motion of defendant Basalt Rock Company for a new trial, above referred to, was granted by an order dated

December 20, 1946, wherein it was stated: "* * * the motion for a new trial is denied, *but conditionally nevertheless* that plaintiff file appropriate legal documents herein effectuating his consent that he take judgment in the sum of $300.00 or in lieu of $12500.00 and that the judgment may be reduced from $12500.00 to $300.00 * * * *otherwise* and in the event plaintiff does not exercise the option hereby extended to him the motion for a new trial is hereby granted * * * upon the ground of insufficiency of the evidence." Plaintiff on December 31, 1946, took an appeal from said conditional order granting defendants' motion for new trial and the order was affirmed by this court by its decision filed March 1, 1948. On March 30, 1948, a petition for rehearing was denied, and on May 1, 1948 the remittitur was filed in the Superior Court. On September 29, 1948, defendants gave written notice to plaintiff requesting him to elect whether or not he would exercise the option extended to him in the trial court's order of December 20, 1946. Plaintiff made no response to this demand. On November 15, 1948, plaintiff caused the clerk of the trial court to enter a judgment on the verdict filed in October, 1946. On November 30, 1948 plaintiff served defendants with a notice of motion to direct the clerk to issue on execution on said judgment. On December 3, 1948 defendants served plaintiff with a notice of motion for an order vacating, annulling and striking from the files said judgment upon the ground that making an entry thereof was unauthorized and that the judgment was void. On December 13, 1948 the trial court denied the motion of plaintiff for the execution and granted defendants' motion to vacate, annul and strike from the files said judgment.

Plaintiff now appeals from the order denying his motion for issuance of an execution on the judgment entered by the clerk, and from the order granting defendants' motion to strike said judgment from the files. His contention is that since the conditional order for a new trial entered December 20, 1946 specified no time limit for him in which to make an election "The whole matter of the disposition of the motion for a new trial was arrested, suspended and held in abeyance, during the election to be made by the plaintiff without limitation as to time." In other words he argues that as the "trial court made no final ruling whatsoever on the motion for a new trial, inasmuch as no time whatsoever was specified wherein the plaintiff was to file such consent if he so elected", and as said motion was not determined within the sixty day period provided for in section 660 of the Code of Civil Procedure, it must be considered as denied, and hence it was proper to enter judgment on the verdict.

At the outset appellant is confronted with the effect of this court's decision on the former appeal. There this court held that by reason of the appeal having been taken the original conditional order of the trial court had not been converted into an unconditional order granting a new trial and that the order should be construed as requiring performance of the conditions on demand. We there said, after referring to the holdings of Holtum v. Grief, 144 Cal. 521, 526, 78 P. 11: "It necessarily follows that by reason of the appeal herein the original conditional order of the trial court has not been converted into an unconditional order granting a new trial by failure of plaintiff to accept the conditions thereof, and therefore by reason of our conclusion herein said conditional order of December 20 is to be construed as requiring performance of the conditions on demand." Whereupon this court determined that the order made was supported by substantial evidence, and being therefore within the proper exercise of discretion by the trial court, the order was affirmed. The petition for a rehearing was denied and thereafter a petition for hearing by the Supreme Court was denied. This court's holding became the law of the case and, as a result, when, after the going down of the remittitur, plaintiff and appellant herein refused on demand to elect to accept the reduction the order granting new trial became operative as an unconditional order to that effect. When in the face of such an order the clerk of the trial court presumed to enter a judgment upon the ver-

dict originally rendered his act was completely without authority of law and was a nullity.

The orders appealed from are affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.



99 Cal.App.2d 175

PEOPLE v. PASCALE.

Cr. 4464.

District Court of Appeal, Second District, Division 3, California.

Aug. 22, 1950.

Joe L. Pascale was convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., of violating the Health and Safety Code by possessing heroin and his motion for new trial was denied, and he appealed. The District Court of Appeal, Wood, J., held that the evidence sustained the conviction.

Affirmed.

1. Criminal law ⇐260(11)

In prosecution for violation of Health and Safety Code by possession of heroin, where defendant contended that he had admitted that heroin was his in order to keep his girl friend from getting into trouble, and there were certain contradictions in testimony of police officer as to whether defendant had asked officer if girl had been arrested, such contentions raised question of fact for determination of trial court. Health and Safety Code, § 11500.

2. Criminal law ⇐260(11)

In prosecution for violation of Health and Safety Code by possession of heroin, where defendant, who was in jail on suspicion of robbery at time heroin was found in his hotel room, testified that at time of his arrest officers had searched everything in his room and had not found heroin, whether it was fair inference from evidence that heroin was planted in defendant's room while he was in jail was question of fact for determination of trial court. Health and Safety Code, § 11500.

3. Criminal law ⇐260(11)

In prosecution for violation of Health and Safety Code by possession of heroin, where defendant was in custody on suspicion of robbery at time hotel management and defendant's girl friend searched his room and discovered heroin, and defendant contended that he had admitted that heroin was his in order to keep his girl from getting into trouble after police officer had informed him that girl friend was going to be booked on heroin charge, whether it was fair inference that defendant was entrapped into admission that heroin was his was question of fact for trial court. Health and Safety Code, § 11500.

4. Poisons ⇐9

Evidence sustained conviction for violation of Health and Safety Code by possession of heroin. Health and Safety Code, § 11500.

Everett W. Leighton, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Gilbert Harelson, Deputy Attorney General, for respondent.

WOOD, Justice.

Defendant was charged with violation of section 11500 of the Health and Safety Code in that on September 11, 1949, he unlawfully had in his possession a preparation of heroin. Trial by jury was waived. Defendant was convicted, and he appeals from the judgment and the order denying his motion for a new trial.

Appellant asserts that the evidence was insufficient to support the judgment. On September 11, 1949, appellant was a tenant of room 111 of a hotel in Los Angeles and he had occupied that room since July 7, 1949. The manager of the hotel went to that room on September 11th to make an investigation regarding a complaint that there was a disturbance in the room the

night before. A girl by the name of Lupe, who said she knew the appellant, was with the manager when he went into the room. The room, in which there was some of appellant's clothing, was in an upset condition. While the manager was making a search therein he noticed a slit in the end of the mattress and he found therein a finger stall containing 18 grams of heroin. The finger stall and contents will be referred to as exhibit A. Lupe asked the manager if she could have exhibit A. He handed it to her and then, without having left her presence, he took it from her and went downstairs to the hotel desk and called the police. On September 11, 1949, at the time the heroin was found, and also on September 10th, appellant was in jail at a police station "on suspicion of robbery."

Police Officer Hansford testified as follows: On September 11th he took appellant from the jail to said hotel room. The hotel manager gave exhibit A to the officer. While the exhibit was in front of the officer he said to appellant, "What about this stuff, Joe?" Appellant shrugged his shoulders and did not say anything. The officer said, "Well, come on, what is the deal, is this yours or isn't it? It was found here in your room." Appellant said, "Yes, it is mine, I put it there. I bought it two days ago. I hid it there and I was picked up for robbery last night, and when I was going to get out of the robbery beef, I was going to cap it up and peddle it." The officer asked him if he was still going with Lupe. Appellant replied, "Yes."

Appellant testified as follows: When he was arrested on suspicion of robbery on September 10th he was in said hotel room and at that time the officers searched the room thoroughly and looked at everything. He did not put exhibit A in the bed. He told Officer Hansford that the exhibit was not his (appellant's). When the officer said he had Lupe in jail and was going to book her too (on the heroin charge), then he (appellant) said exhibit A was his so that she would not get in trouble.

[1-4] Appellant argues that his explanation of the events, and certain contradictions in the testimony of Officer Hansford as to whether the appellant had asked the officer if a girl had been arrested, raise grave doubts as to appellant's guilt. He also argues that since, according to his testimony, the officers searched everything in his room on September 10th and did not find the heroin, it is a fair inference from the evidence that it was planted in his room while he was in jail. He argues further that it is a fair inference that he was entrapped into an admission that the heroin was his. The matters involved in these arguments were question of fact for the determination of the trial court. The judgment is supported by ample evidence.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.



98 Cal.App.2d 787

NIEMANN v. DEVERICH et al.
Civ. 17648.

District Court of Appeal, Second District, Division 2, California.

Aug. 7, 1950.

Charles Niemann, Jr., brought action against Marilyn Deverich and another on a note, wherein named defendant alleged as an affirmative defense that she was a minor at time she signed the note and that after reaching her maturity she disaffirmed the obligation. A judgment that plaintiff take nothing as against named defendant was entered by the Superior Court of Los Angeles County, Ben Rosenthal, J., and the plaintiff appealed. The District Court of Appeal, Wilson, J., held that where marriage of minor female over age of 18 years was not a lawful marriage because purported husband was lawful husband of another when ceremony took place, minor female would not be deemed an "adult person" under statute, and note signed by her after purported marriage

ceremony could be disaffirmed by her after reaching her maturity.

Judgment affirmed.

1. Infants ⇐99

In an action on note, where defendant alleged affirmative defense that she was a minor at time she signed note and that after reaching her maturity she disaffirmed the obligation, California decree annulling defendant's marriage, which occurred before defendant signed note, on ground that defendant's husband had another lawful wife when marriage ceremony between him and defendant was performed because Idaho divorce decree secured by him from his then wife was void was admissible for purpose of showing that defendant was still under legal disability of minority when she signed note. Civ.Code, §§ 25, 86.

2. Infants ⇐10

The statute providing that any female who has reached age of 18 years and thereafter contracts a lawful marriage shall be of age of majority and be deemed an adult person for purpose of entering into any contract refers to a lawful marriage, and, hence, a marriage, in order to accomplish adulthood of a minor female, must be lawful. Civ.Code, § 25.

3. Infants ⇐10, 58(1)

Where marriage of minor female over age of 18 years was not a lawful marriage because purported husband was lawful husband of another when ceremony took place, minor female would not be deemed an "adult person" under statute, and note signed by her after purported marriage ceremony could be disaffirmed by her after reaching her maturity. Civ.Code, §§ 25, 86.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Adult Person".

4. Infants ⇐47

One deals with infants at his peril.

5. Infants ⇐58(1)

The law shields minors from their lack of judgment and experience and under certain conditions vests in them the right to disaffirm their contracts. Civ.Code, § 25.

6. Infants ⇐58(1)

It is policy of law to protect minor against himself and his indiscretions and immaturity as well as against the machinations of other people and to discourage adults from contracting with an infant. Civ.Code, § 25.

7. Infants ⇐47

A person deals with a minor at his peril whether or not he has notice, actual or constructive, of minor's disability. Civ. Code, § 25.

John M. Dvorin, A. L. Abrahams and Henry B. Ely, all of Los Angeles, for appellant.

Francis B. Cobb, Los Angeles, for respondent.

WILSON, Justice.

Action on a promissory note dated November 1, 1946, for the sum of $6,950 signed by Marilyn Deverich and Albert Deverich. Defendant Marilyn filed an answer admitting her signature on the note and alleging as affirmative defenses that she was a minor at the time she signed the note and that after reaching her maturity she disaffirmed the obligation; that she received no consideration for the purported obligation; that the same was incomplete and was never executed or delivered by her to plaintiff; that prior to the date of the purported note a guardian of her person and estate had been appointed, guardianship proceedings had never been terminated, and the purported obligation was not executed or approved by her guardian, was not approved by the court and no claim thereon had been filed in the guardianship proceedings. She further alleged that at the time of her marriage to defendant Albert he had a wife living from whom he had not been legally divorced; that she was nineteen years of age when she married him and subsequently procured a decree of annulment of the marriage.

The evidence is not before us, the appeal having been taken on the judgment roll and a statement of the case which merely set

forth the points plaintiff desired to present on the appeal.

The facts as recited in the findings are as follows: Defendant Marilyn was born on April 25, 1926, and her twenty-first birthday was the twenty-fifth day of April, 1947; on August 4, 1933, in the superior court of Los Angeles County, Alzoa Garland Scott was appointed guardian of her person and estate; the guardianship has never been terminated; no order of the court was obtained permitting the transaction with plaintiff or the execution of the promissory note which is the subject of the action.

On January 3, 1946, Albert Deverich filed a complaint for divorce in the district court of the state of Idaho against his then wife Marjorie May Deverich; on January 4 the defendant entered her appearance in the action, admitted service of summons and complaint, waived time to answer, notice of motion to set, notice of trial, and all further proceedings and consented that the action be heard as a default. On the same date the default of defendant Marjorie was entered, the action was tried, the court found that the plaintiff had been a resident of the state of Idaho for the statutory jurisdictional period immediately preceding the commencement of the action and adjudged that the marriage be dissolved.

On January 8, 1946, four days after the entry of the decree of divorce, defendants in the instant action, Marilyn and Albert, entered into a marriage ceremony in Yuma, Arizona, and until February 28, 1947, lived together as man and wife and held themselves out to be such, which fact was known to and relied upon by plaintiff Niemann in accepting the note sued upon.

On April 8, 1947, defendant Marilyn, by her guardian ad litem, filed a complaint in the superior court of Ventura County for the annulment of her marriage, alleging the same was void for the reason that defendant Albert, ever since December 10, 1937, had had a wife living, and the purported decree of divorce obtained by him in Idaho was void. Defendant Albert consented that his default be entered and the court adjudged the marriage void from the beginning and annulled the same.

On April 25, 1947, defendant Marilyn delivered to plaintiff a written disaffirmance of the promissory note which is the subject of this action. The court found that Marilyn did not receive any consideration from plaintiff and was not required to return any consideration to him.

Prior to October, 1946, Marilyn signed the promissory note sued on herein. The date, name of payee and the amount of the note were blank when she signed it. The blanks were filled by Albert Deverich before the note was delivered to plaintiff.

The foregoing is a statement of facts as found by the trial court. Appellant does not contend that any finding is not sustained by the evidence.

As conclusions of law the court declared that the promissory note was signed by Marilyn in blank when she was under twenty-one years of age; she was entitled to give the notice of disaffirmance and having received no consideration she was not required to restore anything to plaintiff; at the time of the signing of the note she was under the legal disability of a guardianship proceeding pending in the superior court of Los Angeles County; her affairs were under the control of her guardian, and no consent of the court was obtained with respect to the note or to any of the transactions above mentioned.

Upon the foregoing findings of fact and conclusions of law the court adjudged that plaintiff take nothing as against defendant Marilyn Deverich. From this judgment plaintiff has appealed.

[1, 2] When the Ventura decree of annulment of the marriage of defendants Marilyn and Albert was offered in evidence plaintiff objected to the introduction of the proceedings on the grounds that by reason of the fact that he was not a party to the action the decree was not binding on him, citing sections 25 and 86 of the Civil Code; that the evidence of such proceedings was an impairment of the obligation of his contract, denied him due process of law, and denied full faith and credit to the Idaho decree of divorce, citing Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087, 1097, 92 L.Ed. 1429, 1 A.L.R.2d 1355, and Coe v.

Coe, 334 U.S. 378, 68 S.Ct. 1094, 92 L.Ed. 1451, 1 A.L.R.2d 1376. Plaintiff maintains that the Idaho decree of Albert from his former wife determined his marital status and since that decree purported to dissolve his marriage to Marjorie he was free to marry defendant Marilyn. The answer to this contention is that the Ventura decree annulled the marriage of Marilyn and Albert on the ground that the Idaho decree was void and that Albert was the lawful husband of Marjorie when the marriage ceremony between him and Marilyn was performed. The evidence offered (1) in the Idaho case, (2) in the Ventura trial, and (3) in the trial of the instant case is not before us and we are not called upon to review any one of those proceedings. We cannot go behind the Ventura decree since it has become final and it must be presumed that (1) the Ventura court heard evidence with reference to Albert's former marriage and to his purported residence and divorce in Idaho; (2) the evidence sustained the Ventura decree that his marriage to Marjorie still subsists and in consequence thereof his purported marriage to Marilyn was and is void.

The case of Daut v. Daut, 98 Cal.App.2d 375, 220 P.2d 63, is not in conflict with our conclusions. That action was between the same persons who had been parties to a former divorce action in Maryland in which the plaintiff in the California case had submitted to the jurisdiction of the Maryland court by filing an answer to the complaint. The defendant wife in the California case, plaintiff in Maryland, contested the action and based her defense on the Maryland decree. In the instant case a stranger to the Idaho divorce action is involved and she was the plaintiff in the Ventura annulment case wherein the decree is final. Her putative husband was defendant in the latter action and made no defense thereto.

Plaintiff relies on section 25 [1] of the Civil Code to sustain his position. That section provides that "any female who has reached the age of 18 years and thereafter contracts a lawful marriage * * * shall * * * be of the age of majority and be deemed an adult person * * * for the purpose of entering into any contract, * * *" This provision refers to a "lawful" marriage, hence a marriage, in order to accomplish adulthood of a minor female, must be "lawful." If it is not lawful it is not a marriage and her minority status remains unchanged.

The lawfulness of the marriage must be shown. If, as in the instant case, the validity of the marriage is questioned the jurisdiction of the court and the disability of the guardianship remain in effect until the validity of the marriage is determined. If it were not so a wilful ward could frustrate the purpose of the guardianship by contracting an illegal marriage and by such marriage free himself from the protection which the law has provided and which the court was endeavoring to give by the appointment of a guardian. In re Guardianship of Jacobson, 30 Cal.2d 312, 322, 182 P.2d 537. Through her guardian ad litem the validity of Marilyn's marriage was attacked in the Ventura court. That court having rejected the Idaho proceedings and the purported decree of divorce therein en-

1. Section 25 reads: "Minors are all persons under 21 years of age; provided, that this section shall be subject to the provisions of the titles of this code on marriage and shall not be construed as repealing or limiting the provisions of Section 204 of this code; provided, further, that any female who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or her estate, or for the purpose of entering into any contract, the same as if she was 21 years of age. Subsequent judgment of annulment of such marriage shall not deprive such female person of her adult status once attained under the foregoing provision, unless such judgment is obtained in an action commenced prior to her reaching the age of 18 years, in which latter event she shall be deemed to have remained a minor at all times notwithstanding such marriage."

tered, we need not look further into this phase of the proceedings since in determining the instant case the trial court and this court on appeal are bound by the Ventura judgment.

[3] The object of the statute is to protect the persons and estates of those who lack capacity to properly care for themselves and to preserve their property from improvident use. Since the marriage of defendants was not a "lawful" marriage, Marilyn is not "deemed an adult person," she was legally incapable of entering into a contract, and the promissory note sued on is therefore void as to her.

[4] Plaintiff further relies on section 86[2] of the Civil Code. As to this contention he is confronted with the "settled principle of law that one deals with infants at his peril." Pollock v. Industrial Accident Comm., 5 Cal.2d 205, 211, 54 P.2d 695, 698. In that case the court remarked that the effect of the opinion would be to compel the insurance carrier to pay the Industrial Accident Commission's award twice—seemingly a harsh and unjust result, but such was the consequence of the carrier's having dealt directly with a minor.

[5, 6] The law shields minors from their lack of judgment and experience and under certain conditions vests in them the right to disaffirm their contracts. Although in many instances such disaffirmance may be a hardship upon those who deal with an infant, the right to avoid his contracts is conferred by law upon a minor "for his protestion against his own improvidence and the designs of others." It is the policy of the law to protect a minor against himself and his indiscretions and immaturity as well as against the machinations of other people and to discourage adults from contracting with an infant. Any loss occasioned by the disaffirmance of a minor's contract might have been avoided by declining to enter into the contract. Flittner v. Equitable Life Assurance Society, 30 Cal.App. 209, 216, 157 P. 630; Tracy v. Gaudin, 104 Cal.App. 158, 160, 285 P. 720.

[7] While a person deals with a minor at his peril whether or not he has notice, actual or constructive, of the minor's disability, plaintiff in the instant case is chargeable with notice of the fact that Marilyn was under the disability of minority when he accepted her note. Her guardianship proceedings were instituted and a guardian of her person and estate was appointed by the superior court of Los Angeles County in 1933. Such proceedings have been at all times a public record, of which plaintiff is presumed to have had notice, and have been notice to the world of the incapacity of the ward to enter into a contract. The guardianship proceedings have never been terminated. The guardian did not join in or consent to the transaction with plaintiff and the court did not authorize or approve it.

Our conclusion that defendant Marilyn is not liable on the promissory note sued on for the reasons above expressed renders it unnecessary to discuss the further defenses presented.

Judgment affirmed.

McCOMB, J., concurs.

MOORE, P. J., deeming himself disqualified does not participate herein.

2. Section 86 reads: "A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them."

COEN v. SUPERIOR OPTICAL CO., Inc.

COEN et al. v. SUPERIOR OPTICAL CO., Inc.

Civ. 17628.

District Court of Appeal, Second District, Division 2, California.

Aug. 16, 1950.

Rehearing Denied Sept. 1, 1950.

Hearing Denied Oct. 9, 1950.

Action by Franklin Coen against Superior Optical Company, Inc., to recover the agreed price or reasonable value of goods sold and delivered, wherein defendant filed a counterclaim and a cross-complaint for damages against Franklin Coen, Fashion Zyl Company, and Aaron Coen. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, McComb, J., held that substantial evidence sustained every finding of fact upon which the judgment was necessarily predicated and that fact that some immaterial findings were contrary to admissions in pleadings did not constitute ground for reversal.

Judgment affirmed.

1. Sales ⇐359(1)

In action to recover the agreed price or reasonable value of goods sold and delivered, substantial evidence sustained every finding of fact upon which judgment for plaintiff was necessarily predicated.

2. Appeal and error ⇐1071(3)

That some immaterial findings of fact were contrary to admissions in the pleadings did not constitute a ground for reversal of judgment based on findings of fact sustained by substantial evidence.

3. Appeal and error ⇐1011(1)

Trial court's findings of fact based on conflicting evidence are binding on appeal.

4. Appeal and error ⇐1033(7)

Where findings of fact were made on all the material issues raised and they were contrary to defendant's contention, failure to enter judgment on defendant's cross-complaint was not prejudicial to defendant, since any judgment entered on cross-complaint must have been in favor of plaintiff.

Clyde Thomas, Los Angeles, for appellant.

Redmond & Redmond, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff as assignee of Fashion Zyl Co. brought an action on two common counts, first for goods, wares and merchandise sold and delivered of the reasonable value of $2,046.75, and second, to recover for goods, wares and merchandise sold defendant at the agreed price of $2,046.75.

Defendant filed an answer, a counterclaim, and a cross-complaint for damages. After trial before the court without a jury judgment was entered for the plaintiff for the sum sued for, predicated upon findings of fact and conclusions of law in favor of plaintiff. No judgment was entered on the cross-complaint.

Facts: The evidence disclosed that plaintiff's assignor had sold defendant Superior Optical Company spectacle frames of the value of $2,046.75.

Contention: Defendant claims that the evidence is insufficient to sustain the findings of fact upon which the judgment was predicated and that certain findings are contrary to admissions in the pleadings.

[1–3] This contention is without merit. Examination of the record discloses substantial evidence to sustain each and every finding of fact upon which the judgment was necessarily predicated. There are certain immaterial findings which are contrary to admissions in the pleading. However, since the findings are immaterial they do not constitute a ground for reversal of the judgment. There are numerous conflicts in the evidence which the trier of fact resolved in favor of plaintiff and the court's finding is binding on appeal. Further discussion of the evidence would serve no useful purpose.

[4] Likewise there is no merit in defendant's contention that a judgment was not entered on the cross-complaint. Findings of fact were made on all the material issues raised, and since these findings were

contrary to defendant's contention a judgment if entered on the cross-complaint would have been in favor of plaintiff and hence no prejudicial error has been shown by defendant.

Affirmed.

MOORE, P. J., and WILSON, J., concur.



RUINELLO v. MURRAY.
Civ. 17473.

District Court of Appeal, Second District, Division 1, California.

Aug. 14, 1950.

Rehearing Denied Sept. 8, 1950.

As Modified Sept. 11, 1950.

Hearing Granted Oct. 9, 1950.*

Henry Ruinello sued Dorothy Clune Murray, individually and doing business as Ninth & Broadway Building, for breach of an oral employment contract. From a judgment of the Superior Court of Los Angeles County, William B. McKesson, J., for defendant, plaintiff appealed. The District Court of Appeal, Doran, J., held that defendant was not estopped to set up the statute of frauds as a ground of demurrer to plaintiff's third amended complaint.

Judgment affirmed.

1. Frauds, statute of ⇐144

In action for breach of oral contract to employ plaintiff for five years, defendant was not estopped to set up statute of frauds as ground of demurrer to plaintiff's third amended complaint, in absence of allegation of defendant's promise to execute written contract and subsequent failure to do so.

2. Pleading ⇐225(2)

Where three different judges found four complaints filed by plaintiff fatally defective as against demurrers interposing statute of frauds, trial court did not abuse its discretion in sustaining demurrer on such ground to third amended complaint without leave to amend it.

* Subsequent opinion 227 P.2d 251.

Seymour D. Sommer, Los Angeles, for appellant.

Gibson, Dunn & Crutcher, Frederic H. Sturdy, all of Los Angeles, John T. Pigott, Jr., Los Angeles, of counsel, for respondent.

DORAN, Justice.

The appeal herein is from a judgment in favor of defendant, entered pursuant to an order sustaining a demurrer to plaintiff's third amended complaint without leave to amend.

Stripped of extraneous matter, the basic allegations of the third amended complaint may be briefly summarized. In October, 1945, defendant entered into an oral employment agreement with plaintiff, whereby in consideration of plaintiff giving up an alleged "permanent lifetime position" with another employer as engineer and superintendent and taking a similar position with defendant, the owner of the Ninth and Broadway Building in Los Angeles, for the term of five years, defendant would pay plaintiff a monthly salary of $350 plus a yearly bonus of 20% of the gross income in excess of $114,000.

As noted in the respondent's brief, "None of the terms or conditions of the alleged employment which plaintiff claims to have given up is pleaded, other than that it was 'oral' and was 'a permanent lifetime job'." It is also alleged that plaintiff had been personally acquainted with defendant for 20 years and was previously employed by defendant and the latter's husband. Finally, the complaint alleges that after having worked for defendant from December 1, 1945 to February 21, 1948, plaintiff was summarily discharged. The complaint seeks recovery of $11,050, which is the sum plaintiff would have been entitled to receive as salary during the balance of said employment agreement. Plaintiff also prays for an accounting as to gross profits and for judgment of 20% of the yearly gross profits in excess of $114,000.

Plaintiff's original complaint, substantially the same as the one now in issue, was attacked by demurrer—"on the ground that the oral agreement, admittedly not to be

performed within one (1) year, was invalid under the Statute of Frauds." Demurrer thereto was sustained, as was a demurrer to the amended complaint. Plaintiff's second amended complaint was, by stipulation, followed by a third amended complaint to which demurrer was sustained without leave to amend.

[1] It is argued by appellant that, "based on the facts set forth in his complaint, the respondent is estopped to set up the Statute of Frauds * * * where the appellant acted in good faith upon the statements and representations made to him by the respondent, and in reliance of said representations has changed his position so materially that it would be unconscionable to permit the respondent to set up the Statute of Frauds as a defense." In this connection it is claimed that after inducing appellant to give up a permanent lifetime position, "and when he had so successfully performed his duties that the bonus to which he was entitled reached a figure which was not contemplated by the respondent, she arbitrarily discharged the appellant to avoid her obligation, and now seeks to raise the technical defense of the Statute of Frauds."

The case of Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154 is relied upon by the appellant. The facts in that case are stated as follows at page 797 of the opinion in 156 Cal., at page 95 of 106 P.: "Practically, defendants said to plaintiff: 'We want you to enter our employ at once. We know that to do so you must give up your life position in the police department and that you are not willing to do this unless you are assured of employment for ten years at $300 a month. A written contract is, under our statute, essential to guarantee you such employment. We will execute this contract just as soon as Mr. Fair returns from Europe. Go ahead and resign your position now and commence work with us at once, and it will be all right. The written contract will be given as promised.'" It was there held that subsequent repudiation of the oral contract "would constitute such a manifest fraud as would justify the application of the doctrine of equitable estoppel."

The complaint here in question neither alleges nor suggests such a state of facts, nor is any such situation even remotely intimated in any of the four complaints filed. It is further to be noted that the complaint fails to allege any facts connected with the former employment, or "what, if anything, plaintiff gave up by leaving his former position", other than by alleging a previous "permanent lifetime job".

The recent case of Monarco vs. Lo Greco, 35 Cal.2d 621, 220 P.2d 737, has been cited by appellant, where in the language of the headnote, the Supreme Court held that "The doctrine of estoppel to plead the statute of frauds is not rendered inapplicable merely because a change of position * * * did not result from reliance on a representation that a contract would be put in writing * * *. It is the promise that the contract will be performed, rather than such representation, on which a party relies when he changes his position, and the other party would be unjustly enriched by his acceptance of benefits under the contract". The factual situation in the Monarco case, however, was in no respect similar to that of the instant controversy, and the case is of no assistance in maintaining the appellant's position. The present situation is simply one in which the pleader failed to set up requisite facts to justify the application of the principles of estoppel.

[2] It is further contended by appellant that the trial court abused its discretion in sustaining the demurrer without leave to amend. As stated in respondent's brief, "Plaintiff has four times attempted to plead a cause of action, and to each of the complaints put in issue defendant has appeared and interposed the Statute of Frauds. Three different judges found plaintiff's complaint fatally defective."

The right to amend is simply the right to have a reasonable opportunity to plead a cause of action. In the instant appeal the record clearly reveals that appellant has been accorded this opportunity, and that no manifest abuse of discretion has taken place.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

STOCKTON DRY GOODS CO. v. GIRSH.

Civ. 7795.

Sac. 6084.

District Court of Appeal, Third District, California.

Aug. 11, 1950.

Hearing Granted Oct. 9, 1950.*

The Stockton Dry Goods Company, a California corporation, brought action against Stanley Girsh for a judicial interpretation whereby the plaintiff leased to the defendant space in its department store for a shoe department, and whereby rent was fixed at a sum equal to 10% of all net cash sales and 11% of all net charge sales, with neither a minimum nor maximum rental being specified. The Superior Court of San Joaquin County, George F. Buck, J., rendered a judgment interpreting the lease as permitting the plaintiff to conduct shoe departments in the store, and the defendant appealed. The District Court of Appeal, Van Dyke, J., held that there was an implied obligation on the part of the plaintiff not to operate a shoe department.

Judgment reversed with directions.

1. Contracts ⇐152, 167, 168
Customs and usages ⇐10

In the interpretation of contracts, stipulations which are necessary to make contracts reasonable, are implied in respect to matters concerning which the contract manifests no contrary intention, and all things that in law or usage are considered as incidental to contracts, or as necessary to carry them into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded. Civ.Code, §§ 1655, 1656.

2. Landlord and tenant ⇐200(1)

Where lease by corporation operating a department store, of space in the store to tenant to conduct a shoe department, provided that rent was a sum equal to 10% of all net cash sales and 11% of all net charge sales, and specified neither a minimum nor maximum rental, corporation was burdened with implied covenant that he would, during term of lease, conduct business of selling shoes in space allotted to him and that he would so conduct such business as to maintain as large a trade as could be done with reasonably active and competent management and that such business would be conducted for mutual benefit of both parties. Civ.Code, §§ 1655, 1656.

3. Landlord and tenant ⇐200(1)

Rule that where a minimum rental is to be paid, of such amount as to justify a conclusion that parties had fixed on such minimum amount as chief consideration moving to lessor, than there is no implied obligation that lessee shall conduct business in leased premises, notwithstanding a stipulation that lessor should share in gross sales returns, has no application where sole rental is a percentage of sales made.

4. Landlord and tenant ⇐200(1)

Where lease by corporation operating a department store, of space in the store to tenant to conduct a shoe department, provided that rent was a sum equal to 10% of all net cash sales and 11% of all net charge sales, and specified neither a minimum nor maximum rental, there was an implied obligation on part of corporation not to operate a shoe department in the store. Civ. Code, §§ 1655, 1656.

5. Landlord and tenant ⇐130(2)

Every grant of right, interest, or benefit in land carries with it an implied undertaking on part of lessor that grant is intended to be beneficial and that so far as the lessor is concerned, lessor will do no act to interrupt the free and full enjoyment of the thing granted, and if lessee's ordinary and lawful enjoyment of demised land is substantially interfered with by acts of lessor or those lawfully claiming under him, though neither title to the land nor the possession thereof is otherwise affected, implied "covenant of quiet enjoyment" is breached.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Covenant of Quiet Enjoyment".

6. Landlord and tenant ⇐171(1)

There may be a constructive eviction of a tenant by wrongful acts, or failure to

* Subsequent opinion 227 P.2d 1.

act on part of landlord so as essentially to deprive the tenant of beneficial enjoyment of the premises.

Willens & Boscoe, Gordon J. Aulik, all of Stockton, for appellant.

Mitchell, Johnson & Bates, Clive W. Johnson, all of Los Angeles, for respondent.

VAN DYKE, Justice.

Plaintiff and respondent, a corporation operating a department store in the City of Stockton, brought this action against its tenant, defendant and appellant, Stanley Girsh, for declaratory relief. It sought judicial interpretation of the written lease between the parties. Specifically, it sought to have the court declare that it could operate within its department store one or more shoe departments, notwithstanding the lease gave to its tenant a right to conduct such an enterprise therein. The court by its decree declared that it had such a right and from this judgment Girsh appealed. We will hereafter refer to the appellant as lessee and the respondent as lessor.

The lease in question was entered into between the present lessor's predecessors in interest, and the lessee, and recited that the lessors were conducting and maintaining a "so-called department store" in the City of Stockton and that the lessee was desirous of renting a portion of the store premises for the purpose of conducting a shoe department. The term granted was for five years, with option to renew for an additional five-year term. The rent to be paid was fixed at a sum equal to ten per cent of all net cash sales and eleven per cent of all net charge sales. Neither minimum nor maximum rental was specified. The lessee agreed to live up to the rules of the lessor in conducting its department store and to permit all adjustments to be made by the store manager; the lessee further agreed to submit all advertising copy to the manager and that such must be approved by him before it could be published.

The trial court found to be true all of the allegations of the complaint, including the specific allegation that the lessor had, under the lease, the right to operate and conduct one or more shoe departments in the department store and in competition with the business being conducted by the lessee. The trial court rendered its declaratory judgment as prayed for in the complaint, decreeing that the lessor had rights as above alleged, and that, conversely, the lessee did not have the sole and exclusive right to operate the shoe department.

While the lessee, in support of his appeal from said judgment, advances a number of contentions having to do with rulings made by the court during trial, it is unnecessary, we think, to deal with those matters. The principal contention which the lessee urges concerns the court's construction of the lease; and since we believe the trial court erred therein and that its judgment must, therefore, be reversed, we will proceed in this opinion to discuss that matter only.

[1] It is a basic rule in the interpretation of contracts that stipulations which are necessary to make a contract reasonable are implied "in respect to matters concerning which the contract manifests no contrary intention", and that "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded." Civ.Code, §§ 1655, 1656.

[2, 3] Concerning this lease it is apparent that, because the rental payable thereunder consists of a substantial portion of the gross business done in the shoe department, the lessee is burdened with the implied covenant that he will, during the term of the lease, conduct the business of vending shoes in the space allotted to him and further that he will so conduct such business as to maintain as large a trade as could be done with reasonably active and competent management. This is so because it is the evident purpose of both parties, as gathered from the conditions expressed in the lease, that such business

should be conducted. We do not have here a lease under which the lessee is free to either occupy and use the leased premises or leave them vacant and unused, as is the general right of a lessee under the ordinary lease. Selber Bros. v. Newstadt's Shoe Stores, 203 La. 316, 14 So.2d 10; Mayfair Operating Corp. v. Bessemer Properties, 150 Fla. 132, 7 So. 2d 342; Cissna Loan Co. v. Baron, 149 Wash. 386, 270 P. 1022, and Garden Suburbs Golf & Country Club v. Pruitt, 156 Fla. 825, 24 So.2d 898; see, also, annotation to report of same case in 170 A.L.R. at 1107, et seq. In saying that the contract between the parties here, although containing no express statement of an agreement on the part of the lessee that such business would be conducted for the mutual benefit of both parties, nevertheless contained an implied condition to that effect, we are not unmindful of such cases as Cousins Inv. Co. v. Hastings Clothing Co., 45 Cal.App.2d 141, 113 P.2d 878. There it was held that where a minimum rental was to be paid, of such amount as to justify a conclusion that the parties had fixed upon such minimum amount as the chief consideration moving to the lessor, then there was no implied obligation to conduct business in the leased premises, notwithstanding a stipulation that the lessor should share in the gross sales returns. Such a rule has no application where the sole rental is a percentage of the sales made.

[4] But a covenant on the part of the lessee, either express or implied, to conduct a shoe vending business in the leased space within the lessor's store, carried with it the reciprocal implied obligation on the part of the lessor to place no obstacle in the way of the lessee in his performance of that covenant. Competition by the lessor through independently conducted shoe departments, free and unlimited, such as is permitted by the decree of the trial court, is utterly inconsistent with the duty which the lessor under this lease assumed toward the lessee and would be destructive of the relationship intended by the parties. This becomes apparent when we consider what is involved in competition.

Competition means striving for something that is sought by another at the same time; a contention of two or more for the same object or for superiority; rivalry as between aspirants for honors or for advantage in business. Merchants' Nat. Bank of Glendive v. Dawson County, 93 Mont. 310, 19 P.2d 892, 896. Competition is the struggle between rivals for the same trade at the same time. Ferd. Heim Brewing Co. v. Belinder, 97 Mo.App. 64, 71 S.W. 691, 695. It is the effort of two or more parties acting independently to secure the custom of a third party by the offer of the most favorable terms. It is the struggle between rivals for the same trade at the same time. "At common law a trader, * * *, in order to get another man's customers, could use any means not involving violation of the criminal laws, or amounting to 'fraud,' 'duress,' or 'intimidation,' * * *. The trader may boast untruthfully of the merits of his wares, so long as it does not take the form of false statements, amounting to slander or willful misrepresentation of the quality of a rival product, or a libel upon the character, business standing, and credit of his rival, or an effort to induce the public to believe that the product he sells is that manufactured and sold by the rival. He may send out circulars, or give information verbally, to customers of other men, knowing they are bound by a contract for a definite term, although acting upon the expectation and with the purpose of getting the trade of such persons for himself. He may use any mode of persuasion with such a customer, keeping within the limitations stated, which appeals to his self-interest, reason, or even his prejudices. He may descant upon the extent of his rival's facilities compared with his own, his rival's means, his insolvency, if it be a fact, and the benefits which will result to the customer in the future from coming to the solicitor rather than remaining where he is. He may lawfully, at least so far as his rival is concerned, cut prices to any extent, to secure his trade. So long as what he does is done to benefit his own trade, and, in taking over the customers of another, he keeps within the

limitations heretofore defined, he is safe from legal restraint at the instance of a competitor in following 'the law of competition,' which takes little note of the ordinary rules of good neighborhood or abstract morality. The person whose customers are thus taken from him cannot complain, for no right of action lies in his favor against him who solicitated his customer, since the solicitor exercised a legal right in a legal way, and the exercise of a legal right in a legal way, for a lawful purpose, will not give a cause of action." Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co., C.C., 171 F. 553, 560.

We have referred to the meaning of the word "competition" in order to emphasize the character of action which the trial court has found respondent may indulge in towards its lessee notwithstanding its lease with him. It appears from the lease that respondent's space is located on the mezzanine floor within the respondent's department store. Within the lawful limits of competition, therefore, when customers enter respondent's store and ask its employees and salesmen where the shoe department is to be found, respondent, if it be competing for that trade, may have such people so answered as to direct them to its own department; it could even have such persons informed that the best bargains in shoes were in its department rather than in that of its lessee; it could place directive and solicitous signs at the entrance to its department store, directing patrons to its own shoe department. Enough has been said to show that this decision that the respondent lessor here can enter into open competition with its lessee is a matter of serious and vital import to the lessee. We hold that under this lease the lessor would violate its own covenant with the lessee by running a competitive shoe vending business within the confines of its department store.

[5, 6] There is yet another reason in law why the trial court's interpretation of the contract between the parties here cannot be upheld. It has been said that every grant of right, interest or benefit in land carries with it an implied undertaking on the part of the grantor that the grant is intended to be beneficial and that so far as the lessor is concerned he will do no act to interrupt the free and full enjoyment of the thing granted, Dexter v. Manley, 1849, 4 Cush. 14, 58 Mass. 14; and that if the lessee's ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor or those lawfully claiming under him, although neither the title to the land nor the possession thereof is otherwise affected, this implied covenant is breached. Sanderson v. Berwick [1884], L.R. 13 Q.B.Div. [Eng.] 547-C.A.; 62 A.L.R. 1257; Winchester v. O'Brien, 266 Mass. 33, 164 N.E. 807, 64 A.L.R. 900. These implied undertakings are often called covenants of quiet enjoyment and acts in violation thereof may amount to eviction, actual or constructive. "Not only actual expulsion may amount to an eviction, but there may be constructive eviction by wrongful acts, or failure to act on the part of the landlord which essentially deprives the tenant of beneficial enjoyment of the premises." Williston on Contracts, Sec. 892; see, also, Grinnell Bros. v. Asiuliewicz, 241 Mich. 186, 216 N.W. 388; Civ.Code § 1927; Mills v. Richards, 84 Cal.App. 52, 257 P. 542; Landon v. Hill, 136 Cal.Ap. 560, 29 P.2d 281; Aaker v. Smith, 87 Cal.App.2d 36, 196 P.2d 150.

We hold that, under the terms of this lease, for the lessor to compete with its lessee, as the trial court has decreed that it has the right to do, could well amount to a constructive eviction through violation of the covenant of quiet enjoyment implied in the lease, and hence that the judgment of the trial court cannot be upheld.

The judgment is reversed, with directions to the trial court to enter a decree adjudging and declaring that the lessor, respondent herein, does not have the right under the lease in question to conduct a business of selling shoes in its department store in competition with appellant, and that appellant, as lessee of respondent, does have the sole and exclusive right to operate such business in the department store of respondent to the exclusion of all others.

ADAMS, P. J. and PEEK, J., concur.

99 Cal.App.2d 10

PEOPLE v. FIELDS.

Cr. 818.

District Court of Appeal, Fourth District, California.

Aug. 10, 1950.

David Harold Fields was convicted in the Superior Court of Kern County, W. L. Bradshaw, J., of murder in the first degree, and he appealed. The District Court of Appeal, Barnard, P. J., held that evidence did not establish that defendant was guilty of murder in the first degree.

Judgment affirmed as modified.

1. Homicide ⇐22(2)

Under statutory test for first-degree murder a deliberate and preconceived intent to kill must be satisfactorily shown. Pen. Code, § 189.

2. Homicide ⇐22(2)

The "deliberate and premeditated" intent to kill necessary to render a homicide first-degree murder negatives idea of hurried and thoughtless action and reasonably implies existence of some plan or design in advance of taking action, and true test is not duration of time as much as it is the extent of reflection. Pen. Code, § 189.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Deliberate and Premeditated".

3. Homicide ⇐282

In fixing degree of murder of which a defendant is guilty, considerable discretion must be left to jury, but such discretion must be exercised in accordance with standards fixed by law.

4. Homicide ⇐254

A defendant who shot and killed another person with a rifle was guilty under the evidence only of murder in the second degree and not of first-degree murder. Pen. Code, § 189.

West, Vizzard, Howden & Baker, Bakersfield, for appellant.

Fred N. Howser, Attorney General, Gilbert Harelson, Deputy Attorney General, for respondent.

BARNARD, Presiding Justice.

The defendant was convicted of murder in the first degree, with life imprisonment, and he appeals from the judgment.

It was stipulated that Jack Olds was killed on October 29, 1948, by a rifle shot fired by the appellant. They lived in a mountain community in Kern County, had been friends for some years, and had been drinking together late in the afternoon of that day. They arrived at appellant's home about 7:00 o'clock, both showing the effect of liquor but being "friendly and in good spirits." They left half an hour later, ostensibly to take Olds home, and went to Austin's Cafe. The appellant became angry at Austin, who refused to serve him a drink, and a scuffle ensued during which Austin's shirt was badly torn. The appellant then made some uncomplimentary remarks about Austin, and Olds insisted that Austin was right. The appellant then struck Olds with his fist, and Olds clinched with him to keep from having trouble. They scuffled and Olds kept telling him to go home to his wife and children. Olds finally had the appellant on the ground and told him he was going to take him home. With the help of a bystander Olds got him in the car and they drove off.

They reached home about 8:00 o'clock and appellant's wife and sister-in-law, who will be referred to as the sister, came out and all four then entered the house. Between the front room and the kitchen was a bedroom, in which a rifle stood beside a dresser. The appellant stopped in the bedroom and leaned against or over this dresser. The other three went on into the kitchen, and Olds and the sister were talking as the wife started to prepare some coffee. Appellant's wife then saw him at the bedroom door holding the rifle at his hip. As she walked toward him two shots were fired, one of which killed Olds. The sister ran out of the house and the appellant started to follow and fired two shots

toward her. He then turned around and fired two shots in the direction of his wife. She ran to a neighbor's home and phoned for help.

The only eyewitnesses were the wife and sister. The sister testified that she and the wife went out when the others returned at 8:00 o'clock; that "Jack had Dave down"; that "Dave told Jack to let him up, and he let him up"; that she could not remember that anything else was said; that they did not appear to be angry; that Olds assisted the appellant into the house; that he "leaned against the dresser" in the bedroom and she and the others went on into the kitchen; that she and Olds were talking, and "Oh, 5 or 10 minutes" elapsed before anything occurred; that two shots were then fired and Olds fell; that nothing had been said by or to the appellant; that she ran past him and out the front door and on to a neighbor's; and that he fired two shots toward her as she ran.

The appellant's wife testified that as a result of a prior accident he suffered pain at times and took sedative pills; that he had been inclined to be irritable and moody since the accident, and would "act differently" when he took the pills and drank at the same time; that he took two of these pills about 7:00 that night; that when they returned about 8:00 the appellant asked her to get Jack "to turn him loose"; that Jack asked him if he would behave if he let him loose; that Jack helped him up and they came in the house with their arms about each other; that as she moved a child from the bed the appellant fell over on the dresser and "sprawled" across it; that she tried to get him to bed but he wouldn't get up; that she and the others went into the kitchen; that she thought she would make some coffee; that she took the top off the coffee pot to empty it and went past the appellant toward the front door; that hearing a noise she turned around and saw him standing in the door holding the gun at his hip and "looking at the wall, right behind Jack"; that neither he nor Olds said anything; that she walked toward him intending to knock the gun aside but as she raised her hand the gun went off twice; that the sister screamed and ran out, and the appellant fired two shots in that direction; that she dropped the coffee pot and he turned and fired twice toward her; that she ran to a neighbor's and called for help; that she then heard appellant "hollering" that he had shot Jack and asking her to call a doctor; and that she ran back and found him leaning over Olds, saying he had shot him, and asking him not to die.

A number of witnesses who arrived later, some within ten minutes, testified as to what they saw and heard. It thus appears that the appellant then spoke clearly and knew what he was doing and saying, but otherwise this evidence is not very material here. He used considerable profane language but this was habitual with him. While he was somewhat angry and abusive toward some of these witnesses, he was friendly toward others whose help he desired. He told one witness that he did not kill Olds but knew who did and would tell at the proper time. Later, he admitted that he had killed Olds and asked if the witness thought he ought to have an attorney. At one time he told a witness that he had killed Olds all right but that he hoped he could "beat this rap."

The appellant first contends that the evidence is not sufficient to show "beyond a reasonable ground of doubt" that this killing was willful, deliberate and premeditated; that the court should have, on its own motion, instructed the jury according to section 1097 of the Penal Code; and that the degree of the crime should be reduced.

[1-3] Under the statutory test for first degree murder something more than an intentional killing is required, and a deliberate and preconceived intent to kill must be satisfactorily shown. People v. Holt, 25 Cal.2d 59, 153 P.2d 21; People v. Bender, 27 Cal.2d 164, 163 P.2d 8, 19. In the latter case, it is pointed out that "deliberate" implies something that is unhurried and arrived at as a result of careful thought and of weighing the reasons for

and against a contemplated action; that it means the opposite of hasty, impetuous or impulsive; and that "premeditate" means "To think on, and to revolve in the mind, beforehand; to contrive and design previously." The words "deliberate" and "premeditated" not only negative the idea of hurried and thoughtless action but reasonably imply the existence of some plan or design in advance of taking action. "The true test is not the duration of time as much as it is the extent of the reflection." People v. Thomas, 25 Cal.2d 880, 156 P.2d 7, 18. In defining first degree murder, Penal Code, Sec. 189, the legislature has clearly required substantially more reflection than that involved in a mere intent to kill, and seems to have intended by the "any other kind" clause that such a killing must be one of equal cruelty or aggravation with those specifically described. While considerable discretion in fixing the degree must be left to the jury, this must be exercised in accordance with the standards fixed by law. "Mere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does not constitute proof." People v. Bender, 27 Cal.2d 164, 163 P.2d 8, 21.

Applying these standards and rules we think the evidence here is not sufficient, beyond a reasonable doubt, to establish first degree murder. The killing was admitted and there was ample evidence that the appellant was not so intoxicated as to be incapable of forming the required intent. The main question here, as at the trial, is as to the degree of the crime. The respondent contends that the evidence sufficiently shows an intent to kill formed as a result of deliberate premeditation, with a preexisting reflection. It is argued that the appellant had time to deliberate during the ride from Austin's Cafe to his home, and that he could have been "pondering" during the time he was in the bedroom.

[4] The evidence indicates that this killing occurred as a result of one of those sudden and unconsidered impulses upon which men in the condition of appellant not uncommonly act, and which they regret after even slight reflection, rather than as a result of any deliberation or premeditation. While it appears that the appellant displayed some anger while at the cafe, mostly against Austin, and that he later objected to being taken home, there is no evidence that he remained angry at Olds and none of any immediate provocation shortly before the shooting. He showed no such anger when they reached home, although he seems to have insisted upon returning to the cafe, and he accepted Olds' help into the house without taking offense. There was no previous enmity and no threats were uttered at any time. The time he spent in the bedroom was short at best, and his condition was not conducive to careful thought or reflection. His wife passed him without observing any changed position and then, before she had crossed the room, heard a noise and saw him with the gun. There is nothing to indicate that his action was planned or thought over, and the evidence rather strongly indicates that he suddenly grabbed the gun, which was kept right there, after he heard someone come into the room. In any event, he acted very quickly after his wife entered the room and any conclusion that he had been "pondering" and had decided to thus act is necessarily based on guess and conjecture. There is no substantial evidence justifying an inference, beyond a reasonable doubt, that he deliberately and with premeditation formed or carried out an intent to kill.

We have not overlooked two other points raised by the appellant, which we regard as without merit.

The judgment is modified by reducing it to murder in the second degree and, as so modified, is affirmed. The cause is remanded with directions to pronounce judgment accordingly.

MUSSELL, J., concurs.

99 Cal.App.2d 83

In re WINDER'S ESTATE.

MARTENS et al. v. CENTRAL BANK.
Civ. 14397.

District Court of Appeal, First District, Division 1, California.

Aug. 21, 1950.

Proceeding in the matter of the estate of A. H. Winder, deceased, wherein the Central Bank was appointed special administrator and filed a petition for authorization to take designated actions in handling the estate, to which Beatrice Martens and another objected. The Superior Court for Alameda County, Donald K. Quale, J., entered an order instructing the special administrator and the objectors appealed. The District Court of Appeal, Peters, P. J., held that the order was void in that it purported to authorize special administrator to take actions with respect to conduct of affairs of a corporation which could only be taken by board of directors of the corporation, though estate owned all the outstanding capital stock of corporation.

Order reversed.

1. Executors and administrators ⇐82

Probate court had no jurisdiction to instruct special administrator of estate owning entire outstanding capital stock of a corporation as to how to conduct the affairs of the corporation. Probate Code, § 589.

2. Corporations ⇐1

Death of owner of entire outstanding capital stock of corporation did not deprive board of directors of corporation of power to take corporate action.

3. Corporations ⇐1

In administering estate of deceased owner of entire outstanding capital stock of corporation, it could not be treated as the alter ego of decedent in absence of evidence of the required unity of interest and ownership.

4. Corporations ⇐197
Executors and administrators ⇐93(1)

Decedent's estate owning entire outstanding capital stock of corporation, had power to act as a stockholder by voting the stock, but not to run the corporation. Probate Code, § 589.

5. Executors and administrators ⇐82

Special administrator may properly ask probate court for instructions as to how to vote corporate stock belonging to decedent's estate. Probate Code, § 588.

6. Executors and administrators ⇐82

Order of probate court authorizing special administrator of estate of deceased owner of all outstanding capital stock of corporation to lease on specified terms office owned by corporation and conduct corporate affairs at trust office of administrator and consent to payment by corporation of a corporate debt and fixing terms upon which corporation should sell realty belonging to it was void, since it purported to authorize special administrator to take actions which could only be taken by board of directors of the corporation. Probate Code, §§ 588, 589.

Beatrice Martens, in pro per.

Breed, Robinson & Stewart, Oakland, for respondent.

PETERS, Presiding Justice.

The Central Bank was duly appointed special administrator of the above entitled estate. After its appointment, it filed a petition with the Probate Court requesting authorization and permission to take certain designated actions in the handling of the estate. This petition recites that among the assets of the estate is the entire issued and outstanding capital stock of A. H. Winder Corporation, and that, among the assets of the corporation, is a designated piece of improved real property which, during Winder's lifetime, was used as the office of the corporation. It is alleged that it costs the estate nearly $300 a month to maintain this office, that such expense is unnecessary, and that the special administrator can rent the building for $150 a month. It is also alleged that the corporation owns a large number of vacant lots in

Oakland, and owns a large number of contracts of sale on some of these lots upon which monthly payments are being made. In connection with these matters the special administrator requested an order instructing and authorizing it to abandon the existing office of the corporation and to conduct the corporate affairs from the office of the administrator, and for authorization to lease the corporation's office to a designated tenant at a designated rental. The petition also alleged that the corporation, together with one Luella Murray, in 1946, had executed a promissory note to the Central Bank for $20,000; that there was a balance of $7,900, plus interest, due on this note; that the note was secured by a deed of trust covering real property owned by the corporation, and that money was available to pay this note. As to this matter the petition prays for an order authorizing the administrator to pay the balance due on this note.

The appellants, heirs of A. H. Winder, filed certain objections to this petition for instructions. After a contested hearing the Probate Court issued what purports to be an "Order Instructing Special Administrator." The order closely follows the prayer of the petition. It "ordered, adjudged and decreed," that the "special administrator be and it is hereby authorized to conduct the affairs of the A. H. Winder Corporation * * * from its trust department office * * *. That sales of unimproved real property belonging to said corporation be made and approved only where such sales are advantageous to the estate"; that the special administrator "is hereby authorized to lease" the corporate office at a designated rental, and the order prescribes the terms of the lease. The order also "authorized" the special administrator "to consent to A. H. Winder Corporation" paying out of its funds the $7,900, plus interest, owed to the Bank. From this order, on a clerk's transcript, the objectors, *in propria persona,* appeal.

[1] The appellants urge several reasons why the order must be reversed, among them being that the court had no power to instruct the special administrator as to how to conduct the affairs of the corporation. This point is sound and requires a reversal.

[2, 3] An inspection of the petition and the order discloses that the subject matter of the proceeding concerned only corporate transactions over which the estate and the Probate Court had no power or control. The estate owned the *stock* of the corporation—it did not own or control the corporation. The death of the sole stockholder did not deprive the board of directors of the corporation of power to take corporate action. Yet the order appealed from purports to dictate corporate policy. Respondent admits that the estate has no power to act in reference to corporate matters, and that the estate does not own the lots or office building, or owe the debt involved. Respondent further concedes that the record does not disclose that the corporation was the *alter ego* of Winder, as there is no evidence of the required unity of interest and ownership. This concession is in accordance with the law. In re Estate of Greenwald, 19 Cal.App.2d 291, 295, 65 P.2d 70; Judelson v. American Metal Bearing Co., 89 Cal.App.2d 256, 263, 200 P.2d 836.

[4] So far as the record discloses, the estate of Winder is simply the sole stockholder of the A. H. Winder Corporation, but it is the stockholder, not the corporation. The power of the estate is simply to act as a stockholder. Klopstock v. Superior Court, 17 Cal.2d 13, 17, 108 P.2d 906, 135 A.L.R. 318. Its power is to vote the stock, not to run the corporation. Probate Code, § 589; see, 11b Cal.Jur. p. 258, § 848.

[5, 6] Respondent's contention is that what it desired and sought was in reality nothing more than instructions as to how to vote the corporate stock. Undoubtedly, the special administrator could have asked for instructions on this subject. Probate Code, § 588. But the petition and the order cannot be construed as requesting an authorization as to how to vote the stock. Both clearly related to corporate transactions. The order purports to authorize the special administrator to abandon the corporate office and to conduct the corporate

affairs at the trust office of the special administrator. It purports to fix the terms of sales of property to be made by the corporation. It purports to authorize the special administrator to lease the corporate office at a specified rental and purports to fix the terms of the corporate lease. It purports to consent to the corporation paying a corporate debt. All these were matters within the power and control of the board of directors. By no reasonable construction can the order appealed from be construed as an order instructing the special administrator how to vote corporate stock so as to elect directors who would carry out the designated policies. The petition requested and the order purported to authorize the special administrator to take actions which could only be taken by the board of directors of the company. As such, the order was void and must be reversed.

The order appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.



YOUNG v. HAMPTON et al.
Civ. 17799.

District Court of Appeal, Second District, Division 1, California.

Aug. 14, 1950.

Rehearing Denied Sept. 8, 1950.

Hearing Granted Oct. 9, 1950.*

H. Young sued W. J. Hampton and others, to enforce a mechanic's lien for the construction of a dwelling house and garage on defendants' lot. The Superior Court of Los Angeles County, Harry R. Archbald, J., found the balance due on contract, and adjudged a lien accordingly and directed its foreclosure if not paid. Appellants appealed from a judgment thereof and from an order denying motion for a new trial. The District Court of Appeal, Drapeau, J., held that where bank and federal government, through the Veterans' Administration, lent money and credit on basis of a fixed contract between the contractor and the veteran for construction of a home, but contractor and veteran, without advising bank or Veterans' Administration, made a subsequent agreement that home was to be constructed on a cost plus arrangement, contractor could not enforce cost plus contract, but could recover entire credit extended by bank on original contract.

Judgment affirmed as modified.

* Subsequent opinion 228 P.2d 1.

1. Contracts ⇐103, 105

Any bargain is illegal if either formation or performance thereof is prohibited by Constitution or statute. Civ.Code, §§ 1550, 1598, 1667.

2. Army and navy ⇐51

Where bank and federal government, through Veterans' Administration, lent money and credit on basis of fixed fee contract between a contractor and veteran for construction of a home, but contractor and veteran, without advising bank or Veterans' Administration, executed a second contract that home would be constructed on a cost plus basis, contractor could not enforce cost plus contract, but could recover entire credit extended by bank on original contract. Servicemen's Readjustment Act of 1944, § 500 et seq., 38 U.S.C.A. § 694 et seq.

3. Appeal and error ⇐607(1)

Where record on appeal consisted of settled statement of oral proceedings, in lieu of reporter's transcript, District Court of Appeal was required to consider facts therein set forth, especially in view of fact that trial judge who originally tried case retired and work of settling the statement was done by another judge. Rules on Appeal, rules 4(e), 7.

4. Appeal and error ⇐662(4)

Where covenant in contract for construction of a home stated that contractor was to prosecute work diligently and continuously to completion, and statement of case on appeal showed that work was begun and completed on specified dates, trial court did not err in refusing to grant owner rent for contractor's delay in completing home.

Geo. L. Hampton, Van Nuys, for appellants.

Ogden, Crocker & Steelman, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff contractor sued to enforce a mechanic's lien for the construction of a dwelling house and garage on defendants' lot. The trial court found that the work had been done on a cost-plus contract, with a balance due of $2,839.00, adjudged a lien accordingly, and directed its foreclosure if not paid.

Settled statement of oral proceedings on appeal, in lieu of reporter's transcript, has been filed. This statement presents the following facts essential to an understanding of the case:

Defendants, husband and wife, were young people. He was just about to become twenty-one years old when discussions were begun between him and his wife, and plaintiff, relative to building a house. The wife was nineteen. The husband was a veteran of the second world war. And they wanted a home of their own.

Plaintiff gave defendants a letter, stating that she would build them a house and garage, for $8,500, on a lot to be purchased by them. This was to enable defendants to apply to a bank for a veterans' loan for the cost of the house, garage and lot.

They all knew that such a loan would be, in part, guaranteed by the federal government. But, they made a side agreement, that defendants would pay plaintiff the actual cost of the improvements, plus plaintiff's contractor's compensation of 10%, with a maximum of $9,000. Thus, the money secured by the veteran on a veterans' loan was to be used, first, to buy the lot, and secondly, to pay the contractor as far as it would go. Then, the veteran and his wife agreed to pay plaintiff the balance of the cost of the home, together with 10% commission.

After appraisals were made for the Veterans' Administration and for the bank, plaintiff and defendants made and executed a writing, by which plaintiff agreed to build the house and garage, and defendants agreed to pay plaintiff $8,283 for the work. This contract was presented to the bank, with defendants' application for the loan, although, as stated, it did not represent the agreement of the parties.

Upon these representations, the loan was made by the bank, and in part guaranteed by the United States government. Then, before construction was begun, and without advising the bank or the Veterans' Administration, these parties made and executed a second writing, evidencing their real agreement—that the work would be done on a cost-plus basis.

Thereupon, the house and garage were built. And it was the cost-plus contract which was enforced by judgment of the Superior Court.

The government guaranty of part of the loan was based upon the representation that the improvements would be completed for the figure named in the first writing. The bank and the government provided the money and credit upon the assurance that the borrowers would not be required to pay to any one more than the represented appraised value of the lot and improvements. Plaintiff and defendants violated the provisions of the Servicemen's Readjustment Act of 1944, 38 U.S.C.A. § 694 et seq. Young v. United States, 9 Cir., 178 F.2d 78.

[1] "Any bargain is illegal if either the formation or the performance thereof is prohibited by constitution or statute." Rest., Contracts, sec. 580. Also see Sections 598 and 604 of the same work; Civ. Code, secs. 1550, 1598, and 1667; MacRae v. Heath, 60 Cal.App. 64, 212 P. 228; Napa Valley Elec. Co. v. Calistoga Elec. Co., 38 Cal.App. 477, 176 P. 699.

Therefore, the cost-plus contract may not be enforced.

This, then, presents the question whether the entire transaction is illegal and void to the extent that the law will deny relief to all parties. Bank of Orland v. Harlan, 188 Cal. 413, 206 P. 75.

Five progress payments were to be made by the bank from the loan, each to be 20% of $8,283. Plaintiff was paid four of these payments. The last payment has not been

made, and presumably, remains to the credit of the defendants. If the parties are left as the law finds them, defendants will have a house built by plaintiff, for which they have paid four-fifths of less than the actual cost. Plaintiff will lose not only the balance due under the first contract but everything additional which she has put into the improvements.

Shakespeare's Portia demonstrated the futility of exact, literal enforcement of any legal rule. In the multitude of situations incident to human relations, no rule has yet been found to exactly fit every one.

In Restatement's comment to Section 598, Contracts, it is said:

"The statement that all illegal bargains are void is not wholly accurate. It is true that many such bargains are entirely without effect on the legal relations of the parties and that a court will only under very exceptional circumstances enforce specifically an illegal agreement, but the rule of public policy that forbids an action for damages for breach of such an agreement is not based on the impropriety of compelling the defendant to pay the damages. That in itself would generally be a desirable thing. When relief is denied it is because the plaintiff is a wrongdoer, and to such a person the law denies relief. * * *

"* * * A rule to that effect would have unfortunate consequences, since in many cases it would protect a guilty defendant from paying damages to an innocent plaintiff, or would otherwise produce undesirable results."

The rule has not been strictly enforced when necessary to prevent a harsh forfeiture, Rest., Contracts, sec. 600; when one of the parties entered into the contract under desperate circumstances, McAllister v. Drapeau, 14 Cal.2d 102, 92 P.2d 911, 125 A.L.R. 800; and in a number of cases when parties have been permitted to recover when the aid of the illegal contract was not required to establish a case. Wayman Investment Co. v. Wessinger & Wagner, 13 Cal.App. 108, 108 P. 1022; Moore v. Russell, 114 Cal.App. 634, 300 P. 479; Welder v. Director, 118 Cal.App. 124, 4 P.2d 793; California Cured Fruit Association v. Stelling, 141 Cal. 713, 75 P. 320; Butler v. Agnew, 9 Cal.App. 327, 99 P. 395.

[2] In this case the plaintiff should recover the remaining 20% of the first contract, and no more. Extras are included in this statement.

Plaintiff urges that the settled statement of oral proceedings, in lieu of reporter's transcript, is insufficient as a substitute for a reporter's transcript on appeal, and that this case must be decided in accordance with the rules applicable to an appeal on the judgment roll alone.

[3] The record complies with Rule 7 and its several sub-paragraphs, and Rule 4(e) of the Rules on Appeal, adopted by the Judicial Council of this state. This Court is, therefore, required to take into consideration the facts therein set forth. While the statement may be fragmentary and uncertain, it represents a sincere effort by the trial court to comply with the rules. The judge who originally tried the case retired, and the work of settling the statement was done by another judge.

Any change in appellate practice which will save the neverending burden of reading thousands of pages of reporter's transcript should be welcomed by reviewing courts. The present method almost universally in use in California, which presents for review a shorthand writer's verbatim report of everything said on a trial, results in loss of brevity in records, exactitude of argument in briefs, and dispatch in deciding an ever-increasing number of appeals.

[4] Defendants contend that they should have rent for plaintiff's delay in completing the house and garage. The covenant in the contract is to prosecute the work diligently and continuously to completion; the only statement in the substitute for the reporter's transcript is that the work was begun and completed on specified dates, and nothing appears from which want of diligence in the construction work may be predicated. Therefore, the trial court's finding in this respect is controlling.

The appeal from the order denying motion for new trial is dismissed, and the judgment is modified that the plaintiff have judgment against the defendants for $1,689.00; and, as so modified, is affirmed.

WHITE, P. J., and DORAN, J., concur.



99 Cal.App.2d 94

PEOPLE v. DIXON.

Cr. 2651.

District Court of Appeal, First District, Division 2, California.

Aug. 21, 1950.

Jack Ermon Dixon was convicted in the Superior Court for the County of Santa Clara, William F. James, J., of perjury and from the judgment of conviction and order denying a new trial he appealed. The District Court of Appeal, Dooling, J., held that the evidence sustained conviction.

Judgment and order affirmed.

1. Perjury ⇐34(5)

Direct testimony by at least one witness as to the falsity of a statement made under oath, as distinguished from circumstantial evidence, is necessary to establish perjury. Pen.Code, § 1103a; Code Civ. Proc. § 1968.

2. Perjury ⇐12

If a person willfully swears falsely to a belief in the existence of a fact which he knows does not exist, he is as guilty of perjury as if he had sworn directly to the existence of a fact which he knew did not exist. Pen.Code, § 1103a.

3. Perjury ⇐34(1)

Testimony of one witness directly contradicting the facts as to which a defendant has testified to his opinion or belief, plus corroborating evidence which establishes that such opinion or belief was not in fact held by defendant, is sufficient to sustain conviction of perjury. Pen.Code, § 1103a; Code Civ.Proc. § 1968.

4. Perjury ⇐12, 36

Perjury must be knowingly false, and, since defendant's actual state of mind cannot be directly proved, whether he believed the truth of his testimony when he gave it is a question for jury. Code Civ.Proc. § 1968; Pen.Code, § 1103a.

5. Perjury ⇐34(1)

Testimony of one witness directly contradicting the facts as to which defendant, testifying in action for damages, had given his opinion, corroborated by defendant's affidavit used in such action in support of a motion for new trial and by defendant's admission to officers after arrest, sustained conviction of perjury. Pen.Code, § 1103a; Code Civ.Proc. § 1968.

6. Criminal law ⇐1171(1)

Any misconduct of district attorney in argument to jury was not prejudicial to defendant in view of his obvious guilt.

David S. Lull, San Jose, for appellant.

Fred N. Howser, Attorney General, Clarence A. Linn, Deputy Attorney General, for respondents.

DOOLING, Justice.

The defendant was convicted on two counts of perjury and from the judgment and order denying his motion for new trial he prosecutes this appeal.

Appellant was the driver of an ambulance which was in an intersection collision resulting in an action for damages. That action was tried twice and in each trial appellant was a witness. He testified as to the speed of the ambulance on the first trial: "I can't—cannot, so I can't give a definite speed because I was not looking at the speedometer, but I would estimate that the car was doing between 20 and 30 miles an hour."

Referring to Frederick, the driver of the other car, he testified: "They were still in the car and didn't seem to be hurt or anything, appeared to be drinking, all seemed awfully happy * * * Yes, I spoke to

Mr. Frederick * * * When I got to the hospital he was down there, I could smell, seemed to me I could smell it on his breath."

At the second trial the appellant testified: "I couldn't say the exact speed, I would estimate between 20 and 30 miles per hour."

The second trial resulted in a verdict for defendants and appellant swore to an affidavit which was used by plaintiff in that action in support of a motion for a new trial in which he stated under oath:

"The true facts are that: * * * I did not know whether or not Mr. Frederick was drinking; the ambulance was traveling at better than 50 miles per hour just prior to the accident * * *

"At the second trial of the case I falsely testified to substantially the same facts as in the first trial as above set forth, except that I did not testify in regard to the intoxication of Mr. Frederick * * *."

This affidavit was made the basis of a third count of perjury on which defendant was acquitted.

Frederick was called as a witness and testified that at the time of the accident: "I would estimate it (the speed of the ambulance) at about 50 miles an hour." He gave further testimony that at that time he was not intoxicated, had not consumed any intoxicating liquor for several hours, and had no odor of alcohol about him.

Appellant argues that this did not satisfy the requirements of section 1103a, Penal Code and section 1968, Code of Civil Procedure, in that the testimony of Frederick was not direct and positive evidence of the falsity of appellant's testimony.

[1] The California cases require direct, as distinguished from circumstantial, evidence of the falsity of defendant's testimony by at least one witness. People v. Wells, 103 Cal. 631, 37 P. 529; People v. Porter, 104 Cal. 415, 38 P. 88; People v. Maxwell, 118 Cal. 50, 50 P. 18; People v. De Martini, 50 Cal.App. 109, 194 P. 506. Appellant's position seems to be that since appellant couched his testimony in the form of opinion or belief mere testimony of facts inconsistent with the correctness of that opinion or belief does not supply the direct proof required by the cases. If this is the true rule no defendant could ever be convicted of perjury in California if he was careful to qualify his testimony, no matter how wilfully false, by the words, "In my opinion," "to the best of my belief" or an equivalent, since no witness can testify directly to the state of another's mind.

[2, 3] It has been held in this state that: "If a person willfully swears [falsely] to a belief in the existence of a fact which he knows does not exist he is as guilty of perjury as if he had sworn directly to the existence of a fact which he knew did not exist." People v. Agnew, 77 Cal.App.2d 748, 755, 176 P.2d 724, 729; People v. Phillips, 56 Cal.App. 291, 296, 205 P. 40. In the Agnew case the only direct testimony was of two persons that they had never engaged in the activities with which the defendant Agnew had sworn "on information and belief" that they were connected. We are satisfied that the testimony of one witness directly contradicting the facts as to which a defendant has testified to his opinion or belief plus corroborating evidence which establishes that such opinion or belief was not in fact held by the defendant satisfies the requirements of our code.

[4] In every case perjury must be knowingly false, and in every case the defendant's actual state of mind cannot be directly proved. It is for the jury to say in every case of perjury whether the defendant believed the truth of his testimony when he gave it. People v. Todd, 9 Cal. App.2d 237, 243–244, 49 P.2d 611.

[5] There can be no doubt of appellant's guilt. His own affidavit and the transcript of his admissions to the officers after his arrest furnish ample corroboration of that. People v. Housman, 44 Cal.App.2d 619, 627, 112 P.2d 944; People v. Todd, supra, 9 Cal.App.2d 237, 242, 49 P.2d 611; People v. Albert, 91 Cal.App. 774, 777, 267 P. 587.

[6] Appellant complains of misconduct of the district attorney in his argument to the jury. We do not condone some of the district attorney's language which in a close

case might call for a reversal, but appellant's guilt is too obvious for us to hold that he suffered prejudice in this particular case.

Judgment and order affirmed.

NOURSE, P. J., and GOODELL, J., concur.



KOSTAL et ux. v. PULLEN et al.
Civ. 7762.

District Court of Appeal, Third District, California.

Aug. 19, 1950.

Hearing Granted Oct. 16, 1950.*

Action by Joe C. Kostal, Jr., and Lenna M. Kostal, his wife, against Robert F. Pullen, an individual doing business under the firm name and style of Larry's Auto Parts, and others, to recover on a note. The Superior Court, San Joaquin County, M. G. Woodward, J., overruled the defendants' demurrer and denied defendants' motion for a change of place of trial, and defendants appealed. The District Court of Appeal, Peek, J., held that as defendants' notice of motion for change of place of trial specified that on May 17, 1950, defendants would move court for an order transferring cause to Los Angeles County, and minutes of court on that day showed that motion was considered and court ordered same denied, motion was regularly noticed and heard, and there was no denial of truth of facts stated in defendants' affidavits, they would be taken as true, and in view of simple grounds on which motion was made no other points of authority need have been cited other than the appropriate sections of the Code of Civil Procedure governing venue.

Purported appeal from order of June 21, 1949, denied and defendant's motion for change of venue dismissed and cause remanded with instructions.

1. Venue ⇐72

Where defendants' notice of motion for change of place of trial specified that on May 17, 1950, the defendants would move court for an order transferring cause to Los Angeles County, and on that date minutes of court showed that motion was considered and that court ordered that same be denied, motion for change of venue was before the court for consideration.

2. Venue ⇐58

Where defendants moved for change of place of trial on ground that residence of moving party was in another county and that obligation sued on was incurred in that county, no other points and authorities were required to have been cited than appropriate sections of the Court of Civil Procedure governing venue, and as such citations were contained in notice of motion, that was sufficient compliance with rule of Superior Court requiring notice of motion be accompanied with points and authorities, and denying motion, was error. Rules for Superior Courts, rule 3(a); Code Civ.Proc. §§ 395, 396.

A. P. Coviello, Los Angeles, for appellants.

Miller & Kroloff, Stockton, for respondents.

PEEK, Justice.

The record herein shows that following the filing of plaintiffs' complaint, defendants on May 9, 1949, demurred, and at the same time filed a "Notice of Motion for Change of Place of Trial", which was accompanied by an affidavit setting forth the facts upon which the motion would be based. Although no "Points and Authorities" as such, were filed, the notice of motion does state that it was made "pursuant to the provisions of Sections 395 and 396 of the Code of Civil Procedure." The minute order of the court, dated May 17, 1949, after sustaining defendants' demurrer, further ordered that the "motion for change of venue be, and the same is hereby denied." Respondents thereafter filed an amended complaint wherein the note, which formed the basis of their action, was set forth in full. The note showed on its face that the

* Subsequent opinion 225 P.2d 217.

obligation therein incurred was made payable in the city of Los Angeles. To this amended complaint defendants, on May 31, 1949, again demurred and again filed a "Notice of Motion for Change of Place of Trial." Accompanying these documents was one entitled "Points and Authorities in Support of Motion for Change of Venue", wherein the same code sections were again set forth, and in addition several citations were also noted. The trial court, by its order of June 21, 1949, overruled the demurrer and denied "defendants' motion for change of place of trial."

Defendants' notice of appeal specifies that they are appealing from two orders of the trial court denying said motions for a change of venue, and since it was filed on July 5, 1949, was timely as to both orders.

It is appellants' sole contention that since the venue of the case was shown without dispute to be in Los Angeles county, the court erred in denying both motions.

Respondents concede that upon the face of the record before us defendants were entitled to a change of venue but argues that nevertheless the orders of the trial court were proper, in that (1) the filing of the notices of motion to move for a change of venue and the affidavits in support thereof did not constitute a motion, Hanovia Chemical & Mfg. Co. v. Keller, 82 Cal.App. 499, 255 P. 884, (2) in any event such documents were not accompanied by points and authorities as required by Rule 3 (a) of the Rules for the Superior Courts, and (3) defendants' second motion was merely repetitious and hence was properly denied. Story v. Shristin, 137 Cal.App. 484, 30 P.2d 1016.

Since defendants' appeal from the first order is both meritorious and timely, it becomes unnecessary to discuss the appeal from the second order which, under the rule enunciated in Story v. Christin, supra, would appear to be without merit.

[1] But likewise without merit is respondents' argument that no motion for change of venue was ever before the court. The notice as set forth in the Clerk's Transcript specified that on May 17, 1950, the defendants would move the court for an order transferring the cause to Los Angeles County. The minutes of the court on that day show that said motion was considered and that the court ordered that the same be denied. Therefore it is obvious from the record before us that said motion was regularly noticed, was heard on the date set forth in said notice, and that the court, after due consideration, made its order denying the same.

[2] Turning to the contention that the order of the trial court denying appellant's motion for change of venue must be sustained upon the ground that there was a failure to comply with Rule 3 (a) of the Rules for the Superior Court, we think the contention cannot be sustained. Concededly, the facts stated in the affidavit in support of the motion were sufficient to require the granting of that motion and since there was no denial of the truth of these facts as stated in the affidavit they must be taken as true. The trial court therefore could not have based its order denying the motion on any other ground than a failure to comply with the rule, and under the well-known rule that all presumptions and intendments favor the order or judgment of the court, we must assume that this was the basis for the court's order. So assuming, however, we cannot agree that there was not a sufficient, substantial compliance with the rule. It is true there was no document filed entitled "Points and Authorities in Support of Motion for New Trial", but in view of the simple grounds upon which the motion was made, that is, residence of the moving party in Los Angeles County and the incurring of the obligation sued upon in that county, no other points and authorities need have been cited than the appropriate sections of the Code of Civil Procedure governing venue. Such citation was contained in the notice of motion and we hold that to have been, under the circumstances of this case, a sufficient compliance with the rule to make it error on the part of the trial court to deny the motion under the provisions of that rule.

For the foregoing reasons the purported appeal from the order of June 21, 1949 denying defendants' motion for a change of

venue is dismissed, and the cause is remanded with instructions to the trial court to grant defendants' motion of May 9, 1949 for a change of venue.

ADAMS, P. J., and VAN DYKE, J., concur.



99 Cal.App.2d 54

PEOPLE v. STONES.

Cr. 4456.

District Court of Appeal, Second District, Division 1, California.

Aug. 18, 1950.

Thomas Jackson Stones, Jr., was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., of bookmaking, and he appealed. The District Court of Appeals, Drapeau, J., held that conviction was sustained under the evidence.

Judgment affirmed.

Gaming ⇐98(3)

Evidence that defendant was a shoeshine boy, that arresting officer saw defendant talking to people, making notes, and accepting money, that defendant's hands were clean although defendant told arresting officer he had shined seventeen shoes the morning of his arrest, that defendant had $197.00 in small bills, and that a customer of defendant gave defendant $2.00 and said "two to place" and gave a code symbol for a horse running that day at race track, and that defendant made a notation on memorandum pad which was combination betting marker and owe sheet used in bookmaking, sustained conviction for bookmaking and for recording bet of final result of contest of speed of beast. Pen.Code, § 337a, subds. 2, 4.

G. Vernon Brumbaugh, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Gilbert Harelson, Deputy Attorney General, for respondent.

DRAPEAU, Justice.

After trial by the court, defendant was found guilty of two counts of bookmaking. Pen.Code, sec. 337a. No evidence was presented in his behalf. Application for probation was denied, and he was sentenced to six months in the county jail, sentences on each count to run concurrently.

Defendant was a shoe-shine boy in a barber shop. The arresting officer testified that he saw him talking to people, making notes, and accepting money. The arresting officer asked him how many shoes he had shined that morning, and he said seventeen. But his hands were clean. He had in his possession $197 in small bills.

One of defendant's customers gave him $2 and said "Two to place on Number 449." Number 449 was the code symbol for a horse named Iron Pen, running that day at the Del Mar race track. Defendant made a notation on a memorandum pad, and put the pad into a pocket in his shoe-shine apron. This pad was taken from defendant, and was a combination betting marker and owe sheet used in bookmaking.

Defendant urges that the evidence is insufficient to sustain the conviction.

From the facts stated, the evidence is sufficient. People v. Newland, 15 Cal.2d 678, 104 P.2d 778; People v. Mason, 37 Cal.App.2d 407, 99 P.2d 567; People v. Pruitt, 55 Cal.App.2d 272, 130 P.2d 767.

People v. Woods, 35 Cal.2d 504, 218 P.2d 981, is not the same as the case against defendant.

Defendant also urges that he was convicted twice for the same offense. This point was not raised in the trial court. In any event, the evidence showed a violation of Subdivisions 2 and 4 of Penal Code, Section 337a. People v. Jerman, 29 Cal.2d 189, 173 P.2d 805.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

98 Cal.App.2d 826

SIMONS et al. v. EDOUARDE et al.
Civ. 17729.

District Court of Appeal, Second District, Division 2, California.

Aug. 10, 1950.

Hearing Denied Oct. 2, 1950.

Isabella Simons and Gloria Simons Naylor brought an action against Jane Melville Edouarde and Barbara Melville Hudson to recover damages for fraudulent abuse of process. The Superior Court, Los Angeles County, William B. McKesson, J., sustained defendants' demurrer to the complaint without leave to amend, and the plaintiffs appealed. The District Court of Appeal, McComb, J., held that the action had been barred by the statute of limitations and that therefore the trial court had properly sustained the demurrer without leave to amend.

Affirmed.

1. Limitation of actions ⇐31

Action for injury to person is barred within one year after wrongful act is committed. Code Civ.Proc. § 340(3).

2. Limitation of actions ⇐31

Under the one-year statute of limitations, clause "or for injury to or for death of one caused by the wrongful act or neglect of another" embraces all infringements of personal rights as opposed to property rights. Code Civ.Proc. § 340(3).

3. Limitation of actions ⇐31

Action for abuse of process falls within provision of statutes of limitations covering injuries done to the person. Code Civ.Proc. § 340(3).

4. Limitation of actions ⇐104(2)

In absence of confidential relationship between parties, mere failure of defendant to disclose to plaintiff existence of facts does not constitute fraudulent concealment of cause of action such as to toll statute of limitations.

5. Limitation of actions ⇐104(2)

There was no such fiduciary or confidential relationship between landlord and tenant as to impose duty upon landlord to disclose any facts to tenant, and therefore statute of limitations governing action for abuse of process was not tolled by failure of landlord to disclose to tenant existence of facts. Code Civ.Proc. § 340(3).

6. Limitation of actions ⇐55(4)

In action by tenants against landlord to recover damages for fraudulent abuse of process, where it appeared that judgment had been entered against tenants in detainer action on October 2, 1947, that tenants had been forcibly evicted under writ of possession on November 4, 1947, that tenants had moved back into premises and occupied same until adjudged guilty of contempt on May 18, 1948, that husband of one of plaintiff-tenants had continued to occupy premises until December 13, 1948, and that tenants had not filed complaint in action to recover damages for fraudulent abuse of process until November 1, 1949, tenant's action was barred by limitations. Code Civ.Proc. § 340(3).

Robert A. Jarrott, Los Angeles, for appellants.

Francis B. Cobb, Los Angeles, and W. Floyd Cobb, Inglewood, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the sustaining of a demurrer to their complaint without leave to amend in an action to recover damages for fraudulent abuse of process, plaintiffs appeal.

Facts: Plaintiffs filed a complaint seeking to recover damages for an abuse of process alleging (1) that plaintiffs and a cotenant, namely, Edward H. Simons, husband of plaintiff, Isabella Simons, were tenants of defendants, occupying a rent-controlled apartment from and after November 12, 1946; (2) that defendants herein caused an unlawful detainer action to be instituted in the municipal court of the city of Los Angeles against the plaintiffs herein for the recovery of possession of the said rent-controlled apartment; and (3) that in such action defendants alleged as their sole ground for evicting the plaintiffs herein that one of the defendants herein, to

wit, Jane Melville Edouarde, "seeks in good faith to recover possession of the said housing accommodations for her own and personal use and occupancy as housing accommodations." Plaintiffs filed an answer in said action denying the above quoted allegation. Thereupon a trial was had upon the issues. A judgment was thereafter rendered and entered in said action for the plaintiffs therein (respondents herein) against the defendants therein (appellants herein) on October 2, 1947. Plaintiffs in said action did not vacate the premises but remained in possession of same, and on November 3, 1947, defendants caused a Writ of Possession to be issued in the aforesaid action and to be placed in the hands of the marshal of the said municipal court for execution. Under and pursuant to the said Writ of Possession, the plaintiffs were, on November 4, 1947, forcibly evicted from the leased premises by said marshal, and plaintiffs on the same day, namely, November 4, 1947, moved back into said premises and continued to occupy the same until May 18, 1948, at which time they were adjudged guilty of contempt of the said municipal court and imprisoned for a period of five days. Plaintiffs' cotenant, husband of plaintiff, Isabella Simons, continued to occupy the aforesaid premises until December 13, 1948. Defendants never intended, in good faith, to use said premises as housing accommodations for their own personal use and occupancy during all of the times therein mentioned but did make a different disposition of said premises by selling the same on November 26, 1948.

The present complaint was filed on November 1, 1949. Defendants demurred to the complaint on the ground that the cause of action was barred by the provisions of section 340(3) of the Code of Civil Procedure.

Question: Was plaintiffs' cause of action barred by section 340(3) of the Code of Civil Procedure?

[1, 2] This question must be answered in the affirmative. An action for injury to the person is barred within one year after the wrongful act is committed. (Sec. 340(3) Code Civ.Proc.)* The clause "or for injury to or for the death of one caused by the wrongful act or neglect of another," in subdivision 3 of section 340, Code of Civil Procedure, embraces therein all infringements of personal rights as opposed to property rights. (Huntly v. Zurich General Accident & Liability Ins. Co., 100 Cal. App. 201, 212, 280 P. 163. Cf. Basler v. Sacramento Electric, Gas & R. Co., 166 Cal. 33, 35 et seq., 134 P. 993; Groff v. Du Bois, 57 Cal.App. 343, 345, 207 P. 59.

[3] Likewise an action for abuse of process falls within the provisions of statutes of limitations covering "injuries done to the person." (Gordon v. West, 129 Ga. 532, 59 S.E. 232, 13 L.R.A.,N.S., 549; McCullough v. Atlantic Refining Co., 50 Ga. App. 237, 177 S.E. 601, 602.)

Appellants' authorities: Merron v. Title Guarantee & Trust Co., 27 Cal.App.2d 119, 80 P.2d 740; Meigs v. Pinkham, 159 Cal. 104, 112 P. 883, Italiani v. Metro-Goldwyn-Mayer Corp., 45 Cal.App.2d 464, 114 P.2d 370, Argyropolus v. Barnes, 28 Cal.App. 254, 151 P. 1156, DeGarmo v. Luther T. Mayo, Inc., 4 Cal.App.2d 604, 41 P.2d 366, Howard v. Security Title Ins. & Guar. Co., 20 Cal.App.2d 226, 66 P.2d 1247, and Lowe v. Ozmun, 137 Cal. 257, 70 P. 87, relied on by appellants were not actions for injuries to the person but involved damages for injuries to property and are therefore not here in point. The statement in Merron v. Title Guarantee & Trust Co., supra, 27 Cal.App.2d at page 122, 80 P.2d at page 742, "Undoubtedly it is the law that where the gist of the action is a malicious prosecution, the statute begins to run when the wrongful act is done, and the limitation is two years," was dictum and failed to note that the authority, McCusker v. Walker, 77 Cal. 208, 212, 19 P. 382, cited, was decided

* Section 340(3), Code of Civil Procedure reads: "§ 340. * * * Within one year: * * * 3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, * * *."

prior to 1905, the date of the amendment to subdivision 3 of section 340, Code of Civil Procedure which brought within the scope of such section "injuries to the person."

[4] There is likewise no merit in plaintiffs' contention that the statute of limitations was tolled by fraudulent concealment of defendants. Mere failure of a defendant to disclose to a plaintiff the existence of facts in the absence of a confidential relationship between the parties does not constitute fraudulent concealment of a cause of action. (Scafidi v. Western Loan & Building Co., 72 Cal.App.2d 550, 562, 165 P.2d 260.

[5, 6] Clearly in the present case there was no fiduciary or confidential relationship between the plaintiffs and defendants. Hence there was no duty upon defendants' part to disclose any facts to plaintiffs. The cause of action having been barred by the statute of limitations, the trial court properly sustained the demurrer without leave to amend.

Affirmed.

MOORE, P. J., and WILSON, J., concur.



HOLBROOK et al. v. BOARD OF EDUCATION OF PALO ALTO UNIFIED SCHOOL DIST. et al.

Civ. 14273.

District Court of Appeal, First District, Division 2, California.

Aug. 21, 1950.

Rehearing Denied Sept. 20, 1950.

Hearing Granted Oct. 19, 1950.*

C. Ray Holbrook, also known as C. R. Holbrook, sought a writ of mandate to compel the Board of Education of Palo Alto Unified School District and others, to reinstate and re-employ him in the position which he occupied when discharged in 1947. The Superior Court, County of Santa Clara, M. G. Del Mutolo, J., entered judgment denying petition and petitioner appealed. The District Court of Appeal, Goodell, J., held that petitioner failed to sustain the burden of proving that he was entitled to full time tenure as a teacher under the Education Code.

Affirmed.

1. Schools and school districts ⇐133.6

Apart from employing the teacher, assigning his school, fixing his compensation, and re-employment for succeeding years, school board and its members have practically no power by contract, or otherwise, to do anything which affects, one way or the other, question whether such person eventually attains tenure within meaning of Education Code. Education Code, § 13081.

2. Schools and school districts ⇐133.10

Under Education Code, whatever tenure right accrued to a teacher depended entirely on kind and character of services rendered by him, rather than on anything which school board or its members said in conversation, or wrote in formal contracts or informal ones. Education Code, § 13081.

3. Mandamus ⇐174

Evidence presented questions of fact for jury as to which services rendered by teacher were attributable to one distinct set of duties and which to another, for purposes of determining tenure under Education Code. Education Code, § 13081.

4. Appeal and error ⇐996

Where reasonable minds might differ on inferences to be drawn from a particular set of facts, appellate court will not substitute its own conclusions for those reached by trial court.

5. Mandamus ⇐168(2)

In proceeding to compel school board to reinstate and re-employ petitioner in position which he occupied when discharged, burden was on petitioner to convince trial court that he was entitled to full time tenure under Education Code. Education Code, § 13081.

6. Mandamus ⇐168(4)

Testimony established that petitioner failed to sustain burden of proving that

* Subsequent opinion 231 P.2d 853.

he was entitled to full tenure as a teacher under Education Code. Education Code, § 13081.

7. Schools and school districts ⇐55, 133.6

School districts possess most limited power known to law and their trustees are special agents without power to represent district, and tenure under Education Code accrues despite any maneuvers by trustees to prevent it. Education Code, § 13081.

8. Schools and school districts ⇐133.11

Where teacher was employed by school district and his duties were designated as business manager for three-quarters of his time and director of adult education for one-quarter of time and teacher was employed by school district for three consecutive years and re-elected for next succeeding year, teacher only acquired tenure under Education Code for one-fourth full time and not a full time tenure, since position of business manager was not a position requiring certification qualifications. Education Code, § 13081.

9. Schools and school districts ⇐133.6

A school board and teacher cannot by contract transfer noncertificated duties into certificated duties within meaning of tenure section of Education Code. Education Code, § 13081.

10. Schools and school districts ⇐135(5)

Where teacher was employed by a school district and his duties were designated as business manager for three-quarters of his time and director of adult education for one-quarter, teacher could not claim that school district was estopped to contend that teacher's employment was by separate contracts and not an integrated contract, and therefore trial court did not err in excluding evidence attempting to prove estoppel. Education Code, § 13081.

11. Schools and school districts ⇐63(1)

Under statute authorizing governing board of a school district to employ janitors and "other employees" of schools, the business manager of a school was one of the "other employees". Education Code, §§ 14001–14027.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Other Employees".

12. Schools and school districts ⇐63(1)

Evidence established that business manager of a school had ample and legal notice that his "noncertificated" employment as business manager had come to an end.

K. R. McDougall, Palo Alto, for appellant.

Hardy, Carley & Brenner, Palo Alto, for respondents.

GOODELL, Justice.

The appellant sought a writ of mandate to compel the respondent board to reinstate and re-employ him in the position which he occupied when discharged in 1947. From a judgment denying the petition this appeal was taken on an agreed statement.

At all times herein involved appellant held a credential and certificate entitling him to teach in any elementary or secondary school in Santa Clara County and a general administrative credential and certificate entitling him to administer any such school.

On August 1, 1940 he was employed by the district as its business manager and principal of the evening high school for the school year 1940–41. In 1941–42 he continued in the same position. In 1942–43 his duties were designated as business manager and director of adult education. The dividing line between appellant's first three years and his fourth year was July 1, 1943, and for the school year 1943–44 his duties were designated as business manager for three-quarters of his time and director of adult education for one-quarter. In each of his fifth, sixth and seventh years (1944–45, 1945–46 and 1946–47) there was the same designation.

In 1947 his services as business manager were discontinued. However, his services as director of adult education for one-quarter time were continued, since the

board recognized then and has conceded ever since that his status was that of a permanent employee of the district as director of adult education to the extent of one-quarter time. The court concluded "That * * * petitioner automatically was entitled to classification as a permanent one-fourth time employee of said district, and thereafter to one-fourth time permanent employment in a position or positions requiring certification qualifications."

When appellant entered the employ of the district the teachers' tenure act was codified in § 5.500 of the School Code, St. 1935, c. 690, § 7, which read as follows: "Every employee of a school district of any type or class, who after having been employed by the district for three complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, except as hereinafter otherwise provided, at the commencement of said succeeding school year, be classified as and shall become a permanent employee of the district * * *." The exceptions therein mentioned have no bearing on this case. In August, 1943 the new Education Code went into effect, see Stats.1943, p. 310, and what had been § 5.500, School Code, became (with a few changes not now material) § 13081, Education Code. During the first three years of appellant's service § 5.500, School Code, was in effect.

Appellant was employed by the district for three consecutive years and re-elected for the next succeeding school year but the question is, whether he was so employed and so re-elected "in a position or positions requiring certification qualifications?"

To say that a person is a "permanent employee of the district" is to say that he has "tenure" therein, and it is clear from the language of the former § 5.500 and the present § 13081 that the legislature was careful to limit the guarantee of tenure to such employees only as occupy positions "requiring certification qualifications."

The Education Code specifies numerous positions wherein the employee, in order to qualify therefor, must hold a certificate, but the position of business manager of a school district is not among them.

Thus for the first two school years, 1940–41 and 1941–42, appellant was duly certificated as principal of the evening high school, but had no credential or certificate as business manager of the district, since none was required by statute. Likewise in his third year, 1942–43, it is conceded that he was certificated to be a director of adult education. From these premises it would seem to follow that the only services of appellant during those first three years which, under § 5.500, now § 13081, could be considered or counted in determining whether he was entitled to tenure would be such fractional part of his combined or total services as were certificated, that is, rendered under either one or both of those two certificates.

The court concluded that such certificated services added up to one-fourth time, and no more, and that appellant "did not acquire the right to permanent employment * * * by virtue of his services in the position of business manager." It concluded, also, that "the positions of business manager, principal of the evening high school, and director of adult education as held by petitioner, were three separate and distinct positions."

Counsel for appellant insists that his client during the seven years occupied but one full-time position and that therefore he is entitled to full-time tenure. He has developed a unique theory on this subject which he repeats and reiterates in various forms throughout his 112 pages of typewritten briefs.

In the agreed statement this theory is set forth as follows: "Appellant does not contend that a person who is employed by a school district solely to manage business affairs need be certificated. Appellant does contend that the duties of managing business affairs may be combined with duties which do require certification qualifications so as to constitute one single position, and that such a position, so long as it involves a substantial amount of duties requiring certification qualifications, is itself a *position* requiring certification qualifications.

Appellant's major contention is that he was employed in such a position." (Emphasis appellant's.)

In his opening brief appellant says "a full-time position confers full-time tenure if *any part* of the duties of the position are certificated." (Emphasis ours.)

In his closing brief he says: "The tenure is not, however, tenure in any particular position; it is tenure in the school district." Therein he says further: "Whether the strictly certificated duties imposed upon the employee bulk large or small—that is, whether they occupy all or only a part of his time—depends, of course, upon the assignments of work. But, regardless of whether they require a large proportion or only a small proportion of the total amount of time devoted to the position, it is still the *entire position* upon which the statute operates; and the extent of the position is to be determined by the contractual terms of the employment, and the duties performed * * *." (Emphasis appellant's.)

In the first place, no authority is produced in support of this novel theory. Secondly, the argument is inconsistent because of the concession that a person employed *solely* to manage business affairs need not be certificated. Thirdly, and most important, the argument either ignores or directly takes issue with the plain language of the statute which insures tenure only to an employee holding "a position requiring certification qualifications." Appellant's statement that "The tenure is *not* * * * *tenure in any particular position;* it is tenure in the school district" (emphasis added) simply discards the language of the statute, which specifies explicitly which "particular position" leads to ultimate "tenure in the school district."

Appellant claims, also, that the intention of the parties that there should be but one integrated position is shown by a series of acts and conduct of the board and its members (fifteen separate items of which are summarized) evidenced by the contracts entered into between the board and appellant, letters exchanged containing designations and characterizations of appellant's position, entries in the board's minutes, and similar matters.

Whether there was but one integrated position or not is but a subsidiary question in this case. The real question is whether appellant was entitled to full-time tenure, or only one-fourth time tenure, or something in between, and the solution of that question depends entirely on *whether he comes within the teachers' tenure act as an employee occupying "a position requiring certification qualifications."* That is the only test. Appellant concedes that the parties could not by contract "transform non-certificated duties into certificated duties." So conceding, it is difficult to see how he can still argue that there was but one integrated position when his ultimate purpose in doing so is, obviously, to "transform non-certificated duties into certificated duties" and thereby indirectly establish full-time tenure.

"School districts" says the court in Pasadena School District v. Pasadena, 166 Cal. 7, 11, 134 P. 985, 986, 47 L.R.A.,N.S., 892, Ann.Cas.1915B, 1039, "are *quasi* municipal corporations of the most limited power known to the law. Their trustees have special powers, and cannot exceed the limit." Trustees "are special agents, without general power to represent the district." Skelly v. Westminster School District, 103 Cal. 652, 659, 37 P. 643, 645. "While it is true that the relation between the Board and a teacher is that of employer and employee, and that this relationship is created by contract, the terms of that contract are to be found in the authority granted the Board by law." Fry v. Board of Education, 17 Cal.2d 753, 760, 112 P.2d 229, 234.

[1] The authorities hold that apart from employing the teacher, assigning his school, fixing his compensation, and re-employing him (or not) for succeeding years, the board and its members have practically no power by contract, or otherwise, to do anything which affects, one way or the other, the question whether such person eventually attains tenure. Some of the cases on the subject are Grigsby v. King, 202 Cal. 299, 304, 307, 260 P. 789; Abraham v. Sims,

2 Cal.2d 698, 710, 42 P.2d 1029; Owens v. Board, 68 Cal.App. 403, 229 P. 881; La Shells v. Hench, 98 Cal.App. 6, 276 P. 377; Gastineau v. Meyer, 131 Cal.App. 611, 22 P.2d 31; Sherman v. Board, 9 Cal.App.2d 262, 49 P.2d 350, and La Rue v. Board, 40 Cal.App.2d 287, 293, 104 P.2d 689.

[2] Under the authorities it is clear that whatever tenure rights accrued to appellant, were acquired by what he *did*—by the services he rendered during the first three years—rather than by anything which the board or its members *said* in conversations, or wrote in formal contracts or informal ones, (*whether such contracts created one position or two*), or by reports of the superintendent, or by letters sent or exchanged, or by entries in the minutes, or by any other incidental act or conduct of the board, touching appellant's original employment or any renewal thereof.

[3, 4] The question, then, whether appellant's first three years of service entitled him to full-time tenure, half-time tenure, or only quarter-time tenure, depended entirely upon the kind and character of services rendered by him; in other words, upon how much service was rendered in a certificated capacity and how much in a noncertificated capacity. The agreed statement shows that appellant testified at length with respect to these various services, including those which doubtless went beyond the scope originally contemplated, including the defense training center, the committee planning for a junior college, and as acting superintendent or assistant superintendent. His secretary also testified, and at least one other witness, a former board member. There was documentary evidence as well. See 2 Cal.Jur. p. 932. All this evidence was for the trial court to value, weigh, classify, and put in its proper place, (to determine which services were attributable to one distinct set of duties and which to another) and it presented questions of fact from which different inferences could be drawn. Webster v. Board of Dental Examiners, 17 Cal.2d 534, 539–540, 110 P.2d 992, 996, holds that "where reasonable minds might differ on the inferences to be drawn from a particular set of facts, the appellate court will not substitute its own conclusions for those reached by the trial court [citations]."

[5, 6] The burden was on appellant to convince the trial court that he was entitled to full-time tenure, or at least half-time tenure (appellant's secondary point). The findings and conclusions of law indicate that he did not sustain that burden as to either.

We might add that the record shows that certification was required for *all* appellant's duties as principal of the evening high school while with respect to those as director of adult education a certificate was required for only *part* of them. The trial judge not only saw and heard the witnesses but also had the opportunity, by his own questioning of them, to examine minutely into these matters and to reach his own conclusions as to what part of the total services were performed as director and under certification *to some extent,* and what part as business manager, a wholly noncertificated position. Needless to say we have no such opportunity. It should be added that no section of the Education Code has been cited which *expressly* requires certification qualifications for a director of adult education, but since no point is made of this we do not inquire into it.

Still pressing his one-integrated-position theory, appellant contends that respondents are estopped to deny that he held such integrated position. This is based on the premise that for the first three years respondents by their acts and conduct led him to believe that during each year he occupied such a position, which (it is claimed) would lead to full-time tenure, and that he relied thereon to his detriment.

[7, 8] We have already seen that school districts possess "the most limited power known to the law" and that their trustees are "special agents without general power to represent the district." We have cited, also, the cases holding that tenure accrues despite any maneuvers of the trustees to prevent it. If the rule works both ways, as it should, then certainly no acts, conduct or representations, of trustees with such limited powers can produce, insure, ad-

vance, or at all influence, the attainment of tenure, if such actions do not square with statute law.

[9] Had the respondents attempted to make a contract with appellant pretending or purporting to bring his duties as business manager within the purview of § 5.500 School Code, now § 13081, Education Code it would have been utterly void. This is conceded, since appellant admits that the parties could not by contract "transform non-certificated duties into certificated duties."

"An estoppel *in pais* can have no more force or effect in binding the parties than would a contract including the very subject-matter urged by way of estoppel." Thompson v. Doaksum, 68 Cal. 593, 598–599, 10 P. 199, 202. See, also, Raisch v. San Francisco, 80 Cal. 1, 6, 22 P. 22; Lukens v. Nye, 156 Cal. 498, 506, 105 P. 593, 20 Ann.Cas. 158, 36 L.R.A.,N.S., 244, and Taylor v. Spear, 196 Cal. 709, 717, 238 P. 1038, 1041. In the latter case the court, (speaking of the plaintiff's "tenure" *under a lease* made by the Harbor Commissioners) said: "They could not * * * create an estoppel which would have the effect of enlarging the plaintiff's tenure beyond that embraced within the express limitations of the Code section [citations]." The same rule is recognized in McCormick Lumber Co. v. Highland School District, 26 Cal.App. 641, 643, 147 P. 1183, cited and quoted in Briney v. Santa Ana High School District, 131 Cal.App. 357, 361, 21 P.2d 610, a case, by the way, cited by appellant.

Appellant concedes that certification qualifications cannot "be attached to duties by means of estoppel." The estoppel that he seeks to establish is with respect to the "integrated contract", which, as we have already seen, is only a subsidiary question in this case.

[10] There is no merit in appellant's claim of estoppel, and there was no error in excluding the evidence offered in an attempt to prove it.

Appellant's final point is that he was never legally dismissed from the position of business manager. His severance from that part of his employment was a long-drawn-out process, extending over a six-months period. It started with a letter dated February 7, 1947, from the superintendent to appellant *addressed to him as business manager of the district* advising him to look for "different placement for next year." It refers to "dozens of personal conferences" and "two or three recent conferences involving the entire board and others." It suggested that appellant make his own announcement about the change. The tenor of the letter is friendly and co-operative. However, it concludes with the definite statement "I am not going to be able to recommend your reappointment for next year in Palo Alto." After this letter was received there ensued a number of meetings, at one of which the matter was considered by the board for about two hours and at which appellant appeared and addressed them, presumably presenting his side of the case. As the end of the 1946-47 school year drew near, the question now in litigation, as to the extent of appellant's tenure, became acute and the board sought legal advice.

Appellant's last yearly contract consists of an "Offer of employment" dated June 12, 1946 and an acceptance dated June 27, 1946. It stated that at a meeting on June 6 appellant was elected to serve as "Business Manager (¾ time) and Director of Adult Education (¼ time) for the school year beginning July 1, 1946 and ending June 30, 1947. * * * You are hereby classified by this board as a permanent ¼ time employee, subject to acceptance of this offer." It was signed on behalf of the board, and the acceptance was signed by appellant. By its terms the contract expired on June 30, 1947. It was never renewed, and the parleys which had gone on from as early as February made it clear that it was not to be renewed. The agreed statement shows that one of the board's members had been conferring with appellant respecting the matter, and this member testified that "appellant's employment was extended *at appellant's request from July 31st to August 31st;* and that the final act done was the adoption of a formal resolution which was drawn by the District

Attorney, and which the Board modified to soften somewhat, which was adopted by the Board in August." If the testimony which we have just emphasized was believed by the court—as it apparently was—it would show that appellant had notice that his yearly contract as business manager was not to be renewed. The formal resolution adopted August 21, 1947 just referred to (after the preamble) reads "Be it hereby resolved that the * * * District offer said C. R. Holbrook employment as a permanent employee of this District, for one-fourth full time service only, as Adult School Director at an annual salary of $1245 and that his services as Business Manager of this District be discontinued as of September 1, 1947."

Appellant's request for a renewal of his yearly contract was met with the following action at the board's regular meeting on June 26, 1947, as shown by its minutes:

"C. R. Holbrook the business manager presented a letter calling attention to the fact that the salary of the business manager and director of adult education had not been fixed nor had any contract been issued for the following year. He requested that the Board authorize the secretary to execute such a contract incorporating the $360 increment, plus one annual increment. Mr. Packard moved and Mr. Vanderpool seconded the motion that the superintendent be authorized to take whatever action is necessary to pay Mr. Holbrook at the present rate of salary for the month of July and that it be the understanding that he would be entitled to the usual four weeks' vacation with pay in August."

There can be no doubt that appellant had ample notice that he was not to be reemployed as business manager.

Sections 14001–14027, Education Code deal with non-certificated employees.

[11, 12] The authority to appoint a business manager comes from § 14001 which provides that "The governing board * * * shall employ janitors and other employees of the school." By § 14003 the board is authorized to prescribe the duties of noncertificated employees, and by § 14026 it is authorized to fix their compensation. The duties of appellant, important as they were in all three capacities, are not to be compared or bracketed with those of a janitor, but it just happens that the legislature used the quoted language; it is not ours. It follows that appellant was one of the "other employees" mentioned in § 14001, and *as business manager* the only legal hold he had on the district was his yearly contracts, the last of which expired on June 30, 1947, and was never renewed as a yearly contract, but only as an expedient for a decent severance allowance with full pay for the month of July and "the usual four weeks' vacation with pay in August." He knew by such action that his "noncertificated" employment had come to an end, wherefore the arguments in appellant's brief that some of the "personnel conferences" held in the homes of the trustees were not open meetings or legal meetings is of no force. These actions of the board constituted substantial notice of termination of appellant's contract *as business manager,* and there is no merit in the contention that he was not legally discharged, with ample and legal notice, from that position.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

PEOPLE v. STEMBRIDGE.
Cr. 817.

District Court of Appeal, Fourth District, California.
Aug. 14, 1950.

Rehearing Denied Aug. 28, 1950.

Hearing Denied Sept. 11, 1950.

Otis Stembridge was convicted in the Superior Court of Kern County, W. L. Bradshaw, J., of murder in the second degree, and he appealed. The District Court of Appeal, Mussell, J., held that trial court did not commit error in failing to give requested instructions.

Affirmed.

1. Criminal law ⇐824(3)
Homicide ⇐309(3)

Where there is sufficient evidence in murder prosecution upon which a jury may return verdict of manslaughter, instruction defining it should be given even if not offered by defendant, but it is not error to fail to give instruction on manslaughter when there is no evidence to support verdict finding defendant guilty of that crime.

2. Criminal law ⇐824(3)

In murder prosecution, where under evidence defendant was guilty of murder or not at all, trial court was not required to give on its own motion a manslaughter instruction.

3. Criminal law ⇐1144(15)

In murder prosecution, where under evidence defendant was guilty of murder or not at all, and jury was fully instructed as to crime of murder and was told that if they were not satisfied that defendant was guilty of that offense they should acquit him altogether, jury would be presumed to have heeded trial court's instruction in such respect and performed their whole duty in accordance with it.

4. Homicide ⇐304

In murder prosecution, refusal to give instruction as to duty of jury to acquit if homicide was found to be accidental or excusable was not error under the evidence.

5. Homicide ⇐151(1)

Where prosecution established killing of deceased by defendant and there was a definite showing that crime committed was murder, burden was on defendant to show circumstances in mitigation.

6. Homicide ⇐300(7)

In murder prosecution, instructions relating to self-defense were sufficient under the evidence.

7. Criminal law ⇐814(17)

In murder prosecution, where evidence of eyewitnesses to homicide was that killing was committed by defendant, trial court did not err in refusal to give defendant's requested instruction relating to circumstantial evidence.

8. Criminal law ⇐863(2)

Where trial court instructed jury that they might convict one or both of the defendants, and thereafter reread the instructions previously given upon jury foreman asking whether jury might return verdict of guilty as to one defendant and not guilty as to the other, defendant who was convicted could not claim that trial court neglected to give responsive answer to query directed to it by jury foreman.

9. Criminal law ⇐814(1)

In murder prosecution, where theory of conspiracy was basis of naming codefendant as a party defendant but conspiracy was not charged in the information, trial court did not err in failing to give instructions relating to conspiracy.

10. Criminal law ⇐1037(1, 2)

Where statement by prosecuting attorney was improper, but the harmful result, if any, could have been obviated by appropriate instruction of trial court, defendant could not predicate error on appeal in regard to such statement in absence of assignment of such alleged misconduct as error and a request to trial court to instruct jury to disregard it.

11. Criminal law ⇐1171(1)

In prosecution of two defendants on charges of murder and burglary, where both defendants were found not guilty of the burglary charge, statement by prosecuting attorney in his closing argument that trial judge had denied motion to dismiss the burglary charge was not prejudicial.

12. Criminal law ⇐1171(1)

In murder prosecution, where defendant was not found guilty of murder in first degree but was convicted of murder in the second degree, reference by prosecutor in his arguments to automatic right of appeal in case of a verdict of murder in the first degree without recommendation was without application but was not prejudicial.

13. Criminal law ⇐1186(4)

Where evidence was conclusive as to defendant's guilt of crime charged, and District Court of Appeal could not hold that there had been a miscarriage of justice, remarks by prosecuting attorney in his closing argument, although somewhat improper, did not constitute grounds for reversal. Const. art. 6, § 4½.

14. Criminal law ⇐877

In prosecution of two defendants on charges of murder and burglary, where there was a marked difference in evidence as to actions of each of the defendants, verdict finding one defendant guilty and the other not guilty on the murder charge and finding both defendants not guilty on the burglary charge was not fatally defective as inconsistent.

15. Criminal law ⇐878(3)

Where defendant was charged with both burglary and murder in information, the offenses were separate and distinct and acquittal of the burglary count did not preclude a conviction on the charge of murder.

Morris B. Chain, Bakersfield, for appellant.

Fred N. Howser, Attorney General, William E. James, Deputy Attorney General, for respondent.

MUSSELL, Justice.

The defendant has appealed from a judgment of conviction of murder in the second degree and from an order denying a new trial.

In an information, the defendant, Otis Stembridge, and his codefendant, Loran Roulain, were accused of the murder of one John L. Isaaks, and in a second count both defendants were charged with the crime of burglary in entering the Oasis Club in Fruitvale, with intent to commit a felony.

A jury found defendant Stembridge guilty of murder in the second degree, not guilty of the charge of burglary, and acquitted Roulain on both charges.

The material facts, summarized briefly, are as follows: The deceased, John L. Isaaks, with his wife and several friends, arrived at the Oasis Club about midnight on December 15, 1949. An hour or so later there was a disturbance across the street. Defendant Stembridge, who was then in the club, with several others rushed out to see what was happening and found that a man and his wife were engaged in a fight. Two of the spectators separated the contestants and Stembridge then came through the crowd, struck the man with his fist, knocked him down and then turned and ran back into the club.

A number of spectators returning to the club noticed that the bartender, Art Schmidt, was talking to a man who was later identified as Roulain. Roulain said he wanted to get in; that his partner was inside, and Stembridge, on the inside, was asking the bartender to let Roulain in. Schmidt told Roulain that he would let his partner out but didn't want anyone else in; that he was not serving any more drinks and was going to close up. He then let Stembridge out and the two men left together. They were heard to say "Well, we will see you" or, as one witness put it, Roulain said either "I will see you Art" or "I will get you Art".

Shortly thereafter, at about ten minutes to 2:00, the occupants of the Oasis Club started to leave. Some of them were outside getting into their cars when they noticed a car driving up and that one man in it, later identified as Stembridge, had a 22 rifle. Stembridge motioned to the crowd and said "Stand back. It is going to be a fair fight". Roulain then went into the club and Stembridge told those gathered outside that he would kill anyone that moved. Mrs. Isaak, the wife of the deceased, walked up to Stembridge and was told by him to stand back. The deceased

walked toward his wife and Stembridge said to him "You are within an inch of death". Stembridge said he meant business and fired two shots into the air, looked in the window of the club and made the remark that it was not a fair fight; that there were "two to one in there"; that "there was another man in there and he was going to kill him too". Stembridge fired two shots into the cafe, turned and fired twice at the deceased, who was standing from six to ten feet away. One bullet struck Isaak on the right side and the other entered his back. He fell and died within a few minutes. The medical testimony was that either bullet wound would have caused his death.

None of the witnesses saw anything in the hands of the deceased at the time he was shot, or at any other time, and the uncontradicted testimony is that the deceased was several feet distant from the defendant when the shots were fired.

Mrs. Isaak testified that after the defendant shot her husband, he said "Stand back or I will kill you too"; that Stembridge told her not to take a step or she would get what her husband got.

One of the witnesses, Amanda Jordan, heard the statement made by Stembridge to Mrs. Isaak and also heard the defendant, while at the window with the gun, say "I will kill you, Art".

Alice Hallmark, one of the employees at the Oasis Club, testified that after the deceased was shot, Stembridge made the remark "I will either kill him or them" or "I will kill some more before I leave".

Mrs. Isaak further testified that while Stembridge was trying to see inside the cafe, he was also watching the crowd outside; that the deceased took her around to their car and the defendant said "I see you over there. Don't take another step"; that they stopped and the defendant turned his attention back to the window again; that her husband was in front of his car when she heard the shot. She saw him turn to the left after the first shot and fall to the ground, face down; that she took a step forward toward him and the defendant then said "Don't take a step, or I will give you the same thing he got"; that she heard a crash and saw Roulain coming out of the window of the cafe and heard Stembridge say to him "Come on out of there. I just shot a man".

Stembridge and Roulain then drove away. After they had left, the bartender was found lying unconscious on the floor of the club and a witness, Mrs. Tuckness, in a hysterical condition by the telephone.

Mrs. Tuckness testified that she, with several others, left the cafe at about the time Roulain rushed up to the door to enter it; that Roulain pushed his way in and knocked the bartender down; that she rushed in and stood near the door until the bartender told her to lock it; that the bartender and Roulain were both on the floor and the bartender was "getting the worst of it"; that she picked up a chair or a stool and hit Roulain with it several times; that she heard a shot and then locked herself in the restroom; that she remained there about a minute and a half and then came back out to see how the bartender was "making it"; that both men were lying on the floor in front of the door. She then heard another shot and saw Stembridge break the window out and stick his head in the opening. He pointed at the bartender and said something to Roulain; that Roulain then got up and crawled out of the window and the two men left.

Stembridge and Roulain were arrested shortly thereafter and the 22 rifle used by Stembridge was found in the car in his possession.

After his arrest, Stembridge told a deputy sheriff that he and Roulain got into a fight with Art Schmidt in regard to Schmidt locking the door and that they went back to their car and got the 22 rifle; that they then went back to the front of the Oasis and he grabbed the barrel of the gun, broke out the plate glass window in front with the butt of the gun and then fired two or three warning shots over the heads of the people inside; that then he was struck from behind by Isaak and that he turned and fired one shot at him. In a later statement, Stembridge said that he had been at the Oasis Club; that there had been a disturbance across the street; that

he went across to see what was happening and that a man and woman were "having trouble fighting"; that he tried to separate them, took a "poke at the fellow" and knocked him down; that the bartender wouldn't let Roulain into the bar; that after a few seconds of arguing, he and Roulain got in the car, and decided to go to Stembridge's home; that they went there for the purpose of obtaining a gun to take back to the Oasis to see that Roulain had a fair fight with Art Schmidt, the bartender; that after a scuffle, Roulain went in the bar and that he, Stembridge, walked up to the window, saw two people fighting Roulain and that he fired two shots to keep the crowd back because he didn't want "everybody jumping in"; that he fired two shots inside as a warning; that then somebody hit him from behind and he went half way down to his knees and that he remembered the gun going off but not whether it hit anybody.

Stembridge testified in his own behalf in the trial and there claimed that he lost consciousness after the alleged blow on the head and that he did not recall firing the shots which killed the deceased.

The defendant contends: (1) That the court committed error in failing to give certain requested instructions; (2) That the district attorney was guilty of prejudicial misconduct; and (3) That the verdict of the jury was inconsistent.

[1, 2] The defendant first argues that the court erred to his prejudice in failing to give an instruction on manslaughter. This argument is based upon the claim that the shooting of John Isaak resulted either from defendant's acts of self-defense or as a result of accident or misfortune in the heat of passion upon sudden and sufficient provocation and without malice and without premeditation. However, there is no evidence in the record before us that the defendant was acting in self-defense at the time he shot the deceased and there is no evidence of sudden or any provocation to justify the homicide.

Appellant's defense was based on the claim that he was rendered unconscious as the result of a blow on the head. In this connection the court instructed the jury to the effect that they should find the defendant not guilty of murder if there was any reasonable doubt that at the time of the firing of the fatal shots at John Isaak the defendant, Otis Stembridge, was not conscious of his act by reason of a blow on the head suffered immediately preceding the firing of the shots. Although there was no evidence that the defendant acted in self-defense, the court gave an instruction upon that subject. No instruction on the subject of manslaughter was offered by the defendant. While it is the rule that where there is sufficient evidence upon which a jury may return a verdict of manslaughter, an instruction defining it should be given even if not offered by the defendant, it is not error to fail to give an instruction on manslaughter when there is no evidence to support a verdict finding the defendant guilty of that crime. People v. Manzo, 9 Cal.2d 594, 598, 72 P.2d 119; People v. DuBois, 16 Cal.App.2d 81, 86, 60 P.2d 190. The record before us discloses no possible theory upon which to rest an argument that the defendant was guilty of manslaughter. Under the evidence he was guilty of murder or not at all and an instruction on manslaughter was inapplicable. People v. Shannon, 203 Cal. 139, 143, 263 P. 522.

[3] The jury was fully instructed as to the crime of murder and were told in effect that if they were not satisfied that the defendant was guilty of that offense they must acquit him altogether. It is to be presumed that the jury heeded the court's instruction in this respect and performed their whole duty in accordance with it; that if they were not satisfied beyond a reasonable doubt that the defendant was guilty of murder, under the instructions they would have acquitted him. People v. Watts, 198 Cal. 776, 796, 247 P. 884.

The evidence shows that Stembridge was guilty of murder, and murder alone. He left the Oasis Club, went to his home, concealed a 22 rifle in his car and returned with his codefendant to the club with the admitted intent to see that there was a "fair fight". In order to carry out his in-

tent and design when Roulain entered the club, Stembridge remained outside, and, raising the rifle, threatened all of the bystanders that they were within an inch of their lives, that they were not to move, that if they moved, he would kill them and that it was to be a "fair fight". He was heard by some of the witnesses to shout a threat to kill the bartender; he fired two shots outside of the cafe in a general direction and above the heads of the bystanders, and two shots into the club. He fired one shot at the deceased, John Isaak, and as Isaak, who was within about five feet, turned, he fired a second shot into his back. He told the wife of the deceased that she would get the same as her husband got; he shouted inside to Roulain that he "had killed a man". This evidence is entirely insufficient upon which to base a verdict of manslaughter and fails to show any facts which would warrant a belief that the defendant shot Isaak "upon any sudden quarrel or heat of passion". Under the facts shown, the court was not required to give, on its own motion, a manslaughter instruction.

[4] The defendant claims error in the court's refusal to give an instruction as to the duty of the jury to acquit if the homicide was found to be accidental or excusable. However, there was no evidence adduced to justify the giving of the requested instruction.

[5, 6] It is also claimed that the court erred in refusing to instruct the jury as to the burden of proof required to be produced by the prosecution to overcome the claimed self-defense.

The prosecution established the killing of the deceased by the defendant and there was a definite showing that the crime committed was murder. The burden was then on the defendant to show circumstances in mitigation. People v. Jones, 160 Cal. 358, 371, 117 P. 176. This burden he did not attempt to assume, but merely raised the defense that he was unconscious. This was fully covered by the instructions. The instructions given by the trial court relating to self-defense were sufficient under the evidence.

[7] The court did not err in its refusal to give defendant's instruction relating to circumstantial evidence since there was no circumstantial evidence in the case to which this instruction could apply, as the evidence of the eyewitnesses to the homicide was that the killing was committed by the defendant.

We have examined the other offered and refused instructions and conclude that no error resulted in the court's failure to give them.

[8] It is next claimed that the court erroneously failed and neglected to give a responsive answer to a query directed to it by the foreman of the jury as to whether the jury might return a verdict of guilty as to one defendant and not guilty as to the other. The court had instructed the jury that they might convict one or both of the defendants. When the question was asked by the foreman of the jury, the court reread the instructions previously given and told the jury, in effect, that if they so interpreted the facts, they could convict one and acquit the other. The defendant's contention as to this point is entirely without merit.

[9] The contention that the court erred in not giving instructions relating to conspiracy is likewise without merit. This was one of the theories of the prosecution and was the basis of naming the codefendant, Roulain, as a party defendant to the murder charge. However, conspiracy was not charged in the information and the court did give an instruction requested by the defendant sufficiently covering the subject.

[10] Several statements of the prosecuting attorney are assigned as constituting prejudicial error. The first statement was in reference to the testimony of a defense witness who claimed to have found a broken bottle at the scene of the crime. The prosecutor stated that it was very strange to him that defense counsel could find a man who would testify that he had found a whiskey bottle on the scene the next day and referred to the conduct of an attorney in another criminal case. De-

fendant's counsel made no objection to the statement and at the time apparently did not consider it prejudicial to him. While the statement was improper, the harmful result, if any, could have been obviated by appropriate instruction of the trial court and the defendant may not predicate error in this court in the absence of assignment of such alleged misconduct as error and a request to the trial court to instruct the jury to disregard it. People v. DuBois, supra, 16 Cal.App.2d page 87, 60 P.2d 190.

[11] Defendant contends that the prosecutor's statement in his closing argument that the judge had denied a motion to dismiss the burglary charge constituted prejudicial misconduct. No prejudice can be attributed to the statement inasmuch as both defendants were found not guilty of the burglary charge.

[12] Defendant complains of the argument of the prosecutor referring to the automatic right of appeal in the case of a verdict of murder in the first degree without recommendation. This objection is without merit as the defendant was not found guilty of murder in the first degree and the reference to the automatic appeal in cases calling for the death penalty has no application in the instant case.

The jury was properly instructed that statements made by counsel in the course of the trial, not as stipulations, were not to be taken by them as evidence of any facts in the case.

[13] The remarks made by the prosecuting attorney in his closing argument, while somewhat improper, do not constitute grounds for reversal. As was said in People v. Hadley, 84 Cal.App.2d 687, 693, 191 P.2d 517, 520: "In determining the prejudicial effect of errors occurring in the trial of a case an appellate court, by the mandate of Article VI, section 4½ of the California Constitution, must review the entire case for the purpose of determining whether a miscarriage of justice has resulted or the ends of justice subserved. It is only '"in a close case where the evidence is sharply conflicting, substantial, and serious errors vital to defendant that may have resulted in a miscarriage of justice must be regarded as prejudicial and grounds for reversal."' People v. Reese, 65 Cal. App.2d 329, 337, 150 P.2d 571, 576." And as was said in People v. Cabaltero, 31 Cal. App.2d 52, 62, 87 P.2d 364, 369: "It is held, however, that where the evidence clearly supports the conviction and it appears that the jury in all probability would have rendered a verdict of guilty even in the absence of any dereliction on the part of the district attorney, a reversal is not justified."

The evidence before us is conclusive as to the defendant's guilt of the crime charged and we cannot hold that there was a miscarriage of justice. People v. Godsey, 71 Cal.App.2d 82, 93, 162 P.2d 46; People v. Kizer, 22 Cal.App. 10, 20, 21, 133 P. 516, 521, 134 P. 346; People v. Cassidy, 86 Cal.App. 45, 53, 260 P. 313; People v. Green, 96 Cal.App.2d 283, 215 P.2d 127.

[14, 15] As a final ground for reversal of the judgment, the defendant contends that the verdict of the jury was inconsistent in that both defendants were not convicted. There was no inconsistency in the verdict as it was within the jury's province to find one defendant guilty and the other not guilty. Both defendants were found not guilty of the burglary charge. As to the murder charge, the evidence shows that Stembridge fired the fatal shots. There was a deliberate intention on his part to kill, evidenced by statements made by him at the time of the killing and subsequent thereto. There was a marked difference in the evidence as to the actions of each of the defendants. Burglary and murder are two separate and distinct offenses and the acquittal of the burglary count did not preclude a conviction on the charge of murder. As was said in People v. Taylor, 88 Cal.App.2d 983, 987, 199 P.2d 751, 754: "The fact that certain defendants may escape conviction for their crimes is not any legal or logical reason why another defend ant, where substantial evidence has been introduced to sustain his conviction, should be exonerated and be permitted to escape punishment for his crime."

Judgment and order affirmed.

BARNARD, P. J., concurs.

98 Cal.App.2d 811

M. H. GOLDEN CONST. CO. v. SUPERIOR COURT OF STATE, IN AND FOR IMPERIAL COUNTY et al.

EL CENTRO PROPERTIES, Inc. v. SUPERIOR COURT OF STATE, IN AND FOR SAN DIEGO COUNTY et al.

Civ. 4216, 4220.

District Court of Appeal, Fourth District, California.

Aug. 8, 1950.

Rehearing Denied Sept. 5, 1950.

Hearing Denied Sept. 25, 1950.

M. H. Golden Construction Company, a corporation, brought proceedings in prohibition to restrain the Superior Court in Imperial County from taking further proceedings in an action filed in said county, and the El Centro Properties, Inc., a corporation, brought a counter-proceeding to restrain the Superior Court of San Diego County from further proceeding with an action filed therein. The District Court of Appeals, Mussell, J., held that since the two tribunals had concurrent jurisdiction over the same parties and subject matter the tribunal in which jurisdiction first attached was entitled to retain it exclusively, and therefore, since the summons in the San Diego action had been served prior to that issued in Imperial County, the writ of prohibition would lie to restrain the Imperial County Superior Court from taking any further proceedings pending the complete exercise of the San Diego County Superior Court's jurisdiction.

Order in accordance with opinion.

1. Courts ⇐4

Jurisdiction is ordinarily determined by nature of case as made by complaint and relief sought, and nature of action is fixed by allegations of complaint.

2. Venue ⇐4

Action by creditor to recover money alleged due under building contract and for confirmation of creditor's authority under proxy agreement to have corporate assets of debtor corporation sold to satisfy such indebtedness was transitory in character since it did not turn on title to property as distinct from personal obligation.

3. Pleading ⇐45

Plaintiff is required to frame its complaint so as to show that it is entitled to retain trial of action in county in which action was commenced.

4. Corporations ⇐503(1)

Verified complaint which contained allegation that principal office of defendant corporation was located in county where action was brought and that contract upon which action was brought was made and entered into in that county plead sufficient jurisdictional facts. Const. art. 12, § 16.

5. Courts ⇐474

Where construction company brought action in San Diego county against another corporation to recover money due under construction contract, and other corporation brought action in Imperial county against construction company to recover damages for failure of construction company to properly carry out construction contract, but summons in San Diego County action was served prior to that issued in Imperial county, San Diego County Superior Court first acquired jurisdiction of the controversy involved in the two actions and therefore could dispose of the whole thereof. Code Civ. Proc. § 416.

6. Courts ⇐475(1)
Prohibition ⇐10(1)

Where two tribunals have concurrent jurisdiction over same parties and subject matter, tribunal in which jurisdiction first attaches is entitled to retain it exclusively, and prohibition lies to restrain other tribunal from taking any further proceedings pending complete exercise thereof.

7. Courts ⇐30

In action by creditor against debtor corporation, where debtor sought declaration of its rights under proxy agreement with stockholders of debtor corporation, trial court was not deprived of jurisdiction to proceed merely because makers of proxy were not joined as defendants, since trial court had jurisdiction to bring in all necessary parties.

H. G. Sloane, San Diego, for petitioner M. H. Golden Const. Co.

Horton & Knox, El Centro, Martin & Mahedy, San Diego, Sanner, Fleming & Irwin and Thomas J. Madden, Los Angeles, for petitioner El Centro Properties, Inc.

Clarence B. Smith, El Centro, for receiver, Aage Kaiser.

Horton and Knox, San Diego, Martin and Mehedy, San Diego, Sanner, Fleming & Irwin and Thomas J. Madden, Los Angeles, for Superior Court of Imperial County and others.

H. G. Sloane, San Diego, for Superior Court of San Diego County and others.

MUSSELL, Justice.

On April 17, 1950, Golden Construction Company, as plaintiff, filed an action in San Diego County in which a money judgment and declaratory relief was sought against El Centro Properties, Inc. Summons was issued and served on the defendant corporation on the following day. El Centro Properties, Inc. appeared in the action, filed a demurrer and various motions. The demurrer was overruled, the motions were denied and the defendant then filed an answer and cross-complaint. After an answer was filed to the cross-complaint, the matter was set for trial before a jury in the Superior Court of San Diego County.

On March 20, 1950, an action was filed in the County of Imperial by certain stockholders of El Centro Properties, Inc. against the Golden Construction Company in which the plaintiffs alleged that the corporation had failed to take court action for the protection of itself and its stockholders and that such action was filed as a derivative action in behalf of the corporation. The summons was issued at the time the action was filed but was not served on the defendant, Golden Construction Company, until April 21, 1950, three days after the service of the summons in the San Diego action.

On May 5, 1950, the Superior Court in Imperial County appointed a receiver, who took charge of certain real property in that county belonging to the El Centro Properties corporation.

On May 20, 1950, plaintiff in the Imperial County action filed a third amended complaint to which the defendants interposed their demurrer, setting up therein the pendency of another action between the said parties for the same cause, namely: the action then pending in San Diego County. At the same time the Golden Construction Company filed notice of motion to abate the proceedings in Imperial County and to discharge the receiver. Defendants' demurrer was overruled and the motion to abate the proceedings and to discharge the receiver was denied.

The Golden Construction Company then on June 27, 1950, filed its petition herein for a writ to prohibit the Superior Court in Imperial County from taking any further proceedings in the action in that county. El Centro Properties on July 10, 1950, filed its petition herein to restrain the Superior Court in San Diego from taking any further proceedings in the action therein pending.

[1] The primary question for our determination is whether the Superior Court in San Diego has jurisdiction to proceed with the action filed in that county. Jurisdiction is ordinarily determined by the nature of the case as made by the complainant and the relief sought. Ransome-Crummey Co. v. Martenstein, 167 Cal. 406, 408, 139 P. 1060. The nature of the action is fixed by the allegations of the complaint. Becker v. Superior Court, 151 Cal. 313, 317, 90 P. 689.

The action in San Diego County is primarily one to recover moneys alleged to be due plaintiff on a building contract providing for the construction by plaintiff of houses, sewers, roads, curbs and paving on property owned by the defendant corporation in El Centro. In a second cause of action, an account stated was set forth and it was further alleged, among other things, that in order to induce plaintiff not to take action against the defendant and not to record claims of lien

on defendant's property, all the directors and stockholders of the defendant corporation agreed to place the control of the corporation in plaintiff; that this was done in order that there might be no dispute or delay in using defendant's assets in discharge of its obligations to plaintiff; that a proxy agreement was executed by all of defendant's shareholders, pursuant to which three nominees of Golden Construction Company were elected to defendant's board of directors; that in subsequent meetings of the new board, actions were taken to liquidate the indebtedness, including a resolution of March 20, 1950, to sell sufficient of the assets of defendant corporation as might be required to discharge the indebtedness to plaintiff; that at this meeting a resolution was adopted amending the articles of incorporation so as to state that the principal office for the transaction of the business of the corporation is located in San Diego County; that on March 29, 1950, the minority directors of defendant corporation delivered to plaintiff a purported revocation of the proxy agreement; that stockholders in defendant corporation then attempted to elect a new board and to conduct the business of defendant corporation; that the confusion resulting from this conflict of asserted authority makes it impossible for either set of officers to conduct the business of the corporation.

In its prayer for relief, plaintiff seeks a declaration of its rights under the proxy agreement, a money judgment, and confirmation of the authority of the directors to sell the corporate assets of defendant corporation to satisfy the indebtedness due the plaintiff.

[2, 3] It is apparent that the action is transitory in character. It is predicated on contract and a money judgment is sought. The action does not turn on the title to the property as distinct from the personal obligation. The plaintiff, as required, framed its complaint to show it was entitled to retain the trial of the action in the county in which it was commenced. Neet v. Holmes, 19 Cal.2d 605, 610-614, 122 P.2d 557.

[4] The verified complaint contains an allegation that the principal office of the defendant, El Centro Properties, Inc., is located in San Diego County, California, and that the contract upon which the action was brought was made and entered into at San Diego.

Under Article XII, section 16, of the California Constitution, a corporation may be sued in the county where the contract is made * * * or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases.

We conclude that sufficient jurisdictional facts were pleaded in the complaint.

The action in Imperial County was brought by stockholders of the El Centro Properties, Inc. in behalf of the corporation and is an action for damages, an accounting, and for the appointment of a receiver of the corporation properties in El Centro. The damages claimed are alleged to have been occasioned by the failure of the Golden Construction Company to properly carry out the terms and conditions of the building contract, which is the subject of the suit in San Diego.

The complaint alleges, among other things, that the stockholders of El Centro Properties, by agreement, permitted the Golden Construction Company to gain control of the board of directors of the corporation by electing three directors thereon, and in this connection it is alleged that this action was taken in order to protect the defendant and was in lieu of giving security for an indefinite amount of the indebtedness owed to the Golden Construction Company. A part of the indebtedness was admitted. An accounting was sought, as well as the appointment of a receiver to take charge of the properties in El Centro owned by the El Centro Properties, Inc.

[5] Section 416 of the Code of Civil Procedure provides in part as follows: "[When the court acquires jurisdiction.] From the time of the service of the summons and of a copy of the complaint in a

civil action, or of the completion of the publication when service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings * * *."

The summons in the San Diego action having been served prior to that issued in Imperial County, the San Diego court first acquired jurisdiction of the controversy involved in the two actions before us and may dispose of the whole thereof. De Brincat v. Mogan, 1 Cal.App.2d 7, 10, 36 P.2d 245; Gorman v. Superior Court, 23 Cal.App.2d 173, 177, 72 P.2d 774.

[6] The rule is that where two tribunals have concurrent jurisdiction over the same parties and subject matter, the tribunal in which jurisdiction first attaches is entitled to retain it exclusively, and prohibition lies to restrain the other tribunal from taking any further proceedings pending the complete exercise thereof. Myers v. Superior Court, 75 Cal.App.2d 925, 929, 172 P.2d 84.

[7] The contention is made that since the plaintiff in the San Diego action seeks a declaration of its rights under the proxy agreement and argues that the makers of the proxy, not having been joined as defendants, the San Diego court was thereby deprived of jurisdiction to proceed. However, the Superior Court of San Diego County has jurisdiction to bring in all necessary parties. Myers v. Superior Court, supra, 75 Cal.App.2d 931, 172 P.2d 84.

We are not here deciding on the effect of motions for change of venue which have been or may hereafter be made to change the place of trial of the actions herein. This decision is confined to the question of jurisdiction as presented by the petitions before us.

Let the peremptory writ issue as prayed for in the petition of plaintiff Golden Construction Company, a corporation. The alternative writ issued on the petition of El Centro Properties Inc. is discharged.

BARNARD, P. J., concurs.

99 Cal.App.2d 97

PEOPLE v. HAYDEN.

Cr. 2679.

District Court of Appeal, First District, Division 2, California.

Aug. 21, 1950.

Rehearing Denied Sept. 5, 1950.

Hearing Denied Sept. 13, 1950.

Albert Hayden was convicted in the Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., of conspiracy to commit abortion and was placed on probation for five years on condition that he serve one year in the county jail. Before the year had expired and on court's own motion proceedings were instituted to revoke probation during which defendant admitted that he had left custody of deputy sheriff to go with wife to his home, and thereafter court revoked the order of probation and pronounced sentence and defendant appealed. The District Court of Appeal, Dooling, J., held that since the defendant had admitted his violation of probation and probation officer had submitted written report recommending revocation of probation, revocation and sentencing of defendant without allowing him to examine report or refute it by witnesses was not an abuse of discretion.

Judgment affirmed.

1. Criminal law ⇐982

Where probation officer was present in court on original hearing and at request of court made an investigation and report in which he recommended that probation be revoked, notice in writing to probation officer of court's intention to revoke probation was not necessary prior to revocation and sentencing of accused to penitentiary, since requirement of written notice to probation officer, if it applies to an order of revocation, is to give probation officer opportunity to be heard before court acts. Pen.Code, § 1203.3.

2. Criminal law ⇐982

Where accused pleaded guilty to charge of conspiracy to commit abortion and was placed on probation for five years on condition that he serve one year in county jail, and before year expired, proceedings were instituted to revoke probation and accused appeared at hearing with counsel and admitted that he left custody

of sheriff and went with wife to his home, and at later hearing probation officer submitted written report recommending revocation of probation, revocation and sentencing of accused without allowing accused to examine report or refute it by witnesses was not an abuse of discretion. Pen.Code, § 1203.3.

3. Criminal law ⇐982

A proceeding to revoke probation is not a formal trial and is not governed by the rules governing such trial. Pen.Code, § 1203.3.

Arthur D. Klang, Morris M. Grupp, San Francisco, for appellant.

Fred N. Howser, Attorney General, David K. Lener, Deputy Attorney General, Edmund G. Brown, District Attorney, Frank Brown, Assistant District Attorney, San Francisco, for respondent.

DOOLING, Justice.

Defendant appeals from the judgment of the Superior Court sentencing him to the state penitentiary after an order revoking his probation. Appellant pleaded guilty to a charge of conspiracy to commit abortion and was placed on probation for five years on condition that he serve one year in the county jail. Before the year had expired on the court's own motion proceedings were instituted to revoke his probation.

Appellant was brought before the judge on March 16, 1950 and requested a continuance until his attorney could be present which was granted to a later time the same day. With counsel representing him present appellant was interrogated by the judge and answered freely without any legal objection being interposed by his counsel. It developed from his own admission that on at least one occasion while working in the custody of a deputy sheriff he persuaded the deputy to allow him to leave his custody and drive from San Bruno to San Francisco in an automobile with his wife for a visit to his home.

The court then continued the matter for the investigation and report of the adult probation officer. At a later hearing the probation officer submitted a written report in which he recommended that probation be revoked and appellant sentenced. At that hearing counsel for appellant asked for an opportunity to read the probation officer's report and to interview certain witnesses. The judge stated: "Let me say this: On the statement that Mr. Albert Hayden made here on the stand, in open court, there is sufficient—and we don't have to go beyond that—to verify and back up the recommendations of the Probation Officer in the matter, and to convince the Court that in this case such was the situation."

The court without further hearing revoked the order of probation and sentenced appellant.

[1] Appellant urges for reversal that no notice in writing of the intention to revoke probation was given to the probation officer as required by section 1203.3, Penal Code. The law does not require idle acts. The probation officer was present in court on the original hearing and at the request of the court made an investigation and report in which he recommended that probation be revoked. The purpose of the requirement of written notice to the probation officer, if it applies to an order of revocation, see In re Walden, 92 Cal.App.2d 861, 864, 208 P.2d 441, is to give the probation officer the opportunity to be heard before the court acts. He had and exercised that opportunity in this case.

[2, 3] There is nothing in the point that appellant was compelled to testify against himself. Appellant was not compelled to testify. With counsel representing him present he answered the court's questions without any objection. Nor can appellant show prejudice from the fact that he was not allowed to examine the report or refute it by witnesses. The court chose to act, not on the report, but on the defendant's own admission that in violation of the condition of his probation he took a trip from San Bruno to San Francisco and back without being in the custody of any officer. Nothing that appellant might produce could alter this fact. We can find no abuse of discretion in the court's action

in revoking his probation and sentencing appellant. A proceeding to revoke probation is not a formal trial and is not governed by the rules governing such trials. People v. Fields, 131 Cal.App. 56, 20 P.2d 988; People v. Silverman, 33 Cal.App.2d 1, 92 P.2d 507; In re Dearo, 96 Cal.App. 2d 141, 214 P.2d 585.

The fact that appellant had spent nearly a year in jail is a matter for the exclusive consideration of the Adult Authority. People v. Tibbits, 60 Cal.App.2d 335, 338, 140 P.2d 726.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.



99 Cal.App.2d 173

PEOPLE v. EMERY et al.
Cr. 4403.

District Court of Appeal, Second District, Division 1, California.

Aug. 22, 1950.

Theodore Emery and Dr. Samuel D. Collins were convicted of abortion. Thereafter Dr. Samuel D. Collins petitioned for writ of error coram nobis. From an order of the Superior Court of Los Angeles County, Thurmond Clarke, J., denying a writ, the petitioner appealed. The District Court of Appeal, Drapeau, J., held that where conviction depended upon testimony of young woman who claimed that she was pregnant at time involved, testimony by two doctors, if it had been admitted, that young woman victim was not then pregnant, would only have raised a question as to weight of testimony, and alleged negligence of counsel in not calling the two doctors as witnesses was not ground for granting writ of error coram nobis.

Affirmed.

1. Criminal law ⇐997

Where doctor was convicted of abortion on the testimony of young woman who claimed that she was pregnant at time involved, testimony by two other doctors, if it had been admitted, that young woman victim was not then pregnant, would only have raised a question as to weight of testimony, and alleged negligence of counsel in not calling the two doctors as witnesses was not ground for granting writ of error coram nobis.

2. Criminal law ⇐997

Where doctor was convicted of abortion, subsequent evidence that young woman victim was not then pregnant would not require issuance of writ of error coram nobis.

3. Criminal law ⇐997

Writ of error coram nobis will not be granted for newly discovered evidence going to merits of issues tried, and issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial.

Frederic H. Vercoe, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Dan Kaufmann, Deputy Attorney General, for respondent.

DRAPEAU, Justice.

In 1946 defendant was tried by court and jury, and convicted of abortion. He admitted a prior conviction of the same offense. Motion for new trial was made and denied, and he was sentenced to state's prison for the term prescribed by law. The judgment and order were affirmed by this Court. People v. Emery, 79 Cal.App.2d 226, 179 P.2d 843.

In January, 1949, defendant petitioned the Superior Court for writ of error *coram nobis*. The petition was heard and denied. From this order defendant appeals.

Only one ground in support of the petition needs attention. Other grounds in the petition (which was prepared by defendant himself) are palpably insufficient, and are so conceded by his counsel.

At the jury trial the young woman victim of the defendant testified that she

was pregnant, and that she went to defendant's office. She described at length what was done to her on two occasions. A synopsis of her testimony may be read in People v. Emery, supra.

In his petition here defendant avers that two doctors would have testified that they examined the young woman at the time in question and that she was not then pregnant. Defendant asserts that it was negligence on the part of his then counsel not to have called these two doctors as witnesses in his behalf.

A counter affidavit was filed by counsel, denying negligence, stating that defendant himself told him that the woman was pregnant, and asserting that he did all in his power in the defense of his client. The trial court indicated that he believed this affidavit. However, as stated by defendant, professional conduct of his counsel is collateral to the question here involved, and should not in any way be determinative of it.

Many California cases have considered and discussed the writ of error *coram nobis*, its application, its scope and its effect.

In People v. Adamson, 34 Cal.2d 320, 210 P.2d 13, 15, it is said: "In this state a motion to vacate a judgment in the nature of a petition for *coram nobis* is a remedy of narrow scope. (Citing cases.) Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court. (Citing cases.)"

And in People v. Tuthill, 32 Cal.2d 819, 198 P.2d 505, 506, it is said: "Defendant recognizes the following settled rule: 'The office of the writ of *coram nobis* is to bring the attention of the court to, and obtain relief from, errors of fact, such as * * * *a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant*, was not made, either through duress or fraud or *excusable mistake*; these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned.' (Citations.) * * * It is a general rule that the writ will not be granted for newly discovered evidence going to the merits of the issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial. (Citing cases.)"

[1] The effect of the testimony of the two doctors, if it had been taken, could only have been to raise a question of the weight of their opinion and that of the woman herself. The fact that she was not pregnant, if it had been brought to the attention of the court and jury, would not have compelled a verdict of not guilty. It would not have prevented the rendition of the judgment. People v. Emery, supra. Speculation as to what the jury might have done had these witnesses testified is not within the reach of this inquiry.

[2, 3] Nor would the fact that the woman was not pregnant brought now without dispute to the attention of this court compel the issuance of the writ of error *coram nobis*. The rule to be here applied is that set forth in People v. Tuthill, supra: "* * * that the writ will not be granted for newly discovered evidence going to the merits of the issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial."

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

99 Cal.App.2d 43

YEOMAN v. SAWYER et al.

Civ. 7738.

District Court of Appeal, Third District, California.

Aug. 17, 1950.

Rehearing Denied Sept. 16, 1950.

Action by Anna Marie Yeoman, administratrix of the estate of Carl Heckart, deceased, against Edith Sawyer, also known as Edith Heckart, and others, to quiet title to certain realty, in which defendant Edith Sawyer cross-complained to quiet title in herself. The Superior Court, Butte County, Harry Deirup, J., entered a judgment quieting title in defendant, and plaintiff appealed. The District Court of Appeal, Peek, J., held that where husband contributed community funds toward one-half purchase price of property to which title was taken by joint tenancy deed designating husband and a person, not his wife or partner, who had contributed one-half purchase price as joint tenant, interest created was that of tenants in common, and upon husband's death undivided one-half interest in property became a separate descendible interest, was subject to administration and husband's administratrix could maintain action on behalf of husband's estate to quiet title to undivided one-half interest in property.

Judgment reversed and cause remanded with instructions.

1. Deeds ⇐136

Where a husband contributes community funds toward the purchase of property to which title is taken under a joint tenancy deed designating the husband and a person other than his wife as joint tenants, the interest thereby created is not that of joint tenants but rather of tenants in common.

2. Deeds ⇐136
Descent and distribution ⇐11
Executors and administrators ⇐39, 129(3)

Where husband contributed community funds toward one-half purchase price of property to which title was taken under a joint tenancy deed designating husband and a person, not his wife or partner, who had contributed one-half purchase price as joint tenants, interest created was that of tenants in common, and upon husband's death undivided one-half interest in property became a separate descendible interest, was subject to administration and husband's administratrix could maintain action to quiet title to undivided one-half interest in property. Civ.Code, §§ 161a, 682, 686; Probate Code, §§ 202, 573; Code Civ.Proc. § 369.

Clewe, Deahl & McClarrinon, Robert V. Blade, all of Oroville, for appellant.

Charles H. Andrews, Chico, for respondents.

PEEK, Justice.

Anna Marie Yeoman, as administratrix of the estate of Carl Heckart, deceased, commenced this action to quiet title to certain real property situated in Butte County, the complaint containing the usual allegations of such an action. Defendant Edith Sawyer, also known as Edith Heckart, filed an answer denying the principal allegations of the complaint, and in addition cross-complained to quiet title in herself, alleging that she and the deceased, Carl Heckart, had taken title to the property as joint tenants by a deed dated January 2, 1947; and that by a decree of the Superior Court of Butte County dated August 30, 1948 terminating said joint tenancy, she became the sole owner and entitled to the possession of said property. The cause proceeded to trial, at the conclusion of which the court found that the defendant and cross-complainant was the owner of the land in question and that plaintiff had no interest therein. Judgment was accordingly entered quieting title in defendant and cross-complainant, from which plaintiff administratrix prosecutes this appeal.

It appears from the record that the decedent was a married man whose spouse was an inmate of a mental institution in the state of Missouri, which facts were known to defendant. Decedent came to California and first met respondent in September, 1937. After a lapse of some two or three months, decedent and respondent commenced living together as man and wife in Butte County and continued to do so until

decedent's death. During this time they purchased and sold several parcels of real property. The property here in dispute was the last parcel so purchased. Decedent contributed one-half of the purchase price from funds derived from his earnings and respondent contributed the other half from her separate property. A deed was executed and delivered in the names of deceased and respondent as joint tenants.

Appellant's sole contention is that since decedent contributed community funds and respondent contributed separate funds toward the purchase of the property, a valid joint tenancy was never created. As a consequence, appellant asserts, deceased and respondent were tenants in common, each holding an undivided one-half interest separately descendible, and that appellant, as administratrix of decedent's estate, is entitled to quiet title to such one-half interest.

Respondent does not argue that a valid joint tenancy resulted but in support of the judgment argues that decedent's wife, and not appellant, is the only person authorized to maintain an action on the theory that the decedent had made an unauthorized gift of community funds voidable only at the suit of decedent's wife.

The court did not find, nor does the record contain, any evidence of a gift of community funds by decedent to respondent. Therefore the sole question for decision is whether a valid joint tenancy existed between decedent and respondent since the judgment quieting respondent's title to the entire property and the consequent right of survivorship is necessarily dependent thereon.

[1] We have found no case directly passing on the question involved herein. However, we are satisfied that where a husband contributes community funds toward the purchase of property, to which title is taken under a joint tenancy deed designating the husband and a person other than his wife as joint tenants, the interest thereby created is not that of joint tenants but rather of tenants in common. This is true, since, "For the creation of a joint tenancy, four unities are required, namely, unity of interest, unity of title, unity of time, and unity of possession, and the absence of any one of these elements ordinarily will change the nature of the estate." Hammond v. McArthur, 30 Cal.2d 512, 514, 183 P.2d 1, 2. Thus it has been held that where husband and wife, with community funds, take title to property as joint tenants, the form of the conveyance is such as to destroy the statutory presumption that the property is community and the joint tenancy stands as such, the interest of each spouse being separate property unless the spouses intended that it should remain community property. Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003; Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905.

[2] This must follow for, under the provisions of section 161a of the Civil Code, the respective interests of the husband and wife in community property "are present, existing and equal interests." Hence, as the court stated in the Siberell case, supra, by applying the presumption that property standing in the name of the wife is her separate estate and that in the name of the husband is community property "it will be at once noted that there can be no unity of interest present, for the interest of the wife would be unequal to and more than that of the husband." [214 Cal. 767, 7 P.2d 1005.] More recently it has been held that "It is, of course, the law that one joint tenant cannot, as to the joint tenancy interest involved, own a greater share than any of the other joint tenants. * * * The theory is, that joint tenants together have but one estate and hence their interest must be equal. * * * See 2 Tiffany on Real Property 3d Ed. p. 196 at P. 198, § 418; 2 Jones' Blackstone, p. 955, § 254; 2 Reeves Real Property, p. 959, § 677." Estate of Galletto, 75 Cal.App.2d 580, 171 P.2d 152, 156.

Turning to the reference to Tiffany on Real Property, noted in the Galletto case, the following statement is found: "Since joint tenants in theory have together but one estate, they both necessarily have the same amount of interest. For instance, one joint tenant cannot have a one-fourth in-

terest and the other a three-fourth's interest." Sec. 419. This is the precise situation presented in the instant case, for, if the defendant Sawyer held her interest as her separate estate and if that of the decedent was the community interest of himself and his wife in which each had a present existing interest, then Sawyer's interest amounted to one-half and the decedent's and his wife's to a one-quarter interest, respectively.

If, then, a valid joint tenancy was not created under the situation herein presented, the only estate which could have been created was that of a tenancy in common, since decedent and defendant were neither husband nor wife nor were they partners. Section 682, 686, Civil Code; See also McDonald v. Morley, 15 Cal.2d 409, 101 P.2d 690, 129 A.L.R. 810.

Therefore as the parties held the property here in question as tenants in common, and as it is conceded that each party contributed equally to the acquisition thereof, upon the death of decedent the undivided one-half interest standing in his name became a "separate descendible interest." McDonald v. Morley, supra, 15 Cal.2d at page 412, 101 P.2d at page 692. It necessarily follows that since decedent's interest was descendible it thus was subject to administration under the provisions of section 202 of the Probate Code, Estate of Coffee, 19 Cal.2d 248, 120 P.2d 661, and hence plaintiff, as administratrix thereof, was entitled to maintain her action on behalf of said estate to quiet title to said undivided one-half interest therein. Probate Code, section 573; Code of Civil Procedure, section 369; Rehart v. Klossner, 48 Cal.App.2d 40, 119 P.2d 148.

For the foregoing reasons the judgment is reversed, and the cause is remanded with instructions to the trial court to enter judgment quieting title in plaintiff as administratrix of decedent's estate as to an undivided one-half interest, and to enter a like judgment in favor of defendant as to the remaining undivided one-half interest.

ADAMS, P. J., and VAN DYKE, J., concur.

98 Cal.App.2d 782

PEOPLE v. SHEVETTE et al.
Cr. 4419.

District Court of Appeal, Second District, Division 1, California.
Aug. 7, 1950.

Floyd E. Shevette and others were convicted in the Superior Court, Los Angeles County, W. Turney Fox, J., of conspiracy to commit forcible rape, of forcible rape and attempted forcible rape, and of violating the statute making it a crime to participate in copulating the mouth of another person, and they appealed. The District Court of Appeal, Doran, J., held that the evidence supported the convictions.

Judgment affirmed.

1. Criminal law ⇐1144(13)

On criminal appeals, evidence must be viewed most favorably to conviction.

2. Criminal law ⇐1160

In criminal prosecution, weight of evidence is for jury in the first instance, and for trial court after verdict in the second, and if circumstances reasonably justify verdict, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference.

3. Conspiracy ⇐47

Evidence supported convictions of conspiracy to commit forcible rape.

4. Rape ⇐51(4)

Evidence supported convictions of forcible rape.

5. Rape ⇐53(1)

Evidence supported conviction of attempted forcible rape.

6. Sodomy ⇐6

Evidence supported conviction of violation of statute prohibiting person from participating in act of copulating mouth of another. Pen.Code, § 288a.

7. Rape ⇐57(1)

In prosecution for rape, whether acts of intercourse, if they occurred, were forcible was a question for the jury.

8. Criminal law ⇐553

Evidence which discloses circumstances that are unusual is not inherently improbable.

9. Criminal law ⇐742(1)

In prosecutions for rape or conspiracy to commit rape and for violating the statute prohibiting person from participating in copulation of the mouth of another, whether complaining witness' testimony was inherently improbable was a matter for the jury. Pen.Code, § 288a.

10. Criminal law ⇐1159(4)

Reviewing court cannot reject statements of witness that have been believed by trier of facts unless it is a physical impossibility that they be true or their falsity be apparent without resorting to inferences or deductions.

11. Criminal law ⇐380

Testimony of character witness, based not upon what had been heard but upon something witness personally knew about prosecuting witness, was properly excluded.

12. Witnesses ⇐337(5)

Prosecuting attorney could properly cross-examine defendant concerning previous arrests after he testified that he had no prior record, solely for purpose of testing credibility on that issue.

13. Witnesses ⇐277(3)

In criminal case, it is proper to cross-examine defendant upon any relevant and material matter elicited on direct examination to show conduct or statements inconsistent with direct testimony. Pen.Code, § 1323.

Gladys Towles Root, Los Angeles, for appellants.

Fred N. Howser, Attorney General, Stanford D. Herlick, Deputy Attorney General, for respondent.

DORAN, Justice.

In a trial by jury the defendants Floyd E. Shevette, Richard Janeway, Frank M. Williams and Raymond A. Slavens were each convicted of conspiracy to commit forcible rape, of forcible rape and attempted forcible rape, and of violating Section 288a of the Penal Code. The defendants' motions to have case referred to the California Youth Authority, and for a new trial, were denied, as was an application for probation. Each defendant was sentenced to the state prison for the term prescribed by law as to each count, the sentences to run concurrently.

The grounds of appeal, as stated in appellants' brief, are that, "I. The Court committed errors of law during the trial of the action. II. The judgment is contrary to the law and to the evidence. III. The evidence is not sufficient to sustain the verdict."

It appears from the record that Patricia McAuley, aged 17 years, complaining witness herein, accompanied by a friend, Lois Wycoff, left the Wycoff home about 7:00 P.M. on February 9, 1949, and by public conveyance went to the "Roller Center", a skating rink in South Gate, California. The two girls left the rink about 10:45 P.M. and while waiting for a bus, the four defendants and two other boys drove up in a two-door sedan. The defendant Williams, whom Patricia had known before, asked for a match which Patricia supplied. The girls were then invited to ride home, and upon being told that two of the boys would be dropped off at a hot dog stand, got in the car. Patricia sat on Williams' lap in the back seat; Lois sat on another occupant's lap in the front seat.

The defendant Shevette, who owned the car, was then driving; later, after leaving the two boys at the hot dog stand, the defendant Janeway drove the car in the general direction of the girls' home. Against protests that the girls had to go home the car was driven past the proper street and into a cemetery at 162nd Street and Central Avenue. It was then stated that the car would not start, and it was here that the alleged crimes were committed.

Slaven then suggested that he wanted to have sexual intercourse; Lois refused and Janeway said "that they would beat me up if I didn't do it." Lois Wycoff testified, "I told them I was sick. * * * then Shev-

ette said I would have to prove it", otherwise "they would slap me around." Shevette then accompanied Lois a short distance away, and after being shown proof of menstruation, "He said he was sorry." Miss Wycoff desired to return to the car for the purpose of ascertaining whether the complaining witness was all right but was discouraged from so doing, and was kept at a distance by Shevette until the various assaults had been completed.

Patricia McAuley testified that after Lois had left the car, the defendants Slaven, Williams and Janeway each had intercourse while Patricia was struggling in the back seat; that these defendants kept hitting the complaining witness in the face. Williams and Janeway held the girl's arms and legs while Slaven had intercourse; the other two defendants likewise had intercourse while Patricia was being held. Slaven performed the act twice, and one Berardini, originally one of the party who had been let out at the hot dog stand earlier in the evening and who had arrived in another car, also had intercourse. In addition to these acts the complaining witness testified that while another defendant was having intercourse, defendant Janeway and Slaven had each copulated with complainant's mouth.

The complaining witness further testified: "I was crying. I said I was going to go to the police as soon as I got home, and he (Williams) said it wouldn't do any good * * * that they would get guys to come into court to testify against me". Upon returning to the car Lois Wycoff found Patricia "kind of crying and biting her lip"; later Lois observed that Pat's face was swollen and black and blue, "She was shaking, her hands were shaking, and she could hardly even talk."

The defendant Shevette drove the car back to Lois' home where the two girls got out. Patricia told Lois what had happened. Patricia then walked a short distance home, arriving there about 2:30 A.M. Mrs. McAuley found Patricia in a crying and hysterical condition. At that time the daughter made no complaint but the next afternoon informed Mrs. McAuley what had occurred at the cemetery. Patricia was examined by a physician the day after the assaults; "She was crying, very nervous, emotionally upset." The examination revealed tears or breaks in the hymen which "seemed to be not of recent origin"; the relaxed condition of the vagina could "probably, possibly" have resulted from the acts of intercourse which occurred on the preceding day.

A few days after the occurrence, Patricia's mother interviewed the defendant Williams who stated that what Patricia had said about the cemetery episode was true but denied having intercourse; "that he had faked it but had to go through with it to show the other boys that he wasn't a sissy or wasn't going to back out". Williams gave to Mrs. McAuley the names of the other defendants.

At the trial each defendant denied the charges in toto, and also introduced character witnesses who testified that the reputation of Patricia McAuley for morality and chastity was bad. Police officers testified to incriminating statements made by the defendants and to admissions that the complaining witness had been forced into the acts of intercourse. There was evidence indicating that the defendant Shevette did not have intercourse with Patricia but kept the other girl from returning to the automobile until the various acts by the other defendants had been completed. Shevette told an officer that "he thought he did" know what was going on in the car; that upon returning to the car Patricia was crying; that Shevette then returned the girls home.

[1,2] Viewing the evidence most favorably to the convictions as must be done in criminal appeals, the events related by the prosecuting witness, together with the surrounding circumstances disclosed by the record, must be deemed sufficient to support the judgments herein. In the language of the headnote to People v. Newland, 15 Cal. 2d 678, 104 P.2d 778, "the weight of the evidence is for the jury to determine in the first instance and the trial court after the

verdict in the second instance; and if the circumstances reasonably justify the verdict of the jury, an opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference."

[3-6] Both in reference to the conspiracy counts and those charging rape and the other offences involve, the verdicts must be upheld. It is conceded in appellants' brief that the agreement necessary to a criminal conspiracy "need not be formal". As respondent has pointed out, there is evidence that in violation of a promise to take the girls home, "appellants employed trickery to get the girls to the cemetery. There were four men to two girls at all times. * * * Once at the cemetery, the defendants did not waste time. Their avowed purpose was immediately announced." In reference to Shevette, who had no intercourse with either girl, it is pointed out that this defendant provided the vehicle in which the crimes were committed, and not only allowed these acts to be committed without protest, but prevented Lois from going to the aid of the prosecuting witness. That from first to last Shevette aided and abetted the other defendants cannot well be denied. The existence of a criminal conspiracy and each defendant's participation in the crimes, were questions of fact. It cannot be said that the jury's findings as to these matters are without evidentiary support or contrary to law.

[7] "It is appellant's contention that the character testimony as presented by the defense showed that she (Patricia) did not have a good general reputation for morality and chastity", and "proved that, if an act of sexual intercourse occurred on the night in question, it was not a forcible act; it was one with her full consent." But, as pointed out in the respondent's brief, the jury may have felt that the attempt to prove that the bad character of complaining witness lacked conviction, and that the opinions of the character witnesses were predicated upon weak foundation. Again it may be said that such evidence and the inferences to be drawn therefrom, were matters for the jury's consideration.

[8-10] The appellants have attacked the testimony of the complaining witness as "inherently improbable", referring particularly to the latter's statement that while one defendant was having intercourse, another defendant violated Section 288a of the Penal Code. But, as was said in People v. Klinkenberg, 90 Cal.App.2d 608, 204 P.2d 47, 58, 613, "Evidence which discloses circumstances that are unusual cannot be said to be inherently improbable." Again, "A reviewing court cannot reject statements of a witness that have been believed by the trier of facts unless it is a physical impossibility that they be true or their falsity be apparent without resorting to inferences or deductions." Such is the present situation. The jury had before it all the circumstances bearing upon the matter and as respondent's brief points out, "undoubtedly concluded that the * * * offense was not only possible but was in fact perpetrated as related."

[11] It is also contended by appellants that the trial court erred in excluding the testimony of a character witness. However, the record discloses that the witness' opinion was not based upon what had been heard but upon something the witness "personally knew about her." Under such circumstances there was no error in excluding the testimony.

[12, 13] Error is likewise predicated upon the trial court's act in permitting the prosecutor to question the defendant Williams concerning a previous arrest. In reference to this matter the trial court stated: "He (Williams) testified to the fact that he had not had any prior record or prior charge. The questions on cross examination were solely for the purpose of testing his credibility on that issue." As stated in People v. Westek, 31 Cal.2d 469, 476, 190 P.2d 9, 14, "it is proper in a criminal case to cross-examine a defendant upon any relevant and material matter elicited on his direct examination, for the purpose of showing conduct or statements inconsistent with his direct testimony. Pen. Code, sec. 1323."

The record herein discloses substantial evidence in support of the jury's findings; no reversible error has been pointed out; each of the defendants apparently received a fair and impartial trial. There is no merit in any of the appellants' contentions.

The judgments are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



99 Cal.App.2d 49

ARROW FLYING SERVICE, Inc., v. UNIVERSAL FLYERS GROUND SCHOOL et al.
Civ. 17275.

District Court of Appeal, Second District, Division 1, California.
Aug. 18, 1950.

Arrow Flying Service, Inc., brought action against Universal Flyers Ground School, a copartnership, and others, for alleged breach of contract whereby defendant partnership agreed to furnish ground school instructions for students at flying school conducted by plaintiff. A judgment for defendants was entered by Superior Court, Los Angeles County, Charles S. Burnell, J., and the plaintiff appealed. The District Court of Appeal, Drapeau, J., held that where defendant partnership entered into contract to furnish ground school instruction for students at flying school conducted by another partnership, upon corporation being formed to take over operation of the flying school, corporation was entitled to show that it had ratified the contract and to further show that the contract, though signed by only one of the defendant partners, represented a valid and subsisting agreement.

Judgment reversed and cause remanded.

1. Contracts ⇐10(1)

Lack of mutuality is tantamount to want of consideration, and where sufficient consideration is otherwise apparent mutuality is not essential, becoming essential only when its absence would leave a party without a valid or available consideration for his promise.

2. Corporations ⇐448(2)

Where defendant partnership entered into contract to furnish ground school instruction for students at flying school conducted by another partnership, upon corporation being formed to take over operation of the flying school, corporation was entitled to show that it had ratified the contract and to further show that the contract, though signed only by one of the defendant partners, represented a valid and subsisting agreement. Civ.Code, §§ 1636, 3388.

Charles C. Morrison, West Los Angeles, for appellant.

Jesse A. Hamilton, Los Angeles, for respondents.

DRAPEAU, Justice.

Demurrer to plaintiff's second amended complaint was overruled, defendants filed their answer, and the case was called for trial. Objection was sustained to the introduction of evidence on the ground that the complaint failed to state facts sufficient to constitute a cause of action. From the judgment which followed plaintiff appeals.

The complaint alleges that on March 28, 1947, plaintiff and defendants entered into an agreement by which defendants were to furnish to plaintiff ground school instruction for plaintiff's students; that on August 16, 1947, defendants refused to proceed further under the terms of the contract, and ever since that time have refused to comply with it; that nineteen of plaintiff's students required ground school instruction, which defendants refused to give, to the damage of plaintiff in the sum of $205 for each student; that if said students had been so taught plaintiff would have received $196 additional for each of them—all to plaintiff's damage in the sum of $5,463.

At the time the contract was entered into the plaintiff corporation was not in exist-

ence. The contract was between Arrow Flying Service, a partnership, and defendants. The corporation was formed ten or twelve days afterwards; but the parties complied with its terms for a time.

The contract was signed only by one person, Mr. John E. Monroe for the defendants.

The reporter's transcript indicates that the trial judge sustained the demurrer primarily because he felt that on its face it showed lack of mutuality.

The contract reads as follows:

"Arrow Flying Service, herein known as the first party, and Universal Flyers Ground School herein known as the second party, enter into the following agreement:

"The first party agrees to pay the second party 70¢ (seventy cents) per student hour for the number of hours of ground school instruction prescribed by the curriculum of the course in which their students are enrolled.

"The second party shall be the exclusive source for textbooks, supplies and equipment needed in the conduct of the course. The cost of which is not to be included in the above mentioned figure.

"In consideration hereof the second party agrees to maintain and conduct the ground school in accordance with the directives set forth by the approving agencies.

"This contract is to remain in effect for so long as the first party shall be designated an authorized flying school by the Veteran's Administration.

"28 March, 1947

"For Arrow Flying Service

"For Universal Flyers G/S

John E. Monroe

_____"

The contract speaks for itself. Defendants agree to maintain and conduct a ground school; plaintiff agrees to pay for students enrolled.

[1, 2] A contract is to be interpreted to give effect to the mutual intention of the parties as it existed at the time it was made. Civ.Code, sec. 1636. As was said in Brawley v. Crosby Research Foundation, Inc., 73 Cal.App.2d 103, at page 113, 166 P.2d 392, 397; "Lack of mutuality is tantamount to want of consideration, and where, as in this case, sufficient consideration is otherwise present, mutuality is not essential. It becomes essential only when its absence would leave a party without a valid or available consideration for his promise."

Plaintiff had the right to show that the corporation ratified the contract. Smith v. Glo-Fire Co., 94 Cal.App.2d 154, 210 P.2d 286.

Plaintiff also had the right to show that even though the writing was signed by only one party, it nevertheless represented a valid and subsisting agreement. Civ. Code, sec. 3388; Gelfan v. Bessolo & Gualano, 125 Cal.App. 214, 13 P.2d 793.

The judgment is reversed, and the cause remanded for a new trial.

WHITE, P. J., and DORAN, J., concur.



99 Cal.App.2d 210

STOCKTON MORRIS PLAN CO. v. MARIPOSA COUNTY et al. (two cases).
Civ. 7755, 7789.

District Court of Appeal, Third District, California.

Aug. 25, 1950.

Rehearing Denied Sept. 19, 1950.

Hearing Denied Oct. 23, 1950.

Action by the Stockton Morris Plan Company against Mariposa County, Mariposa County District No. 5 and S. A. Milton to recover possession of a piece of road equipment called a road maintainer. From an order of the Superior Court, San Joaquin County, Thomas B. Quinn, J., granting the county's and the defendant Milton's motion for judgment on pleadings and merits respectively, the plaintiff appealed. The District Court of Appeal, Van Dyke, J., held that complaint alleging assignment of conditional sales contract stated cause of ac-

tion in replevin against county, which was in possession of road maintainer but that complaint did not state cause of action against the defendant Milton because he was not in possession.

Reversed as to county; affirmed as to defendant Milton.

1. Pleading ⇐345(1), 350(3)
Stipulations ⇐14(10)

Only where there is entire absence of some essential allegation may motion for judgment on pleadings be properly granted, and hence neither stipulation of facts nor testimony, nor issues raised by answer could be considered on such motion.

2. Replevin ⇐57

Complaint which alleges title in plaintiff to property demanded, right to possession thereof when action was begun, actual possession of property by defendant, demand for possession and refusal to deliver alleges cause of action in replevin.

3. Pleading ⇐345(1.4)

Complaint alleging conditional sale of road maintainer, assignment of contract to plaintiff, default by buyer and possession by county, stated cause of action against county in replevin, as against motion by county for judgment on the pleadings based on alleged invalidity of the conditional sale contract.

4. Sales ⇐479(2)

Replevin by assignee of conditional vendor of road maintainer could not be maintained against defaulting vendee who was not in possession.

5. Replevin ⇐10

Nonpossession, with some exceptions, is a complete defense against action of replevin.

Lafayette J. Smallpage, Harold J. Willis, Stockton, for appellant.

Robert Owen Curran, District Attorney, Mariposa, for respondents.

VAN DYKE, Justice.

The Stockton Morris Plan Company, plaintiff and appellant here, brought suit against Mariposa County and one S. A. Milton to recover possession of a piece of road equipment called a maintainer. The complaint alleges the corporate status of plaintiff, the political status of Mariposa County, and concerning Milton, that at the time of the execution of a certain contract referred to in the pleading he was doing business under the fictitious name and style of "Mariposa County District No. 5". Further it is alleged that on March 31, 1947, California Tractor and Equipment Company by a conditional sale contract containing the usual reservation of title in itself sold and delivered the maintainer to Milton for a price of something over $7,000, upon which a balance remained unpaid; that on the same day California Tractor and Equipment Company transferred to plaintiff all its title to the maintainer and all its rights arising under the conditional contract of sale; that the contract provided that if Milton failed to pay the required installments upon the unpaid balance of the purchase price the plaintiff, as such assignee, could take immediate possession of the property; that no payments had been made and that plaintiff had elected to take such possession. Further, as to Mariposa County, it was alleged that it was in possession of the maintainer and, written demand therefor having been made, had refused and still refused to deliver it to plaintiff, detaining the same from plaintiff's possession without right, to plaintiff's damage; that the property had not been taken for taxes, assessment or fine, pursuant to a statute, or seized under execution or an attachment against plaintiff's property and that plaintiff was entitled to immediate possession. The prayer was for judgment against the two defendants for the recovery of the maintainer, or if that could not be had then for the market value thereof.

When the case was called for trial defendant Mariposa County moved the court for judgment on the pleadings as to it. No such motion was made by Milton. The trial court did not immediately rule upon the motion and certain stipulations of fact were entered into and the parties having thus progressed as far as they could by agreement, several witnesses were sworn

and their testimony taken. The matter was then submitted and the trial court issued an order granting the county's motion for judgment on the pleadings and thereafter caused such judgment to be entered, decreeing that plaintiff take nothing as against the county. As to Milton the court made findings of fact, drew conclusions of law and gave judgment that plaintiff take nothing as to him. Plaintiff has appealed from both judgments. The parties have presented their contentions upon a single record on appeal and we shall render but one opinion.

Treating first the appeal from the judgment on the pleadings in favor of the respondent Mariposa County, it must be said at the outset that the sole question is whether or not the complaint stated a cause of action. As the Supreme Court said in Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 149, 151, 157 P.2d 1, 2:

[1] "In considering whether the judgment on the pleadings was properly granted, it is but necessary to determine the sufficiency of the complaint upon the same principle as though it had been attacked by general demurrer. In other words, it is only where there is an entire absence of some essential allegation that a motion for judgment on the pleadings may be properly granted."

See also Bates v. Escondido Union High School District, 133 Cal.App. 725, 727, 24 P.2d 884, 885, in which the court, after stating the foregoing principle, said: "This court cannot consider anything outside of the complaint itself and must disregard any defect that might be reached by a special demurrer."

Applying the foregoing rule, we must, therefore, disregard the stipulation of facts and the testimony appearing in the record, for nothing contained therein can be looked to in support of the judgment on the pleadings. If that judgment cannot stand solely upon deficiencies in the complaint, the proper course would have been the determination of the cause upon the merits. Nor are issues raised by the answer to be considered, nor the validity of any theory of defense to the action which may be therein set forth.

[2] We think it is apparent from our statement of the allegations contained in the complaint that the action as against the county at least was the simple one of replevin, since the complaint contains all the essential allegations in such a suit and nothing in addition thereto, which in any wise could change the character of the proceeding. Summarized, the complaint alleges title in plaintiff to the property demanded; right to possession thereof when the action was begun, actual possession of the property by the county, demand for possession and refusal to deliver. These allegations have so often been held to sufficiently state a cause of action in replevin that extensive citation of authority could be made, but is unnecessary. It will suffice to quote the following from 5 California Jurisprudence 185:

"The ultimate fact which must be pleaded in an action for the recovery of the possession of personal property is, that plaintiff was at the time the action was commenced the owner of * * * the chattel, coupled with a right to the immediate possession thereof, and that the property was at that time wrongfully in the possession of defendant. If these are alleged, it is not necessary to state the grounds on which the allegations are based."

[3] Counsel for the respondent county have by permission of this court filed herein as their brief on appeal the same brief which they filed in the trial court. An examination thereof discloses that their sole contention in the trial court was based upon the claimed invalidity of the conditional sale contract referred to in the complaint and the asserted legal effects flowing therefrom, but, as we have said, the complaint did not go upon allegations of contractual relations between the plaintiff and the county and no such contractual relations are alleged ever to have existed and no invalidity appears on the face of the contract. The conditional sale contract referred to, copy of which is attached to the complaint,

does not purport to be a contract with Mariposa County nor does it anywhere appear therein that it was the intention of those who did execute the contract that the county should be a party thereto. Apparently the pleader thought best to refer to the contract as showing not only the ownership of the legal title to the chattel by its assignor and the transfer of that title to itself, but also the ground of its right to immediate possession thereof so far as defendant Milton was concerned, to whom the complaint alleges the chattel had been conditionally sold. It is apparent that as far as the complaint is concerned—and that is all we are now considering—it stated a cause of action against the county in replevin, and therefore the judgment on the pleadings in favor of the county must be and it is reversed.

The judgment in favor of defendant Milton rests upon different grounds. It purports to be a judgment on the merits at the trial, preceded by findings of fact and conclusions of law found and drawn by the trial court. Milton answered the plaintiff's complaint. Summarized, he admitted the possession by the county of the maintainer, and denied that he possessed the same or claimed any interest therein or had refused to deliver possession in response to plaintiff's demand. He admitted that he had executed the contract referred to in plaintiff's complaint, although alleging that he had done so with the intention that the maintainer should become the property of Mariposa County. In short, in an action of replevin brought against him he disclaimed all interest in the property sought to be recovered and denied that he possessed the same. These matters were found to be true by the trial court and it would ordinarily follow therefrom that Milton was entitled to the judgment in his favor which he received.

However, appellant argues as follows: That Milton executed the contract as agent for "Mariposa District No. 5"; that Milton did not purport to bind the County of Mariposa and that the county's name appears nowhere upon the face of the contract; that prior to contracting Milton did not have the approval of the board of supervisors of the county relative to the contract or to the purchase of the maintainer; that Mariposa County District No. 5, a road district, is not a political entity and has no corporate existence either de jure or de facto; that Milton did not intend to contract upon his own behalf, but did intend to contract as agent of the road district which he knew did not exist as a political entity. From all of this appellant argues that Milton became liable on the contract as a principal, citing Civil Code Section 2342, since he had assumed to act as an agent and thereby warranted to appellant's assignor that he had authority to act as such and because, purporting to act as an agent, he entered into a written contract in the name of a principal without believing in good faith that he had authority to do so.

[4, 5] Assuming the validity of appellant's argument it does not follow that in this action appellant was entitled to any relief against Milton. The only relief it has asked against Milton by its complaint is the recovery of a chattel, the possession of which the county had at all times. The trial court found as a fact that the county had possession of the chattel and that Milton had not had possession thereof. These findings were supported by substantial evidence. Milton had testified that he had never claimed any interest in the maintainer nor any intent to purchase, use or dispose of the same for himself. Plaintiff sued here, not upon its contractual rights against Milton, whatever they may have been, arising out of his having acted as an unauthorized agent, but to recover possession of the chattel it claimed to own and which it claimed was being withheld from it unlawfully and to such an action, with some exceptions not material here, nonpossession is a complete defense. California Packing Corporation v. Stone, 64 Cal.App. 488, 222 P. 193. We quote from the headnote:

"In an action in replevin or claim and delivery, being an action for the recovery of specific personal property, in order to sustain a judgment for the plaintiff, it must be shown that possession was in the defendant at the time of the beginning of

the action or that he had the power to make delivery of the personal property for the recovery of which the action is prosecuted." See also Rathbun v. Hill, 129 Cal. App. 601, 19 P.2d 64.

For the reasons given, the judgment in favor of the County of Mariposa, based upon the order granting the county's motion for judgment on the pleadings, is reversed, and the judgment in favor of respondent Milton on the merits is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.



99 Cal.App.2d 52

PEOPLE v. LE BLANC.

Cr. 4437.

District Court of Appeal, Second District, Division 1, California.

Aug. 18, 1950.

Warren LeBlanc was convicted in the Superior Court, Los Angeles County, William M. Byrne, J., of robbery in the second degree, and he appealed. The District Court of Appeal, Drapeau, J., held that a codefendant's possession of stolen property was evidence of the defendant's guilt.

Affirmed.

1. Robbery ⚖24(1)

Where codefendants were found together at scene of robbery, possession of one was possession of other, and where, at time of arrest, one defendant threw notebook and cards taken from victim to ground other defendant could be found guilty of robbery, second degree, on that evidence of their possession of notebook and cards.

2. Criminal law ⚖351(2, 3)

Where defendant fled when about to be arrested, and made statements to arresting officers inconsistent with his testimony on trial, defendant's conduct indicated consciousness of guilt.

3. Robbery ⚖4

If elements of robbery are present, crime is made out even though property taken be of slight value.

4. Criminal law ⚖1159(4)

In prosecution for robbery, where two police witnesses testified that they had seen defendant going through his victim's pockets and codefendant arrested at same time threw notebook and cards belonging to victim on ground at time of arrest, there was no such inherent improbability in prosecution's case that defendant's conviction must necessarily have been result of passion and prejudice.

5. Criminal law ⚖553

Inherent improbability is established only when it is physically impossible for facts to be true, or their falsity is apparent without resorting to inferences or deductions.

Jefferson & Jefferson, Bernard S. Jefferson, Martha Malone Jefferson, all of Los Angeles, for appellant.

Fred N. Howser, Attorney General, Donald D. Stoker, Deputy Attorney General, for respondent.

DRAPEAU, Justice.

The complaining witness was going to his hotel room, on East Fifth street in Los Angeles, near the old Southern Pacific station. He had been drinking. It was about eight o'clock at night, and it was dark.

As he came to a street intersection, somebody struck him along the side of the head. Then somebody jerked through his clothes, and took a notebook and cards, and a celluloid wallet. The wallet had in it a dollar bill which the witness had been saving to pay his room rent. He was dazed and frightened and did not know who his assailants were.

At the same time two police officers of the City of Los Angeles were passing by in a vehicle called the "drunk wagon." The officers saw two men at the intersection, standing next to the complaining witness, going through his pockets.

The officers went after the men. One of the men stood still, and was taken into custody by one of the officers. The other man, the defendant here, ran away, was pursued and captured.

On the trial the other defendant said he was going through the victim's pockets to find out where he lived; "to show him the way to go home."

Defendant, appellant here, testified that he was drinking wine on the sidewalk, knew that it was wrong; that he did not touch the complaining witness or take anything from him; did not know the other defendant; and when he saw the officers coming he just "powered right out of there."

Trial by jury was waived, the trial court found the defendants guilty of robbery, second degree. Appellant had an admitted prior conviction, and was sent to the penitentiary. From this judgment he appeals.

Appellant contends that the evidence was insufficient to prove the *corpus delicti* of robbery—that the information charges taking the notebook and cards, and not the celluloid wallet with the dollar bill in it.

Appellant also contends that the prosecution's case against him is inherently improbable, and that his conviction must have been the result of passion and prejudice.

[1] With respect to the first contention: The complaining witness was asked if he had the notebook, and said he did; "I had that in my pocket." At the time of the arrest the other defendant threw the notebook and cards to the ground. Applying the theory of the case for the People, as we must, the possession of one defendant was the possession of the other, and evidence of appellant's guilt.

[2] The two police witnesses testified they saw appellant, as well as the other defendant, going through the victim's pockets. When appellant was about to be arrested he fled. He made inconsistent statements: first, to the officers, that he was going through the man's pockets "to help him find a location that he wanted;" and secondly, on the trial he denied making any such statement. Appellant's conduct indicated consciousness of guilt. People v. Cooper, 81 Cal.App.2d 110, 183 P.2d 67.

[3] Though the property taken be of slight value, if the elements of robbery are present, the crime is made out. People v. Simmons, 28 Cal.2d 699, 172 P.2d 18.

[4] With respect to appellant's second contention, of inherent improbability, passion and prejudice: What has been said sufficiently refutes this contention. No inherent improbability appears in the case, nor in the findings of the trial court.

[5] Inherent improbability is established only when it is physically impossible for the facts to be true, or their falsity is apparent without resorting to inferences or deductions. People v. Huston, 21 Cal.2d 690, 134 P.2d 758; People v. Lindsey, 90 Cal.App.2d 558, 203 P.2d 572.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



99 Cal.App.2d 132

CRACOLICE v. KRAMER et al.

No. 14283.

District Court of Appeal, First District, Division 1, California.

Aug. 22, 1950.

Action by M. A. Cracolice, by Andrew F. Cracolice, his guardian ad litem, against Fred Kramer and another for injuries sustained by service station attendant when brakes on named defendant's automobile failed to work as it was being driven onto grease rack. The Superior Court for Monterey County, H. G. Jorgensen J., rendered judgment in favor of defendants, and plaintiff appealed. The District Court of Appeal, Bray, J., held that the evidence sustained finding that driver of automobile was not negligent and that therefore whether injured

attendant was contributorily negligent was immaterial.

Judgment affirmed.

1. Appeal and error ⇐1001(1)

Trial Court's finding that automobile driver was not negligent was conclusive on appeal, unless such finding was unsupported by any substantial evidence and driver was negligent as a matter of law.

2. Automobiles ⇐368

In action for injuries sustained by service station attendant who was pinned against wall of greasing compartment when brakes of automobile to be serviced failed to hold, evidence sustained finding that driver was not negligent in driving automobile with new brake linings onto greasing rack toward attendant or in trying to pump foot brake instead of using emergency brake when foot brake failed to hold.

3. Automobiles ⇐368

Where finding that driver of automobile which struck service station attendant was not negligent was supported by substantial evidence, whether attendant was contributorily negligent was immaterial.

4. Automobiles ⇐368

In action for injury sustained by service station attendant who was struck by automobile when its brakes failed to work as it was being driven onto grease rack, last clear chance doctrine was inapplicable, in absence of evidence that when driver discovered that foot brake would not work, automobile could have been stopped by use of emergency brakes.

5. Appeal and error ⇐717

Inconsistency between trial court's memorandum and decision and the findings of fact cannot be considered by an appellate court.

Joseph J. Polverino, Charles R. Wayland, San Jose, for appellant.

Gallagher & Madden, Paso Robles, Lacey & Thornberry and Garth V. Lacey, all of Salinas, for respondents.

BRAY, Justice.

In an action for damages for personal injury, tried without a jury, judgment was rendered in favor of defendants, from which plaintiff appeals.

Questions Involved.

The principal question raised is the alleged insufficiency of the evidence to support the court's findings (1) that defendants were not negligent, and (2) that plaintiff was guilty of contributory negligence. Also it is claimed that the findings are contradictory and that the court should have found on the doctrine of last clear chance.

Facts.

Taking the evidence, and the inferences reasonably deducible therefrom, most strongly in favor of defendants, the facts follow: Defendant Fred Kramer was the owner of a 1937 Studebaker sedan. He was the uncle of defendant Walter Kramer, who had come to the United States from Europe but a short time before. One Sunday it was decided that the uncle and nephew, together with the uncle's wife, Mrs. Helen Kramer, would go for a ride. One of the purposes was to show the nephew the scenery; the other was to work in the brake linings. About two weeks before, the car had developed brake trouble, and had been taken to a service station for repair. After a week the car was returned to Fred. The repairman stated that the "car is just like a new car, the lining isn't fixed, is not broken in, you have to drive the car with speed of a new car, and it might be possible that in using the brake you have to pump it up because I can't adjust the brakes until the lining is settled." Walter, who did not have an operator's license, although he was an experienced driver, drove. They left Fred's home in Paso Robles and drove to King City. Fred sat beside Walter and directed his driving, as Walter was unfamiliar with the road. Just before reaching King City, Mrs. Kramer remarked that there was something wrong, as she felt heat under the seat and thought the car smoked. Fred looked out of the window and saw smoke coming out of the rear wheel. They drove into the Standard Oil station. Plaintiff, who was employed there, came by and Fred told him, "There is something wrong with my brakes." Fred got out of the car and saw smoke coming out, and he could smell it.

He asked plaintiff if he could "fix that." Plaintiff told him to drive to the grease rack. Walter drove the car onto the rack. He was unable to stop the car, and it struck plaintiff, who was standing at the center of the rack between it and the rear wall of the greasing compartment, pinning him to the wall, inflicting serious injuries.

Walter Kramer testified that the place where they first noticed smoke coming from the brakes was two or three miles from King City; that when they drove into the service station plaintiff came up and asked him if he wanted gas. Walter's testimony is somewhat confused, probably because of his inaccurate understanding and use of the English language. When it was explained that they did not want gas, but they wanted the brakes checked, plaintiff directed him to the grease rack. This was a hydraulic jack. Plaintiff was standing at the end of the rack and made motions with his hands indicating that Walter was to "come on." The car went very slowly in first gear and did not increase speed. When Walter got on the rack he tried the foot brake; it would not work and he tried to pump. Then he hit plaintiff.

Was defendant Walter Kramer[1] negligent?

[1, 2] The trial court found that he was not. It is not a question of the weight of the evidence or whether, had we been trying the case in the first instance, we would have found otherwise. For us to upset this finding we must find that there was no substantial evidence to support it and that as a matter of law defendant was negligent. We cannot do so from the evidence. The determination of defendant's negligence or non-negligence rests primarily on whether defendant knew or should have known that the foot brake would not work, and whether under the circumstances he should have used the emergency brake. The evidence shows that defendant had stopped the car twice on the way to King City and that the brakes had worked, although defendant may have had to pump them. Defendant stopped the car when he drove in to the service station. It is not clear whether he pumped in order to do so. There was quite a controversy as to whether he used the emergency brake at that time to stop. He first denied using it; then when confronted with statements in his deposition, he admitted that he used it because the foot brake would not work. It was for the court to reconcile this contradictory testimony. There was evidence from which the court could, and evidently did, conclude that nothing had happened which would have put a reasonable person on notice, that the brake would not work or that it was unsafe for defendant to drive onto the rack and towards the plaintiff, who was standing at the end of it, beckoning him on. Nor can we say as a matter of law that it was negligence for defendant to try to pump the foot brake rather than grab the emergency brake when he was on the rack and first discovered that the foot brake was not working, nor even that had he then seized the emergency brake the car would have stopped in time to avoid hitting plaintiff.

Plaintiff contends that the damage done to the steel rear wall of the greasing compartment refutes the defendant's testimony that the car was being driven slowly on the rack. A photograph of this wall is in evidence and undoubtedly was considered by the court. It shows a large dent in the wall. However, there is no evidence of how that wall is supported, how thick the steel is (in the photograph it appears to be quite thin), etc. This, like the knowledge which defendant had of the faulty brakes, the failure to apply the emergency brakes and the other circumstances upon which plaintiff relies, were matters to be and undoubtedly were, argued to the trier of the facts, but do not justify us in holding as a matter of law that defendant was negligent.

The great difference between McMillan v. Kik, 1947, 181 Or. 270, 181 P.2d 128, where the facts of the accident were quite similar to those here, and the present case, is that there the trial court found in plaintiff's favor. On appeal it was held that there was ample evidence to support the finding that

1. Hereinafter referred to as defendant.

defendant was guilty of negligence. So here, had the trial court found in plaintiff's favor, we, under the evidence, would have to hold that such finding was well supported. However, our task now is not to determine the weight of the evidence, but rather whether there is substantial support for the findings which the court actually did make, not which it might have made.

Contributory Negligence.

Evidence was introduced by defendants without objection by plaintiff to the effect that Standard Stations, Inc., plaintiff's employer, had rules to the effect (1) that the employees and not the customer were to drive cars on the grease rack and (2) that when cars were driven thereon the employee must stand to the side of the rack rather than at the end. The court found that "plaintiff's injuries were proximately caused by reason of plaintiff's contributory negligence, in that he violated" the two rules above-mentioned. Plaintiff attacks this finding on two grounds: (1) that the finding is inconsistent with the court's finding that defendant was not negligent, and (2) that the finding is erroneous as it in effect is a finding that violation of the company's rules constitutes negligence per se.

[3] It is not necessary to discuss this finding in view of our holding that the finding that defendant was not negligent is supported by the evidence. As said in Rath v. Bankston, 101 Cal.App. 274, 281 P. 1081, the finding of contributory negligence becomes immaterial, if the finding of non-negligence on the part of the defendant is proper.

Last Clear Chance.

[4] Plaintiff contends that the court should have made a finding on the doctrine of last clear chance. However, at no time was such a finding ever requested. Moreover, the evidence does not disclose facts which would allow the doctrine to be applied. While it is true that defendant knew that as he drove the car onto the rack plaintiff was in front of him, plaintiff's peril did not arise until defendant started to apply the brakes and found they would not work. The evidence fails to show the distance defendant then was from plaintiff and whether by the use of the emergency brake he could have stopped the car.

Tucker v. United Railroads, 171 Cal. 702, 154 P. 835, cited by plaintiff, is clearly distinguishable from our case, first, because "The pleadings clearly raised the issue" of last clear chance, 171 Cal. at page 704, 154 P. at page 836, and secondly, because there was testimony to the effect that the streetcar which struck and killed the woman in that case could have been stopped within the distance that the motorman first saw her and the point where she was struck. In Wright v. Los Angeles Ry. Corp., 14 Cal.2d 168, 93 P.2d 135, also cited by plaintiff, it was held that it was proper for the court to instruct the jury on last clear chance as there was substantial evidence to support the application of that principle. The case of Wheeler v. Buerkle, 14 Cal. App.2d 368, 58 P.2d 230, 232, referred to with approval in the Wright case, 14 Cal.2d at page 179, 93 P.2d at page 14, answers the contention of plaintiff here: "Counsel in their briefs argue the doctrine of the last clear chance, but we cannot consider it on this appeal. That doctrine is one of law and also of fact. If the facts of a case do not bring the doctrine into play, the court must so decide, and is not required to instruct a jury or to find upon it. If the facts of a case be such that the doctrine may be applied, it is the duty of a trial judge to submit it to a jury by proper instructions or to find upon it in the absence of a jury. In the instant case there are no findings upon it. The question is apparently presented here for the first time. In the absence of appropriate findings, we are not required to consider the question here."

[5] Plaintiff points out that in the court's "memorandum and decision" it did not mention the non-negligence of defendant, but merely stated that it found plaintiff guilty of contributory negligence in that he violated the two company rules. However, as said in Lord v. Katz, 54 Cal.App.2d 363, 367, 128 P.2d 907, 909: " 'And no antecedent expressions of the judge can in anyway restrict his absolute power to declare

his final conclusion, in the only manner authorized by law, to wit, by filing his "decision" (findings of fact and conclusions of law), provided in sections 632 and 633 of the Code of Civil Procedure. [Citations.]' " Quoting from Phillips v. Hooper, 43 Cal. App.2d 467, 470, 111 P.2d 22.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



99 Cal.App.2d 1

MAGANINI v. QUINN et al.

MERRITT et al. v. QUINN et al.

Civ. 7756.

Sac. 6048.

District Court of Appeal, Third District, California.

Aug. 10, 1950.

Hearing Denied Oct. 2, 1950.

Actions by Arthur L. Maganini and by G. Merritt and another against James H. Quinn and others as the duly elected, qualified and acting members of the State Board of Equalization to recover deficiency assessments of retail sales tax paid under protest by plaintiffs, and levied by defendants as members of the State Board of Equalization. The Superior Court, Sacramento County, B. F. Van Dyke, J., entered judgments in favor of the defendants, and appeal was taken jointly from both judgments. The District Court of Appeal, Sparks, J. pro tem., held that trial court's finding that quarterly returns of retail sales filed by defendants were not full, true or accurate returns of plaintiffs' retail sales was supported by substantial evidence and was therefore conclusive on appeal.

Judgments affirmed.

1. Evidence ⇐53

A "presumption" is merely a deduction which law directs to be made from particular facts, and unless declared by law to be conclusive may be controverted by other evidence, direct or indirect.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Presumption".

2. Licenses ⇐39

Where State Board of Equalization made deficiency assessment of retail sales tax paid by tavern owner, and owner filed petition for redetermination, and members of Equalization Board conducted comprehensive audit of tavern owner's inventory records, purchase invoices and selling price schedules, in order to determine quantity of stock purchased and disposed of by tavern owner during period, members of Board did not exceed their authority in conducting audit in such manner and there was no requirement that audit was to be restricted to pointing out falsifications, errors or omissions, if any, in books of account themselves. Revenue and Taxation Code, §§ 6001–7176, 7053; Administrative Code, Title 18, subc. 4, § 2098.

3. Licenses ⇐34

Where an action is brought by a taxpayer for recovery of sales tax paid under protest, use of certificate of delinquency as a defense to action is not authorized, and in such case it is incumbent on taxpayer affirmatively to establish his right to recover, and, when contrary evidence is introduced, he must do so by a preponderance of evidence. Revenue and Taxation Code, § 6714.

4. Licenses ⇐32(2)

Where action is brought by State Board of Equalization for recovery of deficiency in sales tax returns, introduction of its certificate of delinquency merely eliminates necessity of preliminary proof. Revenue and Taxation Code, § 6714.

5. Evidence ⇐584(1)

The words "prima facie" mean at first view, and a prima facie case is one which is received or continues until contrary is shown and can be overthrown only by rebutting evidence adduced on other side.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Prima Facie".

6. Appeal and error ⇐994(3), 1012(1)

It is not province of the district court of appeal to pass on weight of evidence, or credibility of witnesses, or to determine which side of an issue has more convincing force, and such matters are entirely for trier of facts.

7. Appeal and error ⇐996

Where different conclusions reasonably may be drawn from evidence by different minds, trial court's findings of fact are conclusive.

8. Appeal and error ⇐1010(1)
Licenses ⇐34

In actions brought to recover deficiency assessments of retail sale tax paid under protest, evidence sustained finding that quarterly returns of retail sales filed by taxpayers were not full, true and/or accurate returns of retail sales, and findings were therefore conclusive on appeal. Revenue and Taxation Code, § 6001–7176, 7053; Administrative Code, Tit. 18, subc. 4, § 2098.

J. Elwood Andresen, Oakland, for appellants.

Fred N. Howser, Attorney General, by Irving H. Perluss, Deputy Attorney General, for respondents.

SPARKS, Justice pro tem.

Two separate actions were brought to recover deficiency assessments of retail sales tax paid under protest by plaintiffs, and levied by defendants as members of the State Board of Equalization. The factual situations of the cases being similar, a stipulation was entered into at the trial that evidence would be presented only in the action in which Arthur L. Maganini was plaintiff, and that the decision of the court rendered therein would apply to both cases. The trial then proceeded before the court sitting without a jury, and the decision being in favor of defendants and against plaintiffs, judgments were thereupon entered. Appeal is now taken jointly from both judgments.

Appellant Maganini owned and operated a tavern known as the "Fairfax Buffet" located in Oakland, California. The business conducted therein consisted mainly of the sale of distilled spirits, beer, wine and soda by the drink, although some tobaccos, candy and food were also sold. In the operation of the tavern appellant had three employees and was not himself personally present at all times during business hours. Record of sales was made by means of a cash register, unequipped with a tape.

The taxable period involved was from October 1, 1943, to September 30, 1946, during which appellant filed quarterly returns of the gross sales of his business, the aggregate amount being the sum of $109,234.90. Taxes in the sum of $2,725.18 were paid thereon. In December of 1946 respondents sent an auditor to examine the sales tax returns, books and records of appellant. After an examination of these documents it was discovered that a discrepancy existed between the amount of merchandise purchased by appellant and the gross amount of sales reported by him. The deficiency was calculated and an additional sum of $439.05 of sales tax and interest was assessed against him. A petition for redetermination was then filed by appellant, and thereupon a second and more detailed audit was made of the tavern's operations. As a result of this re-audit a revised deficiency determination, based upon unreported sales in the amount of $30,958.16, was asserted against said appellant. Additional tax plus interest in the total sum of $915.13 was assessed, which is the amount paid under protest by appellant, and which is sought to be recovered.

Appellant's principal contentions on appeal are that in assessing an additional tax against him respondents disregarded his books of account, without impeaching them and employed a formula based upon a markup arbitrarily applied; also that respondents substituted an estimate of what appellant's gross retail sales should have been in the place of sales tax returns as filed by him.

The tax imposed by the Sales and Use Tax Law, Rev. and Tax.Code, secs. 6001–7176, is self-assessed in the sense that all retailers are required to keep records of their sales and file quarterly tax returns in

such form as may be prescribed by the State Board of Equalization. Such returns are required to show the gross receipts of the seller and the amount of the tax for the period. In this connection Section 7053 of the Revenue and Taxation Code provides: "Every seller, every retailer as defined in subdivision (b) of Section 6015, and every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer shall keep such records, receipts, invoices, and other pertinent papers in such form as the board may require."

Supplementing this section are Sales and Use Tax Regulations, codified in Subchapter 4 of Title 18 of the California Administrative Code, as follows:

Section 2098: "Every seller, retailer and person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer, shall keep until the board in writing authorizes their destruction, adequate and complete records showing:

"(a) The gross receipts from the sales of tangible personal property (including any services that are a part of the sale) made within California irrespective of whether the seller regards the receipts as taxable or nontaxable.

"(b) All deductions allowed by law and claimed in filing returns.

"(c) Total purchase price of all tangible personal property purchased for sale or consumption in California.

"These records must include the normal books of account ordinarily maintained by the average prudent business man engaged in the activity in question, *together with all bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account* as well as all schedules or working papers used in connection with the preparation of tax returns. (Emphasis added.)

"Failure to maintain such records will be considered evidence of negligence or intent to evade the tax, and will result in the imposition of appropriate penalties."

Authority to verify the accuracy of any sales tax return is given in Section 7054 of the Revenue and Taxation Code which provides: "The board or any person authorized in writing by it may examine the books, papers, records, and equipment of any person selling tangible personal property and any person liable for the use tax and may investigate the character of the business of the person in order to verify the accuracy of any return made, or, if no return is made by the person, to ascertain and determine the amount required to be paid."

The statute further provides, Section 6481: "If the board is not satisfied with the return or returns of the tax or the amount of tax required to be paid to the State by any person, it may compute and determine the amount required to be paid upon the basis of the facts contained in the return or returns *or upon the basis of any information within its possession or that may come into its possession.* One or more deficiency determinations may be made of the amount due for one or for more than one period." (Emphasis added.)

As noted above, respondents caused two audits to be made of the business transacted at the Fairfax Buffet. The first or preliminary audit of December, 1946, was conducted substantially as follows: An examination was made of appellant's records in order to determine the average rates of markup on costs as reflected by the reported sales on returns filed by appellant. The average rates of markups so determined were as follows: 1944—100%; 1945—135%; 1946—260%. Respondent's auditor thereupon applied to appellant's cost of goods, sold for the taxable periods of 1944 and 1945, the average normal markup used by like businesses in the community. These were as follows: Distilled spirits —200%; Beer—90%; Soda—200%; Tobacco and candy—25%; Food—100%. A computation of tax was then made, based upon the average normal markups as applied to appellant's sales, and in this manner it was determined that appellant owed $439.05 in additional sales tax and interest.

The second audit, ordered after appellant had filed his petition for a redetermination, was not only a more detailed and comprehensive investigation, but was conducted by an entirely different method. No reference to, or comparison with, the average normal markups used by like businesses in the community was made. On the contrary, a detailed investigation was made of appellant's records in order to determine the *quantity* of stock purchased and disposed of by appellant during the period. Then, in the case of beverages, the sale of which constituted the bulk of appellant's business, a computation was made of the number of individual drinks which the total quantity of inventory would yield, less a tolerance for spillage. To the aggregate thus obtained were applied the prices charged by appellant for the drinks, and in this manner a markup or percentage of increase of selling price over cost calculated.

The trial court's finding of fact as to the second audit was that respondent's auditor "made a detailed audit and analysis of plaintiff's inventory records, purchase invoices and selling price schedules; that from such records, he determined the brand of distilled spirits purchased; the cases and bottles which were inventoried; the total ounces contained therein; after allowing eight percent for spillage, the ounces available for sale; that seven-eighth ounce drinks were served and sold; and that he applied the established price charged for each drink of each brand to the inventory sold, thereby determining the mark-up on distilled spirits sold for the periods herein involved; that similar procedures were followed to ascertain the mark-up on wine and beer."

This method of testing the accuracy and completeness of appellant's journal entries of gross sales, and of determining a deficiency, is essentially the same type of audit which was under consideration in Rathjen Bros. v. Collins, 50 Cal.App.2d 765, 123 P.2d 925. In that case the Board of Equalization computed a deficiency in excise tax upon distilled spirits under the provisions of the Alcoholic Beverage Control Act. The record of sales as disclosed by the books of the wholesaler was not accepted by the board. Instead, the amount of sales was determined by ascertaining the *quantity* of liquor purchased and acquired during the taxable period, and then by deducting from that figure the amount of liquor then on hand and the amount shown by the books to have been disposed of in nontaxable transactions. This figure, in gallons, rather than a figure taken from sales records, was adopted by the board as the quantity sold and subject to tax.

In the Alcoholic Beverage Control Act there is a provision that distilled spirits acquired by a rectifier shall be presumed to have been sold in this State. Deering's Gen. Laws, Act 3796, sec. 24.2. Commenting on this presumption, the court in Rathjen Bros. v. Collins, supra, said 50 Cal.App. 2d on pages 770–771, 123 P.2d on page 928: "The presumption is based on common sense. If, from the total gallonage possessed or acquired during the taxable year, there is deducted the gallonage on hand at the close thereof, plus the gallonage disposed of in nontaxable sales, plus a reasonable loss tolerance, the resulting figure is presumptively the gallonage disposed of in taxable sales. If, as here, there is a large quantity of liquor unaccounted for it is up to the wholesaler to show that it was disposed of in nontaxable transactions. But, unless he does so, the board has established a prima facie case as to the gallonage disposed of in taxable transactions."

[1] A presumption is of course merely a deduction which the law directs to be made from particular facts, and unless declared by law to be conclusive, may be controverted by other evidence, direct or indirect. Consequently, in the Rathjen case, supra, the rectifier was privileged to introduce evidence rebutting the presumption created by Section 24.2 of the Act. In this connection it is noteworthy to observe that in that case the presumption was not deemed to have been overcome by the introduction into evidence of the taxpayer's books of account showing the amount of their gross sales.

[2] From the foregoing, we conclude that respondents here did not exceed their

authority in the manner in which their second audit was conducted and the deficiency determined. The code sections hereinbefore quoted clearly contemplate an examination "behind the books", so to speak, in which original records, such as purchase invoices, sales slips, cash register tapes, and inventory records may be audited and analyzed. There is no requirement that such audit be restricted to pointing out falsifications, errors or omissions, if any, in the books of account themselves.

We further conclude that there was nothing inherently incorrect in the manner in which the audit was conducted. It was predicated in the main upon facts and figures obtained from appellant's own records, and from information as to the manner in which his business had been conducted. No pre-adopted percentage of proceeds over costs was applied, and those portions of the audit which were of necessity dependent upon estimate, such as the eight per cent tolerance for spillage, were, if not correct, subject to be controverted by appellant.

In the case of People v. Schwartz, 31 Cal. 2d 59, 187 P.2d 12, our Supreme Court had under consideration the precise question presented here, namely, the authority of the Board of Equalization to by-pass a taxpayer's record of gross sales and to make a deficiency determination of sales tax in derogation thereof. The method used was as follows: An examination was made of the retailer's bank deposits and cash disbursements, and finding that they substantially exceeded the gross receipts from sales reported by the taxpayer, the latter was called upon to explain the excess. The court said, 31 Cal.2d on page 64, 187 P.2d on page 15:

"The taxpayer's records disclose that, during the period in question, he received in cash from sales (or otherwise accounted for and adjusted) an amount substantially smaller than he had paid out in cash and by check. In the absence of explanation by the taxpayer, and accepting his statement that the partnership had no income except from sales, it reasonably may be concluded that the total of money received, after giving credits as mentioned, is the amount of the additional taxable sales."

[3-5] Appellant seeks to distinguish the holding in People v. Schwartz on the ground that the Board of Equalization there had executed a certificate of tax delinquency. It is true, that when an action is brought by the board a certificate by the board showing the delinquency is declared by the statute to be prima facie evidence of certain facts, namely, of the determination of the tax or the amount of the tax; of the delinquency of the amount set forth; and of the compliance by the board with the provisions of law in relation to the computation and determination of the amounts. Rev. and Tax. Code, sec. 6714. However, when the action is brought by the taxpayer for the recovery of sales tax paid under protest, the use of the certificate of delinquency as a defense to the action is not authorized. In such case it is incumbent upon the taxpayer affirmatively to establish his right to recover, and when contrary evidence is introduced, he must do so by a preponderance of the evidence. On the other hand, when the action is instituted by the board the introduction of its certificate of delinquency merely eliminates the necessity of preliminary proof. The words "prima facie" mean literally, "at first view", and a prima facie case is one which is received or continues until the contrary is shown and can be overthrown only by rebutting evidence adduced on the other side. Frank Moline Co. v. Kleinberger, 108 Cal.App. 60, 290 P. 1042.

The record shows here that appellant produced his books of account with testimony that the entries therein were without error or omission. He then rested his case. Respondents thereupon proceeded in defense, and introduced evidence of its audits, the method followed in going behind the book entries of gross sales, and the resultant determination of the deficiency assessment. Appellant then introduced some rebuttal testimony and the case was submitted to the court.

There being a discrepancy between the amount of gross sales as shown by appell-

ant's books of account and that determined by respondents' audit, a conflict in evidence obviously resulted. The fundamental issue thereof was whether or not the full, true and correct amount of appellant's sales had been entered in his journal, and reported on the quarterly returns. On the one side there was the testimony of appellant and of his accountant as to the correctness of the sales entries, unsupported, however, by cash register tape, or other documentary evidence of sales. When asked how he verified the sales, appellant's accountant testified, "There is no way of verifying sales except the veracity of the man with whom I am doing business."

On the other side of the issue there was the audit conducted by respondents in the manner hereinbefore described and which revealed unreported sales in the amount of $30,958.16.

[6, 7] It is of course not the province of this court to pass on the weight of the evidence, the credibility of the witnesses, or to determine which side of an issue has the more convincing force. These are matters entirely for the trier of facts. Rice v. California Lutheran Hospital, 27 Cal.2d 296, 163 P.2d 860; Peri v. Los Angeles Junction Ry., 22 Cal.2d 111, 137 P.2d 441; Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660. It has been repeatedly held that where different conclusions reasonably may be drawn from the evidence, by different minds, the trial court's findings of fact are conclusive. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183; Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; Raggio v. Mallory, supra; Vosburgh v. Meda, 61 Cal.App.2d 396, 143 P.2d 41; Tobola v. Wholey, 75 Cal.App.2d 351, 170 P.2d 952.

[8] It is our conclusion that the trial court's finding here that the quarterly returns of retail sales filed by appellants were not "full, true and/or accurate returns of plaintiff's retail sales" was supported by substantial evidence, and therefore must be held conclusive on appeal.

The judgments are affirmed.

ADAMS, P. J., and PEEK, J., concur.

STAFFORD et al. v. GROFF et al.

HOWARD v. GROFF et al.

Civ. 17242.

District Court of Appeal, Second District, Division 3, California.

Aug. 18, 1950.

Rehearing Denied Sept. 11, 1950.

Hearing Denied Oct. 16, 1950.

Lucille Stafford, an alleged incompetent, by Comly Shoemaker, her guardian ad litem, and Ray Howard brought action against James Groff and others for an accounting, for injunction, and for cancellation of assignment of oil royalties, and to recover alleged gifts and money loaned. Lucille Stafford died, and Ray Howard, special administrator of the estate of Lucille Stafford, etc., deceased, was substituted as plaintiff. The Superior Court of Los Angeles County, Allan W. Ashburn, J., entered certain orders, and the defendants appealed, and the special administrator cross-appealed. The District Court of Appeal, Wood, J., held that Superior Court had jurisdiction to enter the orders from which the defendants appealed, in view of provision in judgment reserving jurisdiction, and that evidence sustained findings as to an award of additional attorney's fees to Ray Howard as attorney for Lucille Stafford.

Orders affirmed.

1. Insane persons ⇐103

Where judgment, based on stipulation of parties in action to cancel assignment of oil royalties and to recover gifts made and money loaned by alleged incompetent, provided that attorney for guardian of alleged incompetent should recover certain attorney's fees and expenses, but provided that court reserved jurisdiction to make such other and further orders as may be necessary to obtain performance of acts ordered by the judgment, court had jurisdiction to consider subsequent application of attorney for guardian for additional allowance for fees and expenses.

2. Appeal and error ⇐989

It is not a function of a reviewing court to weigh the evidence, but its function, with respect to the evidence, is to determine only the legal sufficiency of the evidence to support the findings.

3. Insane persons ⇐98

In action to cancel assignment of oil royalties and to recover gifts made and money loaned by alleged incompetent, evidence was sufficient to support findings as to additional award of attorney fees and expenses to attorney for alleged incompetent.

Overton, Lyman, Plumb, Prince & Vermille, Los Angeles, for appellants Groff et al.

W. W. Comstock and Ray Howard, Los Angeles, for respondents.

WOOD, Justice.

Lucille Stafford, by a guardian ad litem, commenced an action on October 11, 1943, for an accounting and an injunction against appellants, Mr. and Mrs. J. M. Groff, Elizabeth Groff Dunseth and Roy C. Poor. Mrs. Groff is Mrs. Stafford's sister, and Mrs. Dunseth is Mrs. Groff's daughter. Mrs. Stafford sought to cancel an assignment of oil royalties from herself to Mrs. Groff, to recover alleged "gifts" from her to the Groffs and Mrs. Dunseth, and to recover $210,000 which she had loaned to an investment company in which Mr. Groff was a partner (which company later became defunct). It was alleged in the complaint that Mrs. Stafford was an incompetent person. Later in 1943 she was adjudged an incompetent person, and a bank was appointed guardian of her estate, and Comly Shoemaker was appointed guardian of her person. On December 27, 1944, the superior court approved an agreement between plaintiff, by her guardian ad litem, and Ray Howard and W. W. Comstock, attorneys at law, whereby plaintiff employed said attorneys to represent her in said action and agreed to pay them 50 per cent of the recovery plus attorney's fees and expenses in any proceeding to enforce his (their) rights. On April 23, 1946, Ray Howard as "First Party" and Arthur E. White, an attorney at law representing the defendants Groff, Dunseth and Poor as "Second Party," entered into a "Memorandum Agreement" for settlement of said action subject to approval of the court. The guardian ad litem and the attorneys Howard and Comstock approved the agreement in writing; and attorneys Newton E. Anderson, Arthur E. White and Montgomery G. Rice, as attorneys for the defendants, approved the agreement. That agreement provided that Mr. Howard should receive a total of $18,000 in full payment for all fees and expenses of himself and associates (including $1,600 for Mr. Shoemaker). On September 27, 1946, an "Interlocutory Order Instructing Guardian ad litem as to Settlement," based upon said memorandum agreement, was filed. Among other things, it was provided in said order that the guardian of Mrs. Stafford's estate should pay $13,400 to Mr. Howard and $1,600 to Comly Shoemaker, the guardian ad litem and guardian of Mrs. Stafford's person. Said amounts were for work done and cash spent for the benefit of Mrs. Stafford. On April 26, 1946, under the provisions of the memorandum agreement of settlement, Mr. Howard was paid $3,000. Prior to the proceeding herein, Mr. Howard had received the said $18,000.

On October 27, 1947, a judgment (dated October 24, 1947), based upon a stipulation of the parties, was entered. On January 19, 1948, allegedly pursuant to provisions in that judgment, Ray Howard filed a "Petition for Allowance and Payment of Fees and Expenses to Ray Howard, Attorney." In said petition Mr. Howard sought attorney's fees and expenses for the period from April 23, 1946 (the date of the memorandum agreement) to October 24, 1947 (the date of the final judgment). On February 10, 1948, the matter of the petition came on for hearing. None of the defendants Groff, Dunseth or Poor, or their counsel, was present at the hearing. Evidence was introduced, and the court made an order allowing $10,000 as additional attorney's fees for Mr. Howard and $300 as attorney's fees for Mr. Comstock, the attorney who represented Mr. Howard at the hearing of the petition herein. It was also ordered therein that whenever it shall appear upon motion made in this action that the funds in the hands of the estate guardian amount to $10,000 or less the defendants Groff shall be required to make

said payments of $300 per month commencing from a date to be specified by the court, and also to pay to said estate guardian any unpaid balance of said $10,300 and any other reasonably necessary expense of the guardianship. The defendants Groff, Dunseth and Poor appeal from said order.

Said appellants assert, among other things, that the court did not have jurisdiction to entertain the proceeding that resulted in said order. They argue that the judgment of October 24, 1947, was a final adjudication of the rights of the parties; that jurisdiction was not reserved for further proceedings in the action in which said judgment was rendered; that Ray Howard's petition for further fees presented a new and distinct civil action for attorney's fees; that since his petition was a disputed claim against the guardian, a separate civil action should have been commenced.

The judgment of October 24, 1947, provided, among other things, that the bank, as guardian of said estate, should pay $13,400 to Ray Howard and $1,600 to Comly Shoemaker, guardian ad litem; that defendants Groff should pay to the guardian of the estate for the support of Mrs. Stafford $300 per month plus any additional amounts necessarily and reasonably expended by said guardian "but said payments shall not be required to commence until, and shall continue only so long as, the funds belonging to Lucille Stafford, in the hands of said bank amount to $10,000.00 or less"; that the payment of said sums to Mr. Howard and Mr. Shoemaker "ordered to be made under paragraph (1) hereof, are in full of all of their, and each of their claims under an order made on December 27, 1944, authorizing an agreement between Lucille Stafford and Ray Howard," and all other claims by them or either of them against defendants Groff, Dunseth and Poor and all defendants in an action in the United States District Court in Illinois, and "shall also be in full for all fees, expenses," and other claims of any kind in connection with the prosecution of said actions by Ray Howard, Comly Shoemaker and any of their associates against Lucille Stafford or against her estate either under guardianship or in probate in case of her death. The judgment provided, in paragraph (11) thereof, that: "This court hereby reserves jurisdiction to make such other and further orders herein as may be necessary in order to obtain performance of the acts herein ordered and to make its order decreeing that said estate guardian has complied with this judgment upon said estate guardian showing, after notice to the other parties to the within action, that it has complied with the provisions of this judgment but in all other respects the within action is hereby dismissed with prejudice as to all defendants." In paragraph (25) of the judgment it was provided in part as follows: "A substantial part of the consideration for the signing of the stipulation for this judgment by Ray Howard is the permission hereby granted, for him to apply for an allowance and to be paid the amount so allowed, on account of his fees for services and expenses performed or expended after the making of the Memorandum Agreement of April 23, 1946, in the prosecution of the cases herein referred to, in addition to the $18,000 then agreed upon as his total fee as of that date, of which said $13,400 is a part. Such additional allowance is to be based on the reasonable value of services and the amount of his expenses after said April 23, 1946, and/or for services and expenses subsequent to said date under and pursuant to the agreement made under date of December 28, 1944, on behalf of Lucille Stafford by her guardian ad litem, pursuant to the order herein of December 27, 1944, authorizing the same. Mr. Howard's claims include those based on the provision thereof for attorney's fees in enforcing his rights thereunder.

"The other parties to said stipulation have agreed to this provision after the drafting of the foregoing provisions contained in paragraphs 1 to 24, both inclusive, and this provision is therefore inserted as a modification thereof.

"Said application may be made at any time within ninety days from the date hereof and no statute of limitations or other bar of lapse of time shall apply, and may be made either in the matter of the guardian-

ship (or conservatorship) of the estate of Lucille Stafford as an incompetent or in the matter of the administration of her estate in probate in case of her death including the filing and prosecution of a creditor's claim, and may be made in any court or courts having jurisdiction of such matters, and may be made by Ray Howard or by his representatives in case of his death or incapacity including the manner provided by said agreement of December 28, 1944, with respect thereto." It was also provided in said paragraph (25) as follows: "It is therefore further hereby decreed that no provision of this judgment, nor any finding, conclusion, judgment or order, nor any of the waivers of further fees provided for in said Memorandum Agreement or in said Interlocutory Orders, nor in any document made in pursuance of any of the same, shall be a bar to the making or granting of such application, and no party hereto shall assert any such bar."

[1] By the provisions of the judgment of October 24, 1947, the court reserved jurisdiction to consider and determine such a proceeding as that which resulted in the order appealed from. The court was empowered in this case to reserve such jurisdiction. The judgment was made and given upon stipulation of the parties. In Los Angeles Auto Tractor Co. v. Superior Court, 94 Cal.App. 433, it was said at page 440, 271 P. 363, at page 366: "We find nothing in our statutes or decisions which can be said to have been intended to limit the power of the Superior Court in a suit in equity to grant relief properly adjusted to the equitable rights of the parties as determined by the court, and to control the parties in all matters connected with their required obedience to the orders embodied in the decree." It was also said in that case, 94 Cal.App. at page 439, 271 P. at page 366: "It is possible, however, for a decree in equity to be a final determination of the rights of the parties and of the specific relief to be granted, and yet the decree might contain a reservation of a right of supervision by the court over the administration of the remedy." See also, Leslie v. Federal Finance Co., Inc., 14 Cal. 2d 73, 81, 92 P.2d 906; Hercules Glue Co., Ltd. v. Littooy, 45 Cal.App.2d 42, 45, 113 P.2d 490; Gibson v. River Farms Co., 49 Cal.App.2d 278, 284, 121 P.2d 504. The application herein for such additional allowance was made on January 19, 1948, which was within the 90 days provided in the judgment of October 24, 1947, as the time within which such an application might be made. The court found, among other things (in the proceeding herein upon the petition for additional attorney's fees), that from time to time beginning with the memorandum agreement Mr. Howard had made conditional waivers of his right to recover the full compensation provided by the contingent fee agreement which was approved by the court on December 27, 1944; that the waivers had always been conditional and the conditions had never been performed; that he was not obstructive or delinquent in the performance of his obligations throughout the period of time involved in said proceeding; that the further prosecution of the actions referred to in the final judgment "was made necessary by the failure of the defendants as parties of the second part in said Memorandum Agreement to comply therewith and their actions contrary to their agreements therein." Those findings were supported by the evidence.

[2, 3] Appellants contend also that, even if the court had jurisdiction to entertain the proceeding, Mr. Howard was not entitled to any additional fees. They refer to the interlocutory order (made by Judge Sheldon upon stipulation on September 27, 1946) which provided that the $18,000 when paid should be in full payment of all claims of Mr. Howard, and they refer to the decision (by Judge Sheldon) on the hearing of Mr. Howard's supplemental complaint (on October 2, 1946) that he was not entitled to any fees not provided for in the interlocutory order, and they argue that by reason of said decision the matter of attorney's fees was res judicata. Mr. Howard appealed from that decision, but he abandoned the appeal when the judgment of October 24, 1947, was made upon stipulation. That judgment superseded the interlocutory order and the judgment upon the supplemental complaint. Paragraph

(25) of that judgment, provided, as above shown, that "no provision of this judgment, nor any finding, conclusion, judgment or order * * * shall be a bar to the making or granting of such application [for further fees], and no party hereto shall assert any such bar." The matter of attorney's fees was not res judicata. Said appellants argue further that Mr. Howard was not entitled to payment of the balance of $18,000 (namely $13,400) until he had performed everything required of him under the memorandum agreement and since he did not so perform until the judgment of October 24, 1947, was made, he was not entitled to further fees. The $18,000 was the amount of the fees and expenses as of the date April 23, 1946. It was a question of fact for the trial court as to whether further services were rendered after that date. After said date Mr. Howard went to Illinois twice and made appearances in court there regarding the claims of plaintiff, and he appeared in courts in California several times pertaining to those claims and he held many conferences pertaining thereto. The court herein found, as above stated, that "the further prosecution of the actions referred to in said Final Judgment was necessary and was made necessary by failure of the defendants as parties of the second part in said Memorandum Agreement to comply therewith and their actions contrary to their agreements therein." Appellants assert that Mr. Howard in performing those alleged services was acting for his own personal interest and was not acting for the benefit of Mrs. Stafford, and the court failed to find that the services were for her benefit. It is implicit in the findings, regarding the services and the value thereof, that the services were for the benefit of the plaintiff. It is not a function of a reviewing court to weigh the evidence, but its function, with respect to the evidence, is to determine only the legal sufficiency of the evidence to support the findings. Said appellants assert that only $26,000 was recovered as a result of Mr. Howard's services and that the total amount allowed as attorney's fees exceeded the amount recovered by $2,000. According to the computations of the trial judge, as shown by his statements in announcing his decision, the amount recovered was approximately $56,000. The items considered in arriving at that amount were as follows: $5,504.37, the proceeds of a building and loan certificate; $6,000 cash; and the present value of an award of $300 per month payable to Mrs. Stafford during her life—which value was considered to be the cost of a $300 annuity for her, namely, $44,445.60. The total of those items is $55,949.97. Under the contingent fee agreement Mr. Howard was to receive one-half of the amount recovered. The trial judge considered that $28,000 was one-half of the total recovery and that since $18,000 had been paid, the balance due was $10,000. Mr. Howard asserts that since the Groffs were required by the judgment of October 24, 1947, to pay "additional amounts reasonably and necessarily expended by the guardian," which amounts would include her attorney's fees, guardian's fees then accrued, funeral bill and expenses of administration, and since those sums would amount to approximately $16,000, the total recovery would be the $56,000 plus the $16,000, or approximately $72,000. The evidence was legally sufficient to support said findings.

Said appellants also contend that the court erred in allowing Mr. Howard $300 as fees for the services of his attorney, Mr. Comstock. They argue that Mr. Howard's petition was restricted to an application for his fees and expenses during the period from April 23, 1946, to October 24, 1947, and that the services of Mr. Comstock were rendered, of course, after that period, and therefore the court erred in making an allowance for services rendered beyond the period covered by the application. There is a provision in said paragraph (25) of the judgment of October 24, 1947, as follows: "Mr. Howard's claims include those based on the provision thereof [the memorandum agreement] for attorney's fees in enforcing his rights thereunder." It appears that Mr. Howard did apply herein for fees for his attorney in enforcing his rights. The court did not err in making said allowance.

Said appellants also contend that, even if the court had jurisdiction to award attorney's fees, it did not have jurisdiction to "Order the Other Matters" which were included in the order appealed from. Some of the "Other Matters" referred to, as stated by appellants, were "orders setting aside portions of the guardianship assets for the use of the incompetent and for payment of the award made in the order, and otherwise instructing and directing the guardian as to its duties as guardian and with respect to guardianship assets." They argue that such adjudications, in the order appealed from, purport to construe the judgment of October 24, 1947, purport to assume the jurisdiction of the probate court in guardianship matters, and duplicate orders in the judgment of October 24, 1947. It is not necessary to set forth in detail the orders so referred to. As to the matters duplicated in the order appealed from, the appellants are not aggrieved since they are thereby required to do only that which they were already obligated to do under the judgment entered upon their stipulation. As to the other matters referred to, it appears, under the judgment of October 24, 1947, in this adversary civil action, that jurisdiction to make such orders was reserved. It was therein provided that "This court hereby reserves jurisdiction to make such other and further orders herein as may be necessary in order to obtain performance of the acts herein ordered." Furthermore, as to the purported assumption of probate jurisdiction, it appears that the questions involved therein have become moot. The order herein which was directed against or to the bank has subsequently become a final order in the probate court as an instruction to the bank, as guardian, and to the administrator who succeeded to the guardian's duties after Mrs. Stafford's death. (Mrs. Stafford died on March 14, 1948.) Under the guardianship proceeding the money has been distributed as provided in the order herein, and the guardian and the administrator have been directed by the probate court to proceed against the Groffs and the Ohio Oil Company as ordered by the trial court herein.

The trial judge herein announced his decision in open court on February 16, 1948; Mrs. Stafford died on March 14, 1948, and a formal order *nunc pro tunc* as of February 16, 1948, was entered on March 18, 1948. On said March 18th a representative of Mrs. Stafford's estate had not been appointed, and the trial judge herein, on April 5, 1948, vacated the March 18th order. Ray Howard had been appointed (prior to April 5th) as special administrator of the estate of Mrs. Stafford and on April 5th he was substituted as such administrator as a party in place of Mrs. Stafford. On April 7, 1948, a formal order, which was substantially the same as the order of March 18th, except that it recited the appointment of Ray Howard as special administrator, was also entered *nunc pro tunc* as of February 16, 1948. (Afterward Ray Howard was appointed general administrator, and as such administrator he was substituted as a party on September 21, 1948, in place of himself as special administrator.) The Groffs, Dunseth and Poor, have appealed from the orders of March 18th and April 7th. Since the two orders were to the same effect (except as to the matter of the administrator being a party in place of Mrs. Stafford) the discussion herein is applicable to each order. Since the March 18th order was vacated properly and was superseded by the April 7th order, it appears that the April 7th order is the one primarily involved on this appeal.

By reason of the conclusions hereinabove stated, it is not necessary to determine the other contentions of appellants Groff, Dunseth and Poor. Both orders from which they have appealed should be affirmed.

Ray Howard, as administrator of the estate of Mrs. Stafford, has appealed from the order of April 7, 1948, allowing fees to Ray Howard as attorney for Mrs. Stafford. Mr. Howard, as administrator, petitioned the probate court for instructions regarding the appeal, and he asserts that the appeal is under the direction of the probate court. He states that he appealed as such administrator in order to permit the Groffs to present whatever arguments they might

have against the order allowing fees to him. By reason of the conclusions hereinabove stated, it is not necessary to discuss further the points involved on the appeal by Mr. Howard, as administrator. The order from which he appealed should be affirmed.

The orders of March 18, 1948, and April 7, 1948, are affirmed.

SHINN, P. J., and VALLÉE, J., concur.



98 Cal.App.2d 829

OWENS v. HASLETT et al.

Civ. 7715.

Sac. 6038.

District Court of Appeal, Third District, California.

Aug. 10, 1950.

Hearing Denied Oct. 2, 1950.

Action by Floyd L. Owens against Rose Haslett and others, to foreclose lien claim for amount allegedly due plaintiff under contract for construction of a dwelling house. The named defendant filed a counterclaim and cross-complaint for damages for plaintiff's alleged breach of contract. The Superior Court, Placer County, Lowell L. Sparks, J., entered a judgment denying relief to Rose Haslett, and she appealed. The District Court of Appeal, Van Dyke, J., held that, where contract for construction of dwelling house by contractor was illegal when made because of contractor's lack of license, and owner of house and contractor entered upon and were in course of performance of contract before owner discovered illegality, and contractor constructed two-thirds of house in strict conformity to contract and requested the further payments provided by contract at such stage of construction, and owner refused further payments on untrue claim of contractor's nonfaithful performance and not on any claim of illegality, and contractor ceased performance for such refusal, owner could not on ground of illegality of contract recover losses, incurred by reason of contractor's nonperformance.

Judgment affirmed.

1. Licenses ⇐39.43

A building contractor executing contract for construction of dwelling house and beginning work thereunder without having first procured a license violated the law and the contract was illegal, and procurement of license during course of work did not validate contract, and hence contractor could not maintain action on the contract. Business and Professions Code, §§ 7028, 7030, 7031, 7065 et seq.

2. Contracts ⇐138(1)

As a general rule, to which there are exceptions, a party to an illegal contract can neither recover damages nor, by rescinding, recover the performance that he has rendered, or its value.

3. Contracts ⇐139

Where illegality of bargain is due to facts of which one party is justifiably ignorant and the other party is not, or is due to statutory or executive regulations of a minor character relating to a particular business which are unknown to one party, who is justified in assuming special knowledge by the other party of the requirements of the law, the illegality does not preclude recovery by ignorant party of compensation for any performance rendered while he is still justifiably ignorant or for losses incurred or gains prevented by nonperformance of the bargain.

4. Licenses ⇐39.43

Where contract for construction of dwelling house by contractor was illegally made because of contractor's lack of license, and owner of house and contractor entered upon and were in course of performance of contract before owner discovered illegality, and contractor constructed two-thirds of house in strict conformity to contract and requested the further payments provided by contract at such stage of construction, and owner refused further payments on untrue claim of contractor's nonfaithful performance and not on any claim of illegality, and contractor ceased performance for such refusal, owner could

not on ground of illegality of contract recover losses incurred by contractor's nonperformance. Business and Professions Code, §§ 7028, 7030, 7031, 7065 et seq.

P. H. McCarthy, Jr., F. Nason O'Hara and Herbert S. Johnson, all of San Francisco, for appellant.

Lowell & Lowell, Auburn, for respondent.

VAN DYKE, Justice.

This is an appeal from a judgment denying any relief to Rose Haslett, cross-complainant. Plaintiff below, Floyd L. Owens, to whom likewise all relief was denied, but who does not appeal, contracted with defendant Rose Haslett for the building of a dwelling house, for a price of $6,400.00. It was agreed that payments would be made, one-third when the sub-floor was laid, one-third when the roof was on, and the balance when the building was completed. It appears that one Mary DeMartini owned the land on which the house was to be built, but further mention of her as a party is unnecessary since she does not appeal. She was not a party to the contract. Her mother, Rose Haslett, was building the house as a gift to her.

The work was begun and payments on account were made. When plaintiff considered the building two-thirds completed he requested additional payment up to two-thirds of the agreed price. This was not forthcoming and the plaintiff ceased work. Thereafter defendant employed another contractor to finish the work, and the total cost to her was above the plaintiff's contract price.

Plaintiff, claiming defendant had breached the contract by refusing payment, filed a lien claim for the amount he claimed due him, and brought this action to foreclose the same. Defendant answered, denying his allegations that she had breached her contract, alleging breach on his part by use of defective material, defective workmanship, and abandonment without cause; she counterclaimed and also cross-complained, alleging the aforesaid breaches and asking damages. Hereafter we shall refer to the parties to this appeal as Owens and Haslett.

At the trial it developed that Owens was not, when he contracted, nor for some time after the work was begun, a licensed contractor as required by Division 3, Chapter 9, Article 5, of the Business and Professions Code.

The trial court in its findings of fact found as follows: That the building contract pleaded had been entered into; that Owens began work thereunder and continued periodically until the 11th day of May, 1946, at which time he ceased further work; that on the 9th of May he was "entitled to the second progress payment as provided in said agreement" (a finding we interpret as meaning that the work was two-thirds completed, and done as called for by the contract); that he thereupon demanded of Haslett that she complete the second progress payment and that upon such demand she failed to do so; that the building contract was silent as to the time of completion; that Haslett failed to prove faulty construction; that Owens was not a licensed contractor as required by the Business and Professions Code of this State at the time the contract was entered into, nor when he commenced performance thereunder. As conclusions of law from the foregoing findings of fact the court declared as follows: That Haslett totally breached the contract on May 9, 1946, "justifying plaintiff [Owens] in terminating performance"; that because of this breach Haslett was to be denied recovery for "additional building costs as prayed" in the cross-complaint; that claimed loss of rentals could not be allowed because, the contract being silent as to time of completion, such loss was not within the contemplation of the parties; that damages claimed for faulty material and workmanship be denied as not proven; that because Owens was not a licensed contractor Haslett's motion for nonsuit against him should be granted and recovery by him denied. The judgment decreed that no recovery be had by any party against another, and from this judgment, so far as it decreed no recovery upon the cross-complaint, Haslett has appealed.

It may be said here that the foregoing factual findings are supported by the evidence. Indeed, that issue is not raised by the appellant Haslett. Her contentions revolve around what she conceives to be the legal consequences flowing from Owen's lack of a license. Her contentions as advanced in her brief are stated in this way: Owens violated the law; Haslett was not in pari delicto and the illegality of the contract is not therefore in and of itself a bar to relief; justice and equity require some form of relief and she should be permitted either to recover what she has already paid Owens or to hold him accountable as for a breach of his contract in failing to complete the building, thus making it necessary for her to obtain completion by another contractor at an increased cost.

[1] It is, of course, conceded that Owens violated the law when he executed the contract with Haslett and began work thereunder without first having procured a license. Secs. 7028, 7030, 7031, Bus. & Prof. Code; Holm v. Bramwell, 20 Cal. App.2d 332, 335, 67 P.2d 114; Loving & Evans v. Blick, 33 Cal.2d 603, 607, 204 P. 2d 23. It may be further stated that the contract was not validated so as to enable the plaintiff to sue upon it by his having procured such license during the course of the work, for the statute, Sec. 7031, Bus. & Prof. Code, declares that no person may bring or maintain any action for compensation for doing work for which a license is required without alleging and proving that he was duly licensed *at all times* during the performance of the contract. See, also, Restatement of the Law of Contracts, Section 609, reading as follows:

"A bargain that is illegal when formed does not become legal

"(a) by reason of a change of fact, except where both parties when the bargain was made neither knew nor had reason to know the facts making it illegal." See, also, Teachout v. Bogy, 175 Cal. 481, 166 P. 319; Moffatt v. Bulson, 96 Cal. 106, 112, 30 P. 1022, 31 Am.St.Rep. 192.

It follows that the judgment of the trial court denying relief to Owens was correct, as, indeed, is impliedly admitted by his not having appealed therefrom.

[2] However, a different situation exists as regards the appeal of Haslett from the judgment denying her relief on her cross-complaint. Both Owens and Haslett were parties to an illegal contract and, as a general rule, to which there are exceptions, a party to an illegal contract can neither recover damages nor, by rescinding, recover the performance that he has rendered, or its value. The rule is thus stated in Restatement of the Law of Contracts, Section 598: "A party to an illegal bargain can neither recover damages for breach thereof nor, by rescinding the bargain, recover the performance that he has rendered thereunder or its value, except as stated in Secs. 599-609."

Reference is further made to the matter following the quoted section under the heading "Comment", including the statement that "The rule stated in the Section precludes recovery on principles of quasi-contract for benefits conferred under an illegal bargain, as well as an action on the bargain itself." This general rule has likewise been declared in many opinions rendered by the appellate courts of this State. See Takeuchi v. Schmuck, 206 Cal. 782, 786, 276 P. 345, 346, wherein the court said: "It has long been a rule of law that courts will not compel parties to perform contracts which have for their object the performance of acts against sound public policy either by decreeing specific performance or awarding damages for breach. [Citing cases.] This rule is not generally applied to secure justice between parties who have made an illegal contract, but from regard for a higher interest—that of the public, whose welfare demands that certain transactions be discouraged." See, also, Teachout v. Bogy, supra.

And in Loving & Evans v. Blick, supra, the Supreme Court said: "* * * It has been repeatedly declared in this state that 'a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such con-

tract' [citing cases]; and that 'whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case.' [Citing cases.]" [33 Cal.2d 603, 204 P.2d 25.]

[3] To this general rule there are certain recognized exceptions in favor of a party who is not in pari delicto with the other party to the contract and who, as the more innocent of the two, seeks recovery. One of these exceptions to the general rule material here is stated as follows in Section 599 of Restatement of the Law of Contracts:

"Where the illegality of a bargain is due to

"(a) facts of which one party is justifiably ignorant and the other party is not, or

"(b) statutory or executive regulations of a minor character relating to a particular business which are unknown to one party, who is justified in assuming special knowledge by the other party of the requirements of the law,

the illegality does not preclude recovery by the ignorant party of compensation for any performance rendered while he is still justifiably ignorant, or for losses incurred or gains prevented by non-performance of the bargain."

The conditions which must be met by one seeking recovery under the rule so stated is also covered in the Comment following the foregoing statement of the rule, under subsection b, as follows: "A party who is within the terms of Clause (a) or (b) at the time of the formation of the contract may discover before or during performance the facts that render the bargain illegal. Save in the exceptional cases stated in §§ 600–604, he cannot recover for any performance rendered after the discovery. The same reason then bars him that bars recovery on a contract originally legal that subsequently before performance becomes illegal (see § 608). If, however, on discovering the illegality, he renders no further performance, he can recover the same damages that would be recoverable for any wrongful breach of contract (see § 329), *provided, 1, that his non-performance is caused by illegality, and, 2, that the other party is not equally innocent.* He is not freed from the ordinary requirement for the recovery of damages for breach of contract that a plaintiff who does not himself perform must establish that he could and would have performed except for the defendant's fault. Under the rule stated in the present Section illegality does not preclude recovery, but any other ground for denying recovery is still open." (Italics added.) See, also, McAllister v. Drapeau, 14 Cal.2d 102, 92 P.2d 911, 125 A.L.R. 800.

If, therefore, as she claims on appeal, Haslett was not in pari delicto, if she was justifiably ignorant of the fact which made the contract illegal, that is, Owens' lack of license, then she could, on proper pleading and proof, have made her case come within the above exception to the general rule; for if she was not in pari delicto the illegality of the contract would not have precluded her from recovering for losses incurred or gain prevented by nonperformance of the contract. But, to bring herself within this exception to the general rule, she was required to establish that at some time during the performance of the contract she discovered the facts that rendered it illegal; that she ceased her performance because of this illegality; that she had up to that time in good faith performed the contract, and was ready, able and willing, but for the illegality, to continue to perform. These things are so because when relief is given to a party to an illegal contract who is not in pari delicto it amounts to a recognition of the contract by the court for the benefit of such a party and to prevent injustice; and the party whose plea for relief is thus entertained is faced with the usual and ordinary requirements exacted of any party who seeks recovery of damages for breach by the other party. While, as stated, the illegality of the contract does not preclude recovery in such case, any other ground for denying recovery is still open.

[4] Applying these rules to the situation presented here, as gathered from the factual findings of the trial court, we find

the following: In the beginning an illegal contract was made; it was illegal because of Owens' lack of license; being illegal when it was made, it did not become legal when Owens obtained his license during the progress of the work. Before she discovered the illegality of the contract, both Owens and Haslett had entered upon and were in the course of performance thereof; the house reached the stage of two-thirds completion and, up to that point, as to both material and workmanship that went into it, the house had been constructed in strict conformity to the contract; in that situation Owens requested further performance by Haslett, basing his request upon his faithful performance of the contract thus far; Haslett, basing her refusal, not upon illegality, but upon an untrue claim that he had not so performed, refused further payment; Owens thereupon ceased performance, basing that cessation, in turn, and justifiably in so far as the facts were concerned, upon Haslett's refusal to pay.

When Owens sued her neither party in the pleadings, either in the complaint, the answer or the cross-complaint, as originally filed, set up the illegality of the contract or sought to bring the pleader within any exception from the general rule that parties to an illegal contract can obtain no relief in the courts. But during the course of the trial the illegality developed, and if there was nothing further the court would at that time have been justified in rendering judgment that neither take anything from the other, for under the general rule and in the absence of pleaded and proven exception, whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. However, the trial court proceeded to take all the evidence which either party desired to produce, reserving all rulings, dependent upon illegality, until the close of the trial. Haslett sought and obtained from the court leave to amend her pleadings. Amendments were made, but again she did not plead illegality, and exception to the general rule permitting her to recover; she did not plead that she was not in pari delicto, and the record is barren of any testimony to that effect. But, over and beyond this, she neither pleaded nor proved, although seeking relief as for a breach of Owens' contract, that is, his failure to perform, that she herself had performed up to the time when performance by both parties ceased. True, there was evidence presented by her to the effect that she had ceased performance because Owens had not performed and on the contrary had breached the contract. But the evidence upon this subject was conflicting, the findings of the trial court were in favor of Owens and hence the record here stands that it was Haslett, not Owens, who had been guilty of breach. Haslett thus failed to bring herself within the exception permitting recovery to a party to an illegal contract who is not in pari delicto. This usual and ordinary requirement exacted of all persons who seek to recover upon a contract, that they themselves have kept the agreement, was not met by her and as a consequence she was not entitled upon the facts to any relief and the judgment of the trial court in denying such relief was correct.

It is ordered that the judgment be affirmed.

ADAMS, P. J., and PEEK, J., concur.

99 Cal.App.2d 149

HELVEY v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

Civ. 17334.

District Court of Appeal, Second District, Division 1, California.

Aug. 22, 1950.

A. C. Helvey, administrator of the estate of Ira B. Murphy, deceased, sued the Security-First National Bank of Los Angeles for the amount of a deposit account paid by defendant to the state treasury under the Abandoned Property Act. From an order of the Superior Court of Ventura County, Charles F. Blackstock, J., dismissing plaintiff's amended complaint on defendant's motion, plaintiff appealed. The District Court of Appeal, Drapeau, J., held that the Abandoned Property Act is not unconstitutional.

Order affirmed.

1. Appeal and error ⇐907(2)

In absence of record of evidence before trial court, District Court of Appeal must presume that evidence supports order appealed from.

2. Dismissal and nonsuit ⇐71

Affidavits may be used in support of motion to dismiss action.

3. Dismissal and nonsuit ⇐53(2)

The Superior Court has inherent power to dismiss action shown to be fictitious and sham, without basing order on facts specified in statute. Code Civ.Proc. § 581 et seq.

4. Banks and banking ⇐234
Constitutional law ⇐190, 306
Escheat ⇐2

The Abandoned Property Act, providing for payment to state treasury of amounts of abandoned bank deposit accounts, is not unconstitutional on grounds that it deprives depositors of interest, applies to money deposited before enactment of law, does not provide for notice to depositors, and applies to national banks. Code Civ.Proc. §§ 1274.1–1274.17.

William M. Taylor, Coachella, for appellant.

Arthur H. Blanchard, Robert E. Friedrich, Santa Paula, for respondent.

DRAPEAU, Justice.

In June of 1919 Ira B. Murphy made two deposits in Farmers and Merchants Bank of Santa Paula, in the sum of $710. Defendant in this case is successor to that bank. No further deposits were made, except credits of interest earned. No withdrawals were made. October 2, 1946, defendant bank paid the amount due on the account to the Treasury of the State of California. Abandoned Property Act; Code Civ.Proc. secs. 1274.1 to 1274.17.

Plaintiff is administrator of the estate of Ira B. Murphy, and assignee of decedent's widow. As such, he first petitioned in the Superior Court in Sacramento county in a proceeding against the State of California. The procedure is outlined in Code Civ.Proc. sec. 1274.10. Upon making the necessary proof the court is empowered to direct return of abandoned property to the owner thereof.

While the proceeding in Sacramento county was pending, plaintiff commenced the present action against the defendant in Ventura County. In his brief he says he did this because he could not recover interest from the State.

Defendant served plaintiff's counsel with notice of motion to dismiss. Plaintiff made no appearance on the hearing of the motion. Evidence was heard by the court, the motion was granted, and the case dismissed. From this order plaintiff appeals.

[1, 2] No record of the evidence before the trial court has been supplied to this Court. Therefore, it must be presumed that the evidence supports the order. Vieth v. Klett, 88 Cal.App.2d 23, 198 P.2d 314; Lucich v. Lucich, 75 Cal.App.2d 890, 172 P.2d 73. Affidavits may be used in support of a motion to dismiss. Best v. Fitzgerald, 81 Cal.App.2d 965, 185 P.2d 377.

[3] Plaintiff argues that the order is not based on facts specified in Section 581 et seq. of the Code of Civil Procedure, and is, therefore, void.

The Superior Court has inherent power to dismiss actions which are made to appear fictitious and sham. Cunha Anglo California National Bank, 34 Cal.App.2d 383, 93 P.2d 572.

[4] Plaintiff also argues that the Abandoned Property Act is unconstitutional for the following reasons: (a) A bank depositor is deprived of interest; (b) the money was deposited before the enactment of the law; (c) no notice to depositors is provided for; (d) the Act does not apply to a national bank. Each assignment is without merit. Anderson National Bank v. Luckett, 321 U.S. 233, 64 S.Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.



99 Cal.App.2d 188

PEOPLE v. ELLIS.

Cr. 736.

District Court of Appeal, Fourth District, California.

Aug. 24, 1950.

John Ellis was convicted of robbery and grand theft. From an order of the Superior Court of San Diego County, William A. Glen, J., denying a petition for writ of error coram nobis, defendant appealed. The District Court of Appeal, Barnard, P. J., held that defendant had known all of the facts upon which his contentions were based, and should have presented them in regular way by appeal.

Affirmed.

1. Criminal law ⇐997

Where defendant was convicted of robbery and grand theft, and applied for writ of error coram nobis on grounds of collusion, conspiracy, fraud and perjury, bias and prejudice of judge in his rulings, denial of separate trial, and denial of counsel at preliminary hearing but all of such grounds were known to defendant and could have been presented in the regular way by appeal, writ was properly denied.

2. Criminal law ⇐997

Writ of error coram nobis was never intended as substitute for appeal, or as rehash of former appeal.

John C. Thompson, San Diego, for appellant.

Fred N. Howser, Attorney General, Norman H. Sokolow, Deputy Attorney General, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying a petition for a writ of error *coram nobis*.

The appellant and one Erskine entered a home near San Diego at 1 o'clock in the morning and held up five occupants at the point of a gun, one shot being fired to show "We mean business." They took certain money and other articles and also took an automobile from the garage, in which to leave. They were tried together and convicted of robbery and grand theft, judgment being pronounced on June 16, 1949. Erskine appealed, and the judgment as to him was affirmed by this court. This appellant, who had not appealed, filed a *coram nobis* petition on March 27, 1950, which was denied. On this appeal from that order he filed his own briefs but, at his request, this court appointed his present attorney who ably presented the matter here.

It is first contended that the court abused its discretion in denying this writ "upon the presumption" that the judgment against the appellant had been appealed and affirmed. The record shows the exact contrary; that the trial judge knew that Erskine alone had appealed; and that a hearing was had at which everything submitted was considered.

It is further contended that the trial court erred in rulings on law at the trial

which resulted in a miscarriage of justice, and that appellant's conviction was the direct result of collusion, conspiracy, fraud and perjury, as shown by the "numerous instances" alleged in the petition by reference to the transcript of the trial. In this connection, it is contended that the judge repeatedly showed bias and prejudice in his rulings; that one witness was not excluded from the court room; that his motion for a separate trial was denied; that he was prejudiced because the criminal record of his codefendant was brought out; that no effort was made at any time by his counsel or the judge to protect his rights; that his attorney was negligent in not letting him take the stand and in failing to move for a new trial; that the district attorney prejudicially referred to him as an exconvict; that he thought at the time, and still thinks, that one juror was substituted for another during the first recess; that he was identified as one of the robbers only vaguely and by hearsay; and that he was denied an attorney at his preliminary hearing.

Aside from the matter of diligence, most of these contentions are utterly unsupported by the record, including the trial record which is before us, and would have been unavailing had they been presented on an appeal. He was completely and positively identified by all five occupants of the house, and by a taxi driver who took him and Erskine to the scene immediately before the robbery. One of his fingerprints was found in the house. He admitted having ridden in the automobile which was taken, and he took the officers to it after they had vainly tried for two hours to locate it, Erskine having given them its general location. The record discloses no sign of bias or prejudice on the part of the judge. On the contrary, it shows that he was extremely fair to the appellant in his rulings, and most vigilant at all times in protecting his rights. There is no evidence in the record which in the slightest degree indicates collusion, fraud or perjury. Appellant's attorney at the trial carefully and ably conducted his defense and the criticism of him is entirely unjustified. The only contentions which are at all supported by the record are that he was denied a separate trial, which was obviously correct, and that he was denied counsel at the preliminary hearing, which appears by inference.

[1, 2] All of the contentions made, whether supported or not, were known to the appellant and could have been presented in the regular way. This is true of the contention that he asked for and was refused counsel at the preliminary hearing. If this be assumed, that fact was well known to him at the time. The record shows that when he was brought up for arraignment in the superior court an attorney was appointed for him, and the matter was continued for two days. He was then properly arraigned and pleaded not guilty, and no objection was raised. At the time set for judgment an additional attorney appeared for him, stating that he wanted to look into the advisability of a motion for a new trial, and the matter was continued for two days. No motion was then made, the appellant stated that he had no legal cause to show why judgment should not be pronounced, and this was done.

The appellant's contentions are all without merit and, under familiar rules, his application for this writ was properly denied. His guilt conclusively appears, his trial was eminently fair, and no additional facts are presented which could have affected the judgment. While such a writ serves a just purpose in a few exceptional cases, it is unfortunate that the right thus given is so increasingly abused. It was never intended as a substitute for an appeal, or as a rehash of a former appeal.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

98 Cal.App.2d 817

LUNDIN et al. v. SHUMATE'S PHARMACY, Inc., et al.

Civ. 14288.

District Court of Appeal, First District, Division 2, California.

Aug. 10, 1950.

Action by Catherine Lundin and another against Shumate's Pharmacy, Inc., and others, to recover for injuries sustained by the named plaintiff in a fall while entering the named defendant's drug store. The lower court, Robert McWilliams, J., rendered a judgment on a verdict for the defendants, and the plaintiffs appealed. The District Court of Appeal, Goodell, J., held that there was no error in giving or rejecting certain instructions.

Judgment affirmed.

1. Negligence ⇐138(1)

In patron's action against operator for injuries sustained in fall while entering drug store operated on premises under month to month tenancy, instruction that owner or lessee of building who invites others to enter owes duty to keep premises in reasonably safe condition was not misleading because of words "owner or lessee".

2. Trial ⇐260(8)

In patron's action against operator for injuries sustained in fall while entering drug store, court properly refused to give requested instruction that was lengthy and less favorable to those tendering it than given instructions.

3. Negligence ⇐139(6)

In patron's action against operator for injuries sustained in fall while entering drug store for the first time, instruction that true ground of liability rested on owner's superior knowledge of perilous condition and danger therefrom to invitees over knowledge possessed by invitees was not objectionable as permitting operator to set up its own ignorance caused by its own negligence as a defense.

4. Trial ⇐296(3)

In patron's action against operator for injuries sustained in fall while entering drug store, instruction relating to knowledge of dangerous condition necessary to impose liability for injury to invitee was not objectionable as misleading in view of other given instruction.

5. Negligence ⇐48

To impose liability for injury to invitee by reason of dangerous condition of premises, defective condition must either have been known to owner or occupant or have existed for such time that it was duty of owner or occupant, by exercise of reasonable care, to have known of such defect.

6. Negligence ⇐48

Operator of drug store was under no duty to patron to inspect store and discover that slab of marble on outer edge of floor of entrance was loose, wet and slippery.

7. Negligence ⇐139(2)

In patron's action against operator for injuries sustained in fall while entering drug store, instructions defining ordinary care were not objectionable as imposing on operator a lesser degree of care than that imposed on invitee in view of other given instructions.

8. Negligence ⇐136(26)

In patron's action against operator for injuries sustained in fall while entering drug store, whether patron was guilty of contributory negligence was a question for the jury.

9. Negligence ⇐141(1)

In patron's action against operator for injuries sustained in fall while entering drug store, where contributory negligence was a question for the jury, instruction that where such danger is obvious or is as well known to injured invitee as to owner there is no liability on owner was properly submitted.

10. Negligence ⇐32(2.8)

One who during business hours lawfully enters store to purchase goods does so at implied invitation of owner upon whom law imposes duty of exercising ordinary care and prudence to keep entrance and passageway, in and through which, by its location and arrangement, customer in

entering premises is induced or obligated to go, in a reasonably safe condition so as not to unnecessarily expose customer to danger or accident.

11. Trial ⇐260(1)

Instruction which contained correct statement of law, but which was already covered by given instructions declaring law in equivalent language, was properly refused.

12. Appeal and error ⇐216(1)

In patron's action against operator for injuries sustained in fall while entering drug store, where ordinary care was defined, and proximate cause was not, but patron made no request for a definition, patron could not thereafter complain that court failed to define proximate cause.

13. Trial ⇐260(1)

Proposed instructions given in substance by other instructions were properly refused in form tendered.

14. Trial ⇐255(11)

In patron's action against operator for injuries sustained in fall while entering drug store, court properly refused to instruct that patron could not be charged with contributory negligence because she might have avoided accident if she had acted differently in absence of request by patron.

15. Trial ⇐260(1), 261

Instruction which was carelessly drawn and told no more than jury had already been told in conventional form by given instructions was properly refused.

16. Trial ⇐295(1)

On appeal, court's instruction must be read as a whole.

Jos. A. Brown, San Francisco, for appellants.

Lillick, Geary, Olson, Adams & Charles, San Francisco, for respondents.

GOODELL, Justice.

This appeal is from a judgment on a verdict in favor of defendant.

The action was for damages for personal injuries sustained by appellant Catherine Lundin when she fell while entering the drug store of respondent for the purpose of making a purchase.

Appellants' attacks are all aimed at the instructions, hence a very brief summary of the facts will suffice. The entrance to respondent's store, which is on the corner of 16th and Valencia Streets in San Francisco, is slightly above the sidewalk level. It is claimed that a slab of marble on the outer edge of the floor of the entrance was loose, and wet and slippery as well, and that when the appellant stepped onto the slab she lost her footing and fell. Her left leg was fractured in three places.

Appellants contend that the court erred in instructing the jury as to the duty of an owner to an invitee, in that the charge "omits all mention of any of the specific duties of the proprietor of a place of business to his customers and others who come upon the premises at his invitation." They also claim there was error in refusing to give certain instructions. These contentions will be discussed in detail.

The following instructions were given:

(A) "The owner or lessee of a building who, directly or by implication, invites others to enter owes to such persons who thus enter a duty to have his premises in a reasonably safe condition, and to give warning of latent or concealed perils and dangers."

(B) "He is not an insurer of such persons, nor does the mere occurrence of injury on such premises to such invitee create any presumption of negligence on the part of the owner. His responsibility is not absolute; he is required to use ordinary care for the safety of the persons he invites to come upon his premises. The true ground of liability rests on the owner's superior knowledge of the perilous condition and the danger therefrom to invitees, over the knowledge possessed by the invitee."

(C) "An invitee is a person who has been invited by the proprietor of a certain business to go upon the latter's premises. Such invitation may be either express or implied."

(D) "If you believe from the evidence in this case that the plaintiff * * * was injured when entering the store of the defendant for the purpose of making a purchase of merchandise, the plaintiff * * * was an invitee in the sense which I have used that term and heretofore defined it."

(E) "In order to impose liability for injury to an invitee by reason of the dangerous condition of the premises, the defective condition must either have been known to the owner or occupant, or have existed for such time that it was the duty of the owner or occupant, by the exercise of reasonable care, to have known of such defect."

[1] The first of this group, (A), is characterized by appellants as "colorless" and "formal and minuscule". The only question is whether it was erroneous. The words "owner or lessee" were not misleading since the store was owned and operated by respondent (and so alleged by plaintiffs), under a month-to-month tenancy, and respondent was the only defendant before the court. The criticism of this instruction is not well founded.

[2] Appellants tendered an instruction copied verbatim from Madigan v. O. A. Hale & Co., 90 Cal.App. 151, at page 159, 265 P. 574, 577, which they claim should have been given. It is in 113 words and was less favorable to appellants than instructions (A), (B), (C), (D) and (E), which left no doubt that plaintiff *was* an invitee, while the one tendered said that the person entering "is *presumed* by law to be doing so on the invitation of the owner." Moreover (A) said it was the owner's duty "to give warning of latent or concealed perils and dangers", an element not found in the instruction tendered. The court in the Madigan case by no means gave this cloudy and wordy instruction its wholehearted approval. It said that it was but preliminary, "merely attempting to outline the general duty of defendant *without reference to any question of liability*". (Emphasis added.) The refusal to give the Madigan instruction was correct.

[3] Appellants attack (B) above, and particularly its last sentence. They say it was gross error to tell the jury that the true ground of liability rests on the owner's superior knowledge of the perilous condition and the danger therefrom to invitees, over the knowledge possessed by the invitee. The evidence shows that the occasion in question was Mrs. Lundin's first visit to the store, which had been there for a long time. In thus giving the jury the reason for the rule the instruction emphasized the difference between the "superior knowledge" of the owner over that of an invitee (visiting the store for the first time). There was nothing favorable to the respondent about this, and how appellants can complain is not understandable.

"This instruction" appellants argue "told the jury in plain terms that unless the defendant's knowledge of the condition of the step upon which plaintiff was injured was superior to that of the knowledge of the plaintiff, the defendant was not liable. The defendant could thus set up its own ignorance caused by its own negligence as a defense to the action." We disagree with any such interpretation.

The language of instruction (B) as a whole is a paraphrase of statements repeatedly found in the cases, among them Mautino v. Sutter Hospital Assn., 211 Cal. 556, 560–561, 296 P. 76; Touhy v. Owl Drug Co., 6 Cal.App.2d 64, 66, 44 P.2d 405 and Crawford v. Pacific States Savings & Loan Co., 22 Cal.App.2d 448, 449, 71 P.2d 333.

[4, 5] Appellants attack instruction (E) as an erroneous statement of the law, uncertain and misleading. They ask "How long must a defect exist before the owner or occupant * * * is under a duty to discover it?" In Crawford v. Pacific States Savings & Loan Co., 22 Cal.App.2d 448, 449, 71 P.2d 333, 334, supra, it is said: "The general rule is stated in 45 Corpus Juris, 837, § 245: 'In order to impose liability for injury to an invitee by reason of the dangerous condition of the premises the condition must have been known to the owner or occupant or have existed for such time that it was the duty of the owner or occupant to know of it', citing the California case, Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793." The instruc-

tion was phrased in substantially that language. The "question whether the condition which caused the injury had existed so long as to be discoverable by the defendant within a reasonable time is one for the jury". Rothschild v. Fourth and Market St. Realty Co., 139 Cal.App. 625, 627, 34 P.2d 734, and its citations. Practically the same language was used in Hatfield v. Levy Bros., 18 Cal.2d 798, 807, 117 P.2d 841, citing the Rothschild case. See, also Louie v. Hagstrom's Food Stores, 81 Cal. App.2d 601, 607, 184 P.2d 708. Moreover, as we have seen, the jury was told of "the owner's superior knowledge." There was no error in this instruction.

[6] The instructions (A), (B), (C), (D) and (E) nowhere expressly speak of an owner's duty to inspect his premises, and appellants contend that there is such a duty. They cite no California case of such a type as this, holding that the jury must be instructed on the duty of an owner to inspect. The cases they do cite deal with litigation of an entirely different nature. They cite Basye v. Craft's, etc., Shows, 43 Cal.App.2d 782, 111 P.2d 746, where a bystander at a carnival lost an eye from the fragment of a deflected bullet in a shooting gallery, and Sherward v. Virtue, 20 Cal.2d 410, 126 P.2d 345, involving the liability of the manufacturer of a defective beauty parlor chair, each of them, obviously, a totally different type of case. The Sheward case cited O'Rourke v. Day, etc., Company, 31 Cal.App.2d 364, 88 P.2d 191, a case involving the inspection of a patented water heater. They rely, also, on Spore v. Washington, 96 Cal.App. 345, 274 P. 407, 410, where the court, speaking of the board walk which did the damage, said "no part of it was concealed so as to make inspection difficult or dangerous" and "From the facts adduced the jury might easily have concluded that the slightest inspection would have disclosed the conditions actually existing." Whatever was said respecting *inspection,* was not said in connection with instructions since the opinion points out, 96 Cal.App. page 351, 274 P. page 409, that "Not one single complaint is made of any instruction, and we, therefore, assume that the jury were fully and fairly instructed * * *" Clampett v. Shopping Bag Markets, Inc., 29 Cal.App.2d 410, 84 P.2d 543, cited by appellants, was a slipping case, but it is not in point since the trial court there had directed a verdict for defendant (because it considered plaintiff guilty of contributory negligence as a matter of law) hence no problem of instructions was presented.

Moreover, appellants requested no instruction even mentioning *inspection.* See 24 Cal.Jur., "Trial", § 74. It may well be that no instruction was tendered because they could find no authority on which to base it.

The four following instructions were given on ordinary care:

"By ordinary care is meant that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances."

"While proceeding to enter the premises at the time and place in question, the plaintiff, * * * was required to use ordinary care for her own safety."

"While Mrs. Lundin was under the duty of using ordinary care for her own safety, she was not obliged to search for defects, and she had a right to assume that the place where she stepped was reasonably safe, and a reasonably safe place, until she ascertained to the contrary."

"The law does not require the defendant to use any greater degree of care than the plaintiff was required to use for her own safety and protection in her use of the defendant's premises."

[7] It is contended that the instructions imposed on the owner a lesser degree of care than that imposed on the invitee. It is difficult to follow this in view of the instruction already discussed respecting "the owner's superior knowledge of the perilous condition and the danger therefrom" and in view of the third instruction just quoted, which was clearly in appellants' favor and essentially in the form proposed by appellants, the variations being trifling.

[8] It is contended that the court erred in instructing on contributory negligence. That defense was pleaded, and the case was tried by respondent on that theory. There

were photographs in evidence showing the entrance to the store from several viewpoints and there was much testimony respecting its physical condition. The day was rainy and appellants concede that it is "a matter of common knowledge that marble is or may be extremely slippery in wet weather and that tiles are likewise slippery." Moreover, Mrs. Lundin testified that she just stepped up into the entrance without glancing down and there was other evidence from which the defense could legitimately contend that she was negligent. An instruction on contributory negligence was certainly proper.

[9] What has just been said answers the claim that the following instruction should not have been given: "Where such danger is obvious, or is as well known to the injured invitee as to the owner, there is no liability upon the owner." The wording is not criticized, simply its applicability. If contributory negligence was in the case, this instruction was not improper.

Appellants tendered the following instruction: "You are instructed that one who during business hours lawfully enters a store to purchase goods, does so at the implied invitation of the owner, upon whom the law imposes the duty of exercising ordinary care and prudence to keep the entrance and passageway, in and through which, by its location and arrangement, a customer in entering the said premises is induced or obliged to go, in a reasonably safe condition so as not to unnecessarily expose such customer to danger or accident."

[10, 11] This was taken almost literally from Thompson v. B. F. Goodrich Co., 48 Cal.2d 723, at pages 726–727, 120 P.2d 693, and it is urged that it should have been given, just as it is urged that the Madigan instruction should have been given. There is no doubt that this instruction contains a correct statement of the law, but the first four quoted herein (A to D) declared the law in equivalent language and there was no need for repetition.

[12] It is claimed that the court failed to define "ordinary care" and "proximate cause", both of which terms were used in the instruction on contributory negligence. Ordinary care was defined, as already quoted herein, but proximate cause was not. In three of their proposed instructions appellants used the term "proximate cause" or its equivalent but made no request for a definition of it. In the absence of such request they cannot now complain. Ambrose v. Allen, 113 Cal.App. 107, 116, 298 P. 169; and Dicken v. Souther, 59 Cal.App.2d 203, 209, 138 P.2d 408; 24 Cal.Jur., "Trial", § 74, supra. Spear v. Leuenberger, 44 Cal.App.2d 236, 246, 112 P.2d 43, 49, is not in point. There the court failed to define negligence for the jury in the conventional way or even approaching it, but told them that "Want of ordinary care is called negligence" and then failed to define ordinary care. Here the conventional definition of negligence was given as well as the definition of ordinary care. In the Spear case it is true the court failed to define proximate cause, but it is questionable whether, standing alone, that would have called for a reversal, in the absence of a request for it.

[13] Appellants' proposed instructions II and VII were refused by the court in the form tendered, but were given in substance in (A), (B), (C), (D) and (E), defining an invitee and laying down the owner's duty.

[14] To appellants' complaint that "the court did not instruct the jury that the plaintiff could not be charged with contributory negligence because she might have avoided the accident if she had acted differently" the answer is that they did not so request. 24 Cal.Jur., "Trial", § 74, supra.

[15] Finally, it is claimed that reversible error was committed in refusing an instruction reading as follows: "You are instructed, that even though you may believe from the evidence that the defendant (or its agents and employees) did not know of any defect in the marble step, yet, if *by the exercise of ordinary care you believe* the defendant could have discovered such condition, then, I charge you, the defendant may nevertheless be liable if you believe such condition existed at the time the plaintiff fell, and that such fall was proximately

caused in part or entirely by said condition and proximately caused any injuries, you may believe the plaintiff suffered." (Emphasis added.)

The draftsman probably meant to say "yet, if you believe that the defendant, by the exercise of ordinary care, could have discovered such condition." As tendered, however, it extended the ordinary care rule to the functioning of the jury.

The jurors were told by (B) that the owner "is required to use ordinary care for the safety" of his invitee, and that such owner has "superior knowledge" over his invitee, and by (E) that "the defective condition must either have been known to the owner or occupant, *or have existed for such time that it was the duty of the owner or occupant, by the exercise of reasonable care, to have known of such defect.*" (Emphasis added.)

The instructions which were given were "clear and concise, complete, intelligible, unambiguous and certain". 24 Cal.Jur., "Trial", sec. 85. Why, then, add to the jurors' task the job of trying to grasp the meaning of an instruction which bears internal evidence of having been hastily and carelessly drawn and which tells them no more than they had been already told in conventional form? The tendered instruction, moreover, lacked the saving grace of adhering to "instructions which have been sanctioned by the appellate courts". 24 Cal. Jur., "Trial", § 84.

Appellants characterize the instructions as "one-sided", "half-hearted, misleading and colorless" yet they have produced no authority to convince us that there was error in the giving or the rejecting of any one of them.

[16] "The charge must be read as a whole". 24 Cal.Jur., "Trial", § 113. When so read it was fair, comprehensive, and well balanced.

We find no merit in any of appellants' points, most of which are extremely technical.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

99 Cal.App.2d 25

BUTCHER v. QUEEN CITY IRON & METAL CO. et al.

Civ. 17506.

District Court of Appeal, Second District, Division 2, California.

Aug. 16, 1950.

George Butcher brought action against the Queen City Iron & Metal Company, a partnership, and others, for personal injuries. A judgment in favor of plaintiff was entered by the Superior Court of Los Angeles County, Samuel R. Blake, J., and the defendants appealed. The District Court of Appeals, McComb, J., held that evidence that plaintiff, while a business invitee on premises of defendant partnership, undertook to remove steel plate from table at request of partnership's employee without knowing that there was a round piece of steel beneath the plate, though such fact was known to partnership's employee, and that round piece of steel rolled off table and struck plaintiff on foot, supported finding that plaintiff's injury was caused by negligence of partnership's employee and that plaintiff was not contributorily negligent.

Affirmed.

1. Negligence ⇐32(1)

An owner of property is under duty to a business invitee to exercise reasonable care in maintenance and use of its premises so as not to injure invitee.

2. Negligence ⇐32(1)

A business invitee is entitled to ordinary care at hands of employee of an employer and an omission of such care resulting in injury makes employer liable to injured party.

3. Appeal and error ⇐999(3)

A finding by jury that plaintiff in personal injury action is a business invitee when supported by substantial evidence is binding upon appellate court.

4. Appeal and error ⇐1001(1)
Negligence ⇐136(14, 26)

Whether defendant was negligent or plaintiff contributorily negligent are questions of fact for determination of jury whose findings supported by substantial evidence will not be reversed on appeal.

5. Negligence ⇐134(3), 135(1)

Evidence that plaintiff, while business invitee on premises of defendant partnership, undertook to remove steel plate from table at request of partnership's employee without knowing that there was a round piece of steel beneath the plate, though such fact was known to partnership's employee, and that round piece of steel rolled off table and struck plaintiff on foot, justified finding that plaintiff's injury was caused by negligence of partnership's employee and that plaintiff was not contributorily negligent.

6. Appeal and error ⇐1004(1)

A jury's verdict will not be set aside upon appeal on ground that verdict is excessive unless verdict is so outrageously excessive as to suggest passion, prejudice, or corruption.

7. Damages ⇐132(6)

$15,000 for loss of plaintiff's big toe on his right foot causing a permanent limp and permanently impairing circulation at lower end of right foot, so that gangrene might be caused to flare up with necessity of further amputation of a part of his foot or leg, was not excessive.

Moss, Lyon & Dunn, Los Angeles, Henry F. Walker, Los Angeles, of counsel, for appellants.

Erb, French & Picone, Beverly Hills, Ralph Highsmith, Los Angeles, Samuel B. Picone, Beverly Hills, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff in the sum of $15,000 after trial before a jury in an action to recover damages for personal injuries, defendants appeal.

Facts: On October 25, 1947, plaintiff went to defendant partnership's place of business, which was a steel and metal yard, for the purpose of buying a piece of steel and also some scrap angle iron. Upon entering the yard plaintiff saw defendant Wood, an employee of the partnership, and also Mr. Carpio, foreman of the yard. The foreman upon learning plaintiff's mission requested plaintiff to follow him to the back of the yard. This he did and was shown a piece of steel longer than he desired. The foreman told plaintiff he could cut the metal the length desired, and started to cut it in plaintiff's presence. Before the metal was completely cut plaintiff walked along the stock shed to a point where the foreman had told him he could find some scrap angle iron. Plaintiff picked up some short pieces of angle iron and went toward the office and the scales. Plaintiff stopped near a cutting table where defendant Wood was using a torch. On the table was a steel plate below which was a piece of round steel approximately 3½ feet in length and about 2½ to 2¾ inches in diameter, weighing approximately 100 pounds. Plaintiff did not know the round steel was on the table, it being completely covered by the plate steel and not visible to plaintiff. Defendant Wood, however, knew the piece of steel was beneath the plate. While plaintiff was standing near the table defendant Wood looking in the general direction toward plaintiff said "That plate is in my way." After the statement, plaintiff went up to the table, picked up the steel plate, and the piece of round steel beneath the plate rolled off the table striking plaintiff's right foot and injuring it.

As a result of the injury it was necessary to amputate the right great toe. The amputation of the toe caused plaintiff to have a permanent limp and a doctor testified that further surgery might be necessary in the future.

Questions: First: *Did the evidence show that defendant partnership had violated a duty which it owed plaintiff?*

This question must be answered in the affirmative and is governed by these rules:

[1] 1. An owner of property is under a duty to a business invitee to exercise reasonable care in the maintenance and use of its premises so as not to injure such invitee. (Smith v. Pickwick Stages System, 113 Cal.App. 118, 126, 297 P. 940.)

[2] 2. A business invitee is entitled to ordinary care at the hands of the employee of an employer and an omission of such care resulting in injury makes the em-

ployer liable to the injured party. (Smith v. Pickwick Stages System, supra, 113 Cal. App. at page 126, 297 P. 940.)

[3] 3. A finding by a jury that a plaintiff is a business invitee when supported by substantial evidence is binding upon an appellate court. (Bee v. Tungstar Corporation, 65 Cal.App.2d 729, 732, 151 P.2d 537.)

[4] 4. Whether defendant was negligent or plaintiff contributorily negligent are questions of fact for the determination of the jury whose finding supported by substantial evidence will not be reversed on appeal. (Reinders v. Olsen, 60 Cal.App. 764, 767, 214 P. 268; McStay v. Citizens Nat. T. & S. Bank, 5 Cal.App.2d 595, 600, 43 P.2d 560.)

[5] Applying the foregoing rules to the facts in the instant case the jury from the evidence were justified in finding that plaintiff was a business invitee on the premises of defendant partnership, and that defendant Wood within the scope of his employment requested plaintiff to remove the steel plate from the table. Also that plaintiff did not know there was a round piece of steel beneath the plate and defendant Wood was negligent in not informing plaintiff of such fact. Likewise the jury was justified from the evidence in finding that plaintiff acted as a reasonably prudent man would have acted under the same or similar circumstances and was therefore not contributorily negligent.

Second: *Was the judgment excessive?*

[6] This question must be answered in the negative. A jury's verdict will not be set aside upon appeal on the ground that the verdict is excessive unless the verdict is so outrageously excessive as to suggest passion, prejudice, or corruption. (Junge v. Midland Counties etc. Corp., 38 Cal.App. 2d 154, 160, 100 P.2d 1073.)

[7] In the instant case the amount of the award, $15,000, does not fall in such category. The evidence disclosed that as a result of the injury plaintiff lost the big toe on his right foot causing a permanent limp and that the circulation in the lower end of his right foot was permanently impaired which might cause gangrene to flare up with the necessity of a further amputation of a portion of his foot or leg.

Affirmed.

MOORE, P. J., and WILSON, J., concur.



99 Cal.App.2d 124

RINGO v. JOHNSON.

No. 14174.

District Court of Appeal, First District, Division 1, California.

Aug. 22, 1950.

Action by Robert Ringo against Raymond W. Johnson for injuries sustained by pedestrian when struck by defendant's automobile. The Superior Court for the City and County of San Francisco, James G. Conlan, J., entered judgment on an order granting a motion for nonsuit, and plaintiff appealed. The District Court of Appeal, Bray, J., held that pedestrian's own testimony established as a matter of law that he was contributorily negligent in crossing street outside crosswalk without looking for approaching vehicles and that presumption of due care could not be invoked to raise a question of fact as to such contributory negligence.

Judgment affirmed.

1. Automobiles ⇐244(1)

Where pedestrian was struck by and thrown to the hood of an automobile and then rolled off, fact that his spectacles were found in a particular place would not justify a finding that he was struck at that place.

2. Negligence ⇐122(1)

Where a plaintiff is unable, because of loss of memory, to testify as to his own conduct, the presumption of due care applies as a species of evidence.

3. Death ⇐58(1)

In action for wrongful death, the presumption that deceased exercised due care

for his own safety may be weighed against other evidence, since, being dead, he is unable to testify.

4. Evidence ⇐89, 589, 594

A fact is proved as against a party when established by uncontradicted testimony of the party himself or his witnesses under circumstances which afford no indication that such testimony is the product of mistake or inadvertence, and when fact so proved is wholly irreconcilable with a presumption sought to be invoked, the presumption is dispelled and it disappears from the case.

5. Automobiles ⇐242(8)

Where pedestrian's own testimony, though confused, as well as that of defendant showed that pedestrian was crossing street outside crosswalk when struck by defendant's automobile, presumption of due care could not be invoked to raise a question of fact as to contributory negligence of pedestrian, though he had had difficulty in expressing himself both before and after accident and repeatedly testified that he did not remember exatly where he crossed street. Vehicle Code, § 560.

6. Automobiles ⇐245(72)

A pedestrian who crosses street outside crosswalk and without looking for approaching vehicles is guilty of "contributory negligence" as a matter of law. Vehicle Code, § 560.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Contributory Negligence".

7. Appeal and error ⇐927(3)

On appeal from order granting a nonsuit, the evidence and every favorable inference and presumption properly arising therefrom must be weighed in the light most favorable to plaintiff.

8. Automobiles ⇐242(8)

Defendant had the burden of proving contributory negligence of pedestrian struck by defendant's automobile.

9. Automobiles ⇐245(72)

Pedestrian's own testimony that he was crossing street at night outside crosswalk and without looking for approaching vehicles when struck by defendant's automobile established as a matter of law that pedestrian was contributorily negligent and, in absence of any evidence which would support a finding in favor of pedestrian on such issue, defendant was entitled to a nonsuit. Vehicle Code, § 560.

Fitzgerald, Abbott & Beardsley, Oakland, for appellant.

Charles V. Barfield, San Francisco, for respondent.

BRAY, Justice.

Action for personal injuries brought by a pedestrian against the driver of an automobile which struck him. Plaintiff appeals from a judgment entered on an order granting a motion for nonsuit.

Questions Presented.

While the basic question is whether there is any substantial evidence which would have supported a verdict for plaintiff, that question, in turn, depends primarily upon whether, under the facts, the presumption that plaintiff used due care applied.

Facts.

It is not necessary to detail all of the facts in the case. About 10:30 p. m. plaintiff, a pedestrian, was proceeding in a northerly direction across California Street in San Francisco when he was struck by an automobile operated by defendant, who was driving westerly along said street. At the place in question there is no marked crosswalk. It was defendant's contention that plaintiff was crossing the street outside of the crosswalk area and hence defendant had the right of way. Defendant so testified, and so did plaintiff. Defendant testified that when he saw plaintiff, defendant was 25 feet west of the westerly property line of Spruce Street; that plaintiff came from behind an approaching street car and was about 10 feet in front of defendant's car; that defendant stopped his car around 15 feet after hitting plaintiff, and that when he hit plaintiff, plaintiff landed on

the top of the car's hood and fell to the street; that he did not carry the body forward at all; that when his car stopped, plaintiff lay in the street approximately 15 feet behind the rear end of the automobile. A bystander and defendant carried plaintiff directly over to the sidewalk, placing him at a point which was 35 or 40 feet west of the west property line of Spruce Street. The person who helped carry plaintiff did not testify. Later other witnesses saw plaintiff in that spot.

A witness who arrived shortly after the accident testified that he found a pair of glasses (identified as plaintiff's) at the curb at a point which he marked on a photograph of the scene. They were at the northwesterly corner of the intersection where the curve of the curb starts to straighten out. This would be on a line with the property line at or near the westerly extremity of the crosswalk and about 35 feet easterly of where defendant claims plaintiff was when struck.

Plaintiff's testimony was vague and contradictory, due to difficulty in expressing himself, a difficulty which had existed prior to the accident. Since the accident he had had more difficulty in expressing himself and making himself understood as "his nerves are completely shot."

Concerning whether he crossed at the crosswalk, plaintiff testified: "I really don't remember whether I crossed at the intersection or I crossed, cut the corner, like * * *." He was asked where he was with reference to the pedestrian crossing when he started across California Street. He replied, "I don't remember, I don't know." Again:

"Q. Now, Mr. Ringo, you told your attorney—one of your attorneys, Mr. Myers, didn't you, that you didn't know whether you were crossing in the crosswalk or outside of the crosswalk, is that right? A. Yes, sir.

"Q. You told him you couldn't remember whether you were in the crosswalk or not, is that right? A. Between the crosswalk and about the middle—the middle of the—it is where they stop and let people off the street car, in between there some place.

"Q. You mean the safety zone there on the south side of California Street? A. Yes, sir, the south side."

He was then shown a photograph of the intersection, and marked on it the point at which he crossed, stating that it was "in between the middle and the place—and the place where the people turned, where the people cross, where the people cross." His testimony and his marking of the photograph (he later marked where he was when hit) show that he started from the safety zone which was west of the west end of the crosswalk and that he was also westerly of the latter when struck. In marking the photograph as to the point where he was struck, he said: "I can't remember exactly, but a little further than that, about there (indicating)." He later testified: "Q. Well, now is it not a fact, Mr. Ringo, that you know you were not crossing in the crosswalk at the time of this accident? A. I wasn't crossing in the crosswalk, no, but I was crossing about the middle of the—I don't know, I mean my—crossing in the middle of the—in the middle of the safety zone, then I—then I crossed over that way."

Concerning whether he looked to his right or east before starting to cross California Street, his testimony is likewise confused. He first said: "I looked at the car I just got off. I looked, I saw the lights, I guess the lights shining on the street, and I thought I got a glimpse of the lights shining on the street, so then I just crossed, to get across the street. Q. I see. Then were you hit by the automobile? A. Yes, sir." Inasmuch as after getting off the car which was on the northerly side of the street, plaintiff crossed to the southerly side, looked at an excavation there before he started to cross back, it is difficult to understand what is meant by seeing lights shining on the street. The streetcar meantime had gone west a few blocks and apparently was coming back. Plaintiff testified that before starting back he saw the lights of the streetcar coming towards him from the west.

(Defendant came from the east.) He later testified:

"Q. —you say that before you started to cross the street, you looked to your left, or to the west, and you saw a streetcar coming down there? A. I never turned to the left, I might glance a little to the left, so I could see the headlights of any car. You can generally see the headlights coming—coming. I didn't know it was a car, exactly, but I knew a car was coming, and I had enough time to cross over. I saw the headlights.

"Q. You are talking about a streetcar coming from the west? A. And the car was coming a little bit behind the streetcar, I think.

"Q. An automobile came from the west behind the streetcar? A. I imagine so, I didn't see it.

"Q. This is an automobile that was coming from the west? A. No, not from the west. Pardon me. From the east to the west.

"Q. That was while you were on the sidewalk, was it? A. No, I was crossing the—crossing the street.

"Q. Well, now, are you telling us that you looked to the east before you started to go across the street? A. I didn't look to the east, I saw the headlights of the car coming from the east and started to walk across the street then.

"Q. What did you see, the headlights of a streetcar or what? A. Automobile or streetcar, I knew something was coming and I had to hurry up and walk across.

"Q. Coming in which direction, from east to west or west to east? A. From east to west."

In his deposition he positively stated that he did not look to the east at all as the "quickest place to get hit from a car is coming from the west." When asked if he saw defendant's automobile any time before the accident he said he saw the headlights. He then denied that he had not looked to the east before the accident happened. On redirect examination his counsel asked if he could remember exactly what happened at the scene of the accident and he replied, "No, beause after I was hit, I became very emotional, and I couldn't help it, I just got emotional, I don't know what happened exactly, I know what happened before." Admittedly he received no head injury. He had previously testified: "Q. * * * Then were you hit by the automobile? A. Yes, sir. Q. Do you remember anything after that at all? A. Not too much, no."

Defendant moved for a nonsuit on the ground that the evidence affirmatively showed that plaintiff was guilty of contributory negligence as a matter of law. The court granted the motion. Plaintiff contends that there was evidence from which a jury could have found that plaintiff was crossing in the crosswalk. The question of whether he was in the crosswalk is of prime importance, for if he were he would have the right of way. Vehicle Code, § 560. He contends, first, that from his confused testimony the jury could have inferred that he actually was in the crosswalk when hit. We have set forth all his testimony on the subject and it is apparent that nowhere did he say he was in it. In fact he positively stated that he did not cross at the crosswalk and the line he drew on the photograph demonstrates it.

[1] Secondly, plaintiff contends that there was other evidence that plaintiff was in the crosswalk when hit. This is based upon the testimony of the witness Smith that he found plaintiff's glasses at or in the crosswalk and some 30 to 35 feet behind the point which defendant testified was the point of impact. Defendant testified that plaintiff walked into the side of the car, was cast up on top of the hood, rolled off and fell at practically the point of impact. Plaintiff contends that this testimony is inherently improbable, and, coupled with the place where the glasses were found, shows that plaintiff was in the crosswalk when hit. The testimony of the police officer was that the left front headlight was damaged, as well as the top of the hood, which would indicate that defendant was mistaken when he said plaintiff walked into the side of the car. However, there was nothing in this testimony that justified the

claimed inference that plaintiff was in the crosswalk. Everything that plaintiff claims pointed towards plaintiff being in that position was merely surmise or conjecture. The same is true as to the location of the glasses. No one can say where glasses will end up when their wearer is struck and thrown to the hood of a car and then off, as occurred here; and to determine that the mere fact that the glasses were found in a particular place is sufficient proof to justify a finding that he was hit at that place would be to base such a finding on mere surmise or conjecture.

Thirdly, plaintiff contends that in view of his confused way of testifying and his claimed lack of memory the jury was entitled to weigh, against his own testimony, the presumption that he used due care, and that the conflict between the presumption and his testimony was sufficient to send the case to the jury. This brings us to the question of when a plaintiff is entitled to the benefit of the presumption.

[2] Where a plaintiff is unable, because of loss of memory, to testify to his own conduct, the presumption applies as a species of evidence. See Douglas v. Hoff, 82 Cal.App.2d 82, at page 84, 185 P.2d 607, at page 608—where the plaintiff "lost all remembrance of the circumstances of her accident and * * * was unable to relate how it happened"; Satariano v. Sleight, 54 Cal.App.2d 278 at page 280, 129 P.2d 35 at page 37—where plaintiff "suffered a brain concussion and remembered nothing of what had happened after leaving the gymnasium" before the accident; Hoppe v. Bradshaw, 42 Cal.App.2d 334, at page 337, 108 P.2d 947, at page 948—where plaintiff in the accident sustained a "brain injury [which] resulted in a loss of memory to such an extent that he had no recollection of any of the incidents" from a time prior to the accident; Scott v. Sheedy, 39 Cal.App.2d 96, 102 P.2d 575—where the plaintiff had received a brain injury in the accident and testified that he could not tell anything about how the truck which struck him came into the opening of a barricade he was guarding.

[3] There are many cases holding that the presumption of due care may be weighed against other evidence where the plaintiff is dead and hence cannot testify. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Westberg v Willde, 14 Cal.2d 360, 94 P.2d 590.

[4] We have been able to find no case, nor have we been cited to one, which holds that a plaintiff is entitled to the benefit of the presumption of due care where his own testimony is directly contradictory to it. The presumption may be invoked by a party when "his evidence is not inconsistent therewith." Smellie v. Southern Pacific Co., supra, 212 Cal. at page 555, 299 P.2d at page 535. The presumption gives rise to a conflict in the evidence "unless the presumption on the one hand is irreconcilable with the evidence on the other hand" said the court in Mar Shee v. Maryland Assurance Corp., 190 Cal 1, at page 9, 210 P. 269, at page 273. The test is there stated: "* * * a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case." As to the presumption in question here, this test is approved in the Westberg case, supra, 14 Cal.2d at page 365, 94 P.2d 590.

[5] Applying such test to the facts of our case, it appears that plaintiff's own testimony as well as that of defendant dispels the presumption because it shows that he was not crossing the street within the crosswalk. Nor can plaintiff bring himself within the exception above mentioned "that the testimony is the product of mistake or inadvertence" by saying, as he did, that he "didn't remember." While he repeated such an expression, he positively testified more than once that he was not within the crosswalk. In fact, when he was showing on the photograph where he crossed the street, while saying he did not "remember

exactly" he moved the point "a little further than that, about there * * *." We can find no case where the presumption remains in the case after uncontradicted evidence to the contrary, merely because the plaintiff uses the expression "I don't remember" in connection with his own testimony showing that he did remember. As said in Mundy v. Marshall, 8 Cal.2d 294, 296, 65 P.2d 65, 66: "The manner in which the decedent was crossing the street having been covered by the plaintiff's own evidence, there is no room for the operation of the presumption that he was exercising due care, Paulsen v. McDuffie, 4 Cal.2d 111 [47 P.2d 709], and it cannot be relied upon to establish a conflict in the evidence." As said in Paulsen v. McDuffie, 4 Cal.2d 111, 119, 47 P.2d 709, 714: "It is difficult to see how there was any place for a presumption as to the plaintiff's conduct. What he did on that occasion was entirely covered by the evidence in the case, and there was neither necessity nor reason for indulging in any presumption upon that subject."

[6] While plaintiff's aunt testified that since the accident plaintiff had a great deal more difficulty in expressing himself and making himself understood, the difficulty is not that, because although his testimony was somewhat confused and he several times repeated that he did not remember, his testimony showed that he did remember and the one thing he did make clear was that he did not use the crosswalk. Moreover, plaintiff also made it clear that he did not look to the east before crossing the street. Under such circumstances it has been held that a pedestrian is guilty of contributory negligence as a matter of law. Weissman v. Seehusen, 55 Cal.App.2d 391, 393, 131 P.2d 10; White v. Davis, 103 Cal. App. 531, 542, 284 P. 1086.

[7-9] Taking every favorable inference and presumption properly arising from the evidence, and weighing the evidence in the light most favorable to plaintiff, as we are required to do in passing upon an order granting a nonsuit, Williamson v. Pacific Greyhound Lines, 78 Cal.App.2d 482, 177 P.2d 977, we are unable to find any evidence which would support a finding in favor of plaintiff, and hence the nonsuit was proper. While the burden of proof of the issue of contributory negligence is on the defendant, the evidence of plaintiff shows as a matter of law that he was contributively negligent. See Weissman v. Seehusen, supra, 55 Cal. App.2d 391, 131 P.2d 10; Foy v. Carlton, 29 Cal.App.2d 575, 85 P.2d 220.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



98 Cal.App.2d 743

GILLIES et al. v. MICHIGAN MILLERS MUT. FIRE INS. CO. et al.

Civ. 17531.

District Court of Appeal, Second District, Division 2, California.

Aug. 1, 1950.

Rehearing Denied Aug. 16, 1950.

Hearing Denied Sept. 25, 1950.

B. Allison Gillies and others, doing business as Acme Saw Works, a limited partnership, sued Michigan Millers Mutual Fire Insurance Company, a corporation, and Northwestern Mutual Fire Association, a corporation, for a decree of contribution. The Superior Court, Los Angeles County, Charles C. Burnell, J., rendered a judgment adverse to plaintiffs and plaintiffs appealed. The District Court of Appeals, Moore, P. J., held that an "excess" clause in fire policy issued by Fulton was improperly ignored in applying apportionment clauses of specific fire policies issued by defendants.

Judgment reversed with instructions and appeal from order denying appellants' motion for a new trial dismissed.

1. Insurance ⇐604

Where merchandise which was destroyed by fire was insured against fire under policies of specific insurance and of excess insurance issued by different insurers, and insurers gave assured their several drafts totaling amount of loss, with drafts being computed according to formula

of insurers under specific policies, with agreement that dispute as to extent of liability of each insurer should thereafter be adjusted between insurers, and insurers each took a "loan receipt agreement" from insured, insurers under specific policies were estopped from asserting loan receipts were fictitious, and insurer under excess policy could obtain decree of contribution from insurers under specific policies.

2. Insurance ⇐162, 504

A "specific fire policy" covers property at a specific location in a specific amount for a specified premium, and in event of a loss, insurer is liable to extent of its policy.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Specific Fire Policy".

3. Insurance ⇐504

Where there are two or more specific fire policies insuring same property, liability is prorated to extent of joint coverage.

4. Insurance ⇐504

If a merchant insures his merchandise in one store and pays a definite premium for fire insurance on merchandise, the insurance is "specific insurance" and in event of loss merchant can collect amount of insurance to extent of loss but not exceeding amount of policy.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Specific Insurance".

5. Insurance ⇐124, 138(1)

An insurance policy is merely a contract between insurer and insured and they may contract as they please so long as they do not violate regulatory statutes.

6. Insurance ⇐504

An "excess" fire policy does not attach until full value protected by specific insurance has been exhausted.

7. Insurance ⇐504

Where merchandise destroyed by fire was insured against fire under specific policies containing an apportionment of loss clause, and under an excess policy written after specific policies were written, the "excess" clause was improperly ignored in applying apportionment clauses of specific policies, as against contention of insurers under specific policies that they were liable for no greater portion of loss suffered by insured than amount insured under specific policies bore to entire insurance covering merchandise. Insurance Code, § 2071.

8. Insurance ⇐171, 502, 504

The "amount of insurance" under specific fire policy is the face value of policy, whereas "amount of liability" is a variable factor, dependent upon extent of loss and apportionment clause.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Amount of Insurance" and "Amount of Liability".

George Penney, Robert M. Newell, Theodore A. Chester, all of Los Angeles, Rein, Mound & Cotton, New York City, of counsel, for appellants.

Schell & Delamer, Sampson & Dryden and Jacob Swartz, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

Appeal from a judgment involving policies of "specific" insurance and "excess" insurance.

October 25, 1946, appellants suffered a loss by fire which destroyed their merchandise to the extent of $34,417.64. On that day they carried three policies of insurance against loss of such property by the following insurers in the following amounts:

Michigan Miller Mutual Fire Insurance Co.	$25,000
Northwestern Mutual Fire Association	5,000
Fulton Fire Insurance Company	80,000 [1]
Total	$110,000

1. $80,000 was taken as the basic amount for computing the annual premium on the policy whose liability fluctuated with the changing inventory. However, the policy fixed $115,000 as the maximum liability.

Each is referred to herein by the first word of its name.

Following the fire and presentation of claims, a dispute arose among the insurance carriers respecting the extent of liability of each of them under the terms of their respective policies. Being unable to reach an agreement as to the extent of the liability of each, they decided to reimburse their assured for the total loss sustained by the fire according to respondents' formula and thereafter to adjust disputed matters. Pursuant to such decision, within the knowledge of all, they gave to the assured their several drafts as follows:

Michigan,	$ 8,298.92
Northwestern,	1,659.75
Fulton	24,459.07

Thereupon each took from the assured a "loan receipt agreement." Before delivering its draft, Fulton required that it approve the loan receipt agreements executed by both respondents. The drafts issued by the insurers were drawn on forms customarily used by them. Within two months after the fire both respondents cancelled their policies. Two months later appellants filed this action on behalf of Fulton. The case was tried on a stipulation of facts and other documents. The court found that (1) Michigan and Northwestern issued their policies of fire insurance upon the merchandise of appellants; (2) respondents' policies were the only policies of specific insurance in force at the time of the fire; (3) appellants had excess insurance (Fulton's) to which no liability attached until such specific insurance had been exhausted; (4) the total insurance in effect on the day of the fire was $103,682; (5) Michigan's proportionate share of the loss is 25,000/103,682; Northwestern's is 5,000/103,682; and Fulton's is 73,682/103,682 or the balance, $24,459.07. The premium paid to Fulton was ascertained by taking the monthly average of the value of appellant's merchandise on hand for a year. The court found also that the Fulton policy contains the following provisions:

"5. 'Contributing Insurance Clause.' Permission is granted for other insurance written upon the same plan, terms, conditions, and provisions as those contained in the form attached to this policy, i. e., insurance written under this provisional reporting form. The insurance under this policy in accordance with its printed conditions or riders, shall contribute only with other insurance as herein above defined, against any peril insured by this policy.

"6. 'Specific Insurance.' Insurance other than described in the 'Contributing Insurance Clause' paragraph 5, shall be known as specific insurance for which permission is hereby granted. However, in the computation of the final premium it shall not be permissible to deduct or credit such specific insurance against the values shown in the monthly reports except when

"(a) It has been necessary to procure such insurance to protect values in excess of the limits of liability of this policy, or

"(b) It has been disclosed by written endorsement hereon showing location, expiration and amount.

"7. 'Excess Clause.' This policy does not attach to or become insurance against any peril upon property herein described which at the time of any loss is insured by 'specific insurance' as defined in paragraph 6, until the liability of such 'specific insurance' has been exhausted, and then shall cover only such loss or damage as may exceed the amount due from such 'specific insurance' (including the amount otherwise due from invalid insurance had same been valid, and including also the amount due from any uncollectible insurance) after application of any contribution, coinsurance, average, distribution, or other similar clauses contained in policies of such 'specific insurance' affecting the amount due thereunder, not, however, exceeding limits as set forth herein."

[1] Respondents now contend that the "loan" to appellant is a fiction; that since Fulton paid appellants it cannot obtain a decree for a contribution from respondents. The law is otherwise. Fireman's Fund v. Palatine Insurance Company, 150 Cal. 252, 255, 88 P. 907; Luckenbach v. W. J. McCahan Sugar Refining Company, 248

U.S. 139, 39 S.Ct. 53, 55, 63 L.Ed. 170, 1 A.L.R. 1522. In the latter case a loss occurred while the merchandise was in possession of a carrier whose bill of lading provided that the carrier shall have the full benefit of any insurance on the cargo. The policy warranted against liability for merchandise in the possession of any carrier who may be liable for loss or damage thereto. The insurer paid the shipper the amount of the loss by use of "loan receipts" whereupon action was brought in the shipper's name for the insurer's sole benefit. Mr. Justice Brandeis said that the insurer would not be liable to the shipper if the carrier was liable, but that if the insurer settled the loss before the carrier's liability had been determined the insurer would lose the benefit of all claims against the carrier to which it would be subrogated in the absence of a provision to the contrary in the bill of lading. If nothing should be recovered from the carrier the shipper could retain the loans as payment under the policies. Such devices are common business practice, declared the court and it is "creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice." The doctrine thus announced is sound and is applicable here even though the policies involved there specifically provided for the procedure. Moreover, respondents contend with poor grace against the method used by appellants since the loan receipts, the amendments to the drafts and the stipulation of facts clearly prove that the parties intended to devise a means of reimbursing appellants promptly with the view of later determining the liability of each insurer. Respondents knew that Fulton could have refused to pay more than its admitted liability and thereby could have compelled the assured to sue each company. The doctrine of estoppel is justly invoked against respondents' asserting the loan receipts to be fictitious.

Two Kinds of Policies

[2, 3] The contracts sold to appellants by Michigan and Northwestern are standard fire insurance policies which provide fixed and inflexible coverage for which definite premiums are paid. They are known as "specific insurance." A "specific" policy covers property at a specific location in a specific amount for a specified premium. In event of a loss, the insurer is liable to the extent of its policy. If there are two or more policies of specific insurance they prorate the liability to the extent of their joint coverage. But if the assured carries a "floater" or "monthly reporting" policy, the issuer thereof shares the liability on a different basis.

[4] If a merchant insures his merchandise in one store and pays a definite premium therefor, it is specific insurance and in event of loss he can collect the amount thereof to the extent of his loss but not exceeding the amount of his policy. But if the amount of his stock fluctuates from day to day or if he intends to move his stock from one location to another, or if he maintains several establishments, he contracts with the insurer to pay a premium on his monthly average inventory, and in event of loss he recovers the value of merchandise destroyed. Such an arrangement is effected by including in his policy a provisional amount clause such as is found in Fulton's policy, to wit:

"The amount of insurance provided for hereunder is provisional and is the amount on which the deposit premium is based, it being the intent of this insurance to insure hereunder the actual cash value of the property described herein, subject to the limits of liability and provisions for other insurance hereinafter provided."

Thus the insurance sold by the "provisional reporting" form is not a fixed amount as in the specific insurance sold to appellants by respondents. The first premium on the Fulton policy was based upon the average value of appellants' stock estimated at $80,000. But it was subject to revision according to the monthly inventories submitted to Fulton. At the end of the policy period the actual premium rate was determined by the monthly average value of the merchandise minus the amount of such specific insurance as was in force

during the same period. Paragraph 7 of Fulton's policy emphatically excludes from its coverage any peril to property named in the policy "which at the time of any loss is insured by *specific insurance* as defined in paragraph 6, until the liability of such specific insurance has been exhausted, and then shall cover only such loss or damage as may exceed the amount due from such specific insurance."

Basis of Respondents' Contention

[5-7] Inasmuch as respondents' policies are of the "specific" type written on the Standard Form containing an apportionment of loss clause[2], as required by section 2071, Insurance Code, they conceive that they are liable for no greater proportion of the loss suffered by appellants than the amount insured bore to the entire insurance covering the property. In this they contend in vain. Fulton's policy was written subsequent to those of respondents and it provides definitely for Fulton's liability to attach only to the loss in excess of $30,000 of insurance provided by respondents. It follows that the court below erred in ignoring the "excess" clause of the Fulton policy and in applying the apportionment clauses of respondents' policies. It has been long established that an insurance policy is merely a contract between insurer and insured; that they may contract as they please so long as they do not violate regulatory statutes; and that an "excess" policy does not attach until the full value protected by specific insurance has been exhausted. Fairchild v. Liverpool and London Fire & Life Insurance Company, 51 N.Y. 65; Klotz Tailoring Company v. Eastern Fire Ins. Co., 116 App.Div. 723, 102 N.Y.S. 82; Wilson Co. v. Hartford Fire Ins. Co., 300 Mo. 1, 254 S.W. 266; United Underwriters Ins. Co. v. Powell, 94 Ga. 359, 21 S.E. 565; Hale v. Central Manufacturers Mutual Ins. Co., Mo.App., 93 S.W.2d 271. In the Klotz case the plaintiff carried three policies. Two were specific insurance and one was an excess or floater policy just as in the case at bar. Defendant's policy was for $932.05; the other specific policy was for $7,160.25 while the floating insurance of Globe & Rutgers Fire Insurance Company was for $50,000. The Globe policy contained a clause substantially the same as paragraph 7 of Fulton's policy. Defendant contended that it was liable for only its proportionate share of the total loss ($12,833.79) that the amount of its policy bore to what it claimed was the entire insurance in force at the time of the fire and that such share amounted to only $583.87, already paid. The court rejected such contention, and after approving and quoting from Fairchild v. Liverpool & London Fire & Life Ins. Company, supra, the court said: "In the light of the Fairchild Case, therefore, there seems to be no doubt of the exact meaning and effect of the provision contained in the Globe Company's policy. By its terms it did not cover or protect any of the property affected by the defendant's policy of insurance; that is, it did not and could not affect any part of such property which was fully covered by defendant's policy, and failed to reach that interest in the property which was covered by defendant's policy. In this view, the Globe policy did not in any wise affect the interest in the property which was destroyed, covered by the defendant's policy and the other specific insurances; and the 'whole insurance,' referring only to the property that was covered by the defendant's policy, does not include the floating insurance, that issued by the Globe Company, for it covered other property." [116 App.Div. 723, 102 N.Y.S. 84]

The Missouri court was equally as emphatic in maintaining the doctrine thus announced. In Wilson Company v. Hartford Fire Insurance Company, supra, the plaintiff and other packers had procured a policy of specific insurance from defendant through the Kansas City Livestock Exchange which was comprised of all meat

2. "This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, and expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property whether valid or not, or by solvent or insolvent insurers."

packers who kept their beef steers in the yards. For convenience the exchange was named as the assured. The only limitations on the Hartford insurance were that it would not exceed $150 on any one steer or $35 on any one hog. Wilson Company being insured as a member obtained an excess policy with Globe & Rutgers in the amount of $100,000 which provided that its insurance "shall be considered surplus insurance, where any specific insurance exists on any of the property hereby insured, and this insurance shall not apply or contribute, until the amount collectible from all such specific insurance shall have been exhausted." [300 Mo. 1, 254 S.W. 281]. Hartford Fire maintained that it should pay nothing or only its proportionate share of the total insurance. However, the excess clause of the Globe & Rutgers policy was too explicit to be overcome by mere exclamations of disappointment. "A floating policy", said the court, "is one intended to supplement specific insurance on property, and attaches only when the latter ceases to cover the risk. * * * The reason for the creation and the purpose of this character of policy is to provide indemnity for property which cannot, because of its frequent change in location and quantity, be covered by specific insurance. * * * Floating or surplus insurance is a form of indemnity * * *. By its terms it cannot become operative until the prior insurance has been exhausted."

The excess clause of a floating policy cannot be defeated by a distinct clause of a policy of specific insurance on the same property where the pro-rata clause of the latter provides that all insurance on the property whether specific or floating is to be considered in the apportionment. In such a situation, the court held the floating policies did not insure the same property and the insurance under the floating policy did not cover any property then protected by specific insurance. United Underwriters Ins. Co. v. Powell, supra.

Notwithstanding the clarity and force of the cited decisions and the soundness of their logic, respondents insist that under the apportionment clauses in their policies they should be required to pay no more than that proportion of the loss which the amounts of their policies bear to the entire insurance. That amount they assert to be $133,682[3], the aggregate of the face amounts of the three policies. They argue that they should be held respectively for 25,000/133,682 and 5,000/133,682 of the total loss of $34,417.64 and Fulton for 103,682/133,682, the balance of the loss. They cite Air Transport Mfg. Co. v. Employers Liability Ins. Corp., 91 Cal.App.2d 129, 204 P.2d 647—a decision of this court. It does not apply to the issues here involved. Pacific Indemnity first issued a public liability policy to Air Transport with a limit of $25,000 for injury to one person. The policy carried an apportionment clause similar to those in the policies of respondents at bar. Later Employers issued to American U-Drive Truck Rentals Company a public liability policy with a limit of $25,000 with an omnibus clause extending coverage to any person operating a vehicle with U-Drive's consent. Also, it contained a type of excess clause to the effect that if other valid insurance of the same type protected the insured, Employers' policy was to be null and void, except that if the limit of Employers' policy exceeded such other policy Employers should be liable for only such excess. Air Transport rented a car from U-Drive and an accident occurred during its use. The court determined the liability of each company as of the time of the accident, holding that because of its apportionment clause the Pacific policy did not constitute such unconditional insurance as would render void the policy of Employers and that by reason of the latter's policy, that of Pacific afforded only pro-rata insurance. There the court decided but one question: was Employers' policy rendered void because of the existence of other valid insurance? Or to be more specific, was the policy issued prior to that of Employers' valid insurance within the meaning of the

3. This figure is derived from the fact that on the day of the loss the total inventory amounted to $103,682. Respondents contend that the value of the Fulton policy is equal to this sum.

"other insurance" clause of the defendant's policy? The court held that the term, "valid insurance," contemplated insurance which provides unconditional coverage and that since the Pacific policy afforded *only pro-rata* coverage it did not meet the requirement. The "excess" portion of the clause was not involved. This is readily understood by supposing there had been no excess provision whatever in defendant's policy. The court would still have determined that Employers' policy was not void and would have apportioned the liability on the basis of the apportionment clause in Pacific's policy and reached the same result, to wit, Employers was liable for one half of the loss up to $12,500. Still another distinguishing feature of the Air Transport decision is to be found in the fact that the Fulton policy conditioned that its insurance should not attach if there was other insurance, valid or invalid, on the property. Had the policy of Employers' Liability Insurance Corporation contained the same language this court could not have held otherwise than that the Employers' policy was void.

[8] Respondents attempt to dilute the force of paragraph 7 of the Fulton policy. They cannot do so for the reason that its provisions give it a character that determines the issues of the controversy. They admit that paragraph 7 provides that the insurance of Fulton does not attach until the liability of "specific insurance" has been exhausted; that it expressly covers a loss which exceeds the *amount due from* specific insurance; that it does not say that its insurance does not attach until the face value or the amount of the specific insurance is exhausted. They thereby contend that the purport of the excess clause was to afford insurance for all loss exceeding that proportion of the loss for which respondents were liable after including the amount of Fulton's policy in the apportionment; that Fulton anticipated that the liability of any specific insurance might be reduced below its face amount by such contribution, coinsurance or other similar clause contained in the specific policy. In advancing such argument respondents rely on the distinction between "amount of insurance" and "amount of liability," the former being the face value of a policy whereas the "amount of liability" is a variable factor, dependent upon the extent of the loss and the apportionment clause. "The amount of the insurance is the maximum amount of the risk assumed, the face of the policy; the amount of the loss is the adjusted damage by fire to the property covered by the policy; the amount of the liability as to any particular loss is the amount of the adjusted damages properly apportionable to the policy." Stephenson v. Agricultural Insurance Co., 116 Wis. 277, 93 N.W. 19, 21; see also Farmers Feed Co. of New Jersey v. Scottish Union & Nat. Ins. Co., 173 N.Y. 241, 65 N.E. 1105, 1107. This distinction is proper, but the cases relied upon were concerned only with apportionment problems and in neither was there a contention by any insurer that its policy was excess over another. In a situation such as the one at bar where one policy is excess, this *liability* of the specific policies is to be determined independently of the surplus insurance. This is clear from the language of paragraph 7 itself which specifically provides that the policy "does not * * * become insurance * * * until the liability of such specific insurance has been exhausted." It is also true that Fulton's policy anticipated a reduction of the liability of any specific policies below their face values through contribution, coinsurance or like clauses, but this provision was inserted for the benefit of the insured and not for the protection of other insurers. Such clauses are distinct from apportionment provisions. The former operate to reduce the amount the insured could recover and would function regardless of whether or not there was a provisional policy in the picture.

The implication and intendment of the judgment of the court below if held valid would foreshadow grave perils for full insurance coverage in California. If it were correct, it would render difficult and grossly expensive full protection against loss by fire. Where a merchant has a number of establishments with a fluctuating inventory in each of them with all protected by one or more specific policies he must have the

benefit of a flexible coverage to be certain of the continuity as well as the growth of his business. If he had only a $20,000 specific policy on his stock in store and a fire should destroy it while housing a $100,000 stock, the loss might prove to be tragic. To maintain specific insurance for the latter sum would be exceedingly costly. If a provisional reporting or "excess" clause policy may be carried, allowing the merchant to pay a premium on his average monthly stock he may thereby be protected fully at all times. But he cannot without great expense do so if he may not contract to report monthly the value of his merchandise on hand and pay a premium in accordance therewith. Where attempts have been made to defeat the purpose of the provisional reporting and flexible premium scheme the courts have emphatically rejected them. Peters v. Great American Insurance Co., 5 Cir., 177 F.2d 773.

Respondents have attempted to distinguish a number of authorities cited in support of the proposition that surplus insurance attaches only after the full coverage of specific policies has been exhausted. They contend that the language of the excess clause referred to in the cited decisons is utterly different from that in the Fulton policy. But a momentary perusal of the cases demonstrates that they are peculiarly apropos. Their excess clauses are substantially identical with that in the Fulton policy. In United Underwriters Insurance Company v. Powell, 94 Ga. 359, 21 S.E. 565, 566, the provision in a policy other than the specific insurance was "this policy shall not apply to or cover any cotton which may at the time of loss be covered, in whole or in part by * * * any more specific insurance." In response to the specific insurer for a contribution the court ruled that under the quoted clause it was not entitled thereto. The excess clauses in the Fairchild and Klotz cases, supra, provided that the excess policies should not cover property covered by specific insurance. In Hale v. Central Manufacturers Mutual Insurance Company, Mo. App., 93 S.W.2d 271, and Cutting v. Atlas, 199 Mass. 380, 85 N.E. 174, the excess insurance policy provided that it should not apply until all specific insurance is exhausted. Respondents erroneously conclude that they applied the formula used in Federal I. Credit Bank v. Globe and Rutgers, D. C., 7 F.Supp. 56, 59, in computing their proportions of the liability to appellants. The monthly reporting policy in the Federal case did not provide that it shall be "excess" over "specific" insurance. On the contrary the court held the effect of the clause was that in event of loss all insurance "both specific and monthly reporting, contribute to the loss in proportion to the amounts insured by the respective policies; the amount of contributing insurance covered by the specific policies being the amounts specified therein; and the amount of the reporting policies as contributing insurance being the excess of value at risk after deducting the specified amount in the specific policies." The reporting policies in that case did not provide for "excess loss insurance but was excess contributing insurance," and would contribute with the specific policies whereas the Fulton policy provides that it will pay the excess over the liability of specific insurance.

Respondents likewise misinterpret Wilson Co. v. Hartford Fire Insurance Company, supra. Despite their efforts to distinguish the decision by contending that "there was no excess of value at risk, and therefore the Globe Rutgers was not liable for any proportion of the loss," it is clear that the Hartford policies had no *amount of insurance* stated but that they named a limit to be paid on any one hog or steer. The court did not suggest that the amount of insurance in relation to the value of the entire property was to be considered. The excess policy contained a paragraph to the effect that it is surplus insurance "where any specific insurance exists on any of the property hereby insured, and this insurance shall not apply or contribute until the amount collected from all specific insurance shall have been exhausted." The court held that the defendant was obliged to pay the extent of its full liability. Since the loss was only $68,000, it was fully protected by the specific policy and consequently the excess insurers escaped liability.

From a review of the authorities, considering the clear and explicit meaning of Fulton's excess clause, the effect of the judgment of the trial court is exactly what it should be if the author of that clause had concluded with a provision for Fulton to apportion any loss with the specific insurers: the antithesis of the intention of the excess clause as written.

The judgment is reversed with instructions to enter judgment as prayed. Appeal from order denying appellants' motion for a new trial is dismissed.

McCOMB and WILSON, JJ., concur.



98 Cal.App.2d 805

PEOPLE v. ROSS et al.

Cr. 4447.

District Court of Appeal, Second District, Division 1, California.

Aug. 8, 1950.

Hearing Denied Sept. 7, 1950.

William Winston Ross, alias Billy Ross, Letha Ahause, and Betty Ann Schrader, etc., were convicted in the Superior Court, San Luis Obispo County, Ray B. Lyon, J., of burglary and conspiracy to commit burglary, and from the judgment and an order denying a motion for a new trial, the defendants William Winston Ross and Letha Ahause appealed. The District Court of Appeal, Drapeau, J., held that the evidence supported the convictions.

Judgment and order affirmed.

1. Criminal law 633(2)

Statutory proceedings for reading information to the jury are not mandatory. Pen.Code, § 1093.

2. Criminal law ⇐1166½(10)

Where information jointly charged three defendants with burguary and conspiracy to commit burglary, and one defendant pleaded guilty to both counts, and court permitted information to be read to the jury and allowed jury to be informed of pleas of the respective defendants, but cautioned that pleas were not to be taken as any evidence of guilt of other defendants as to any particular count, fact that court did not direct clerk not to mention the guilty plea of one defendant did not deprive remaining defendants of a substantial right. Pen.Code, § 1093.

3. Criminal law ⇐369(2)

Generally, in criminal case, evidence is admissible that tends naturally, logically, and by reasonable inference to establish any fact material for the prosecution or to overcome any material matter to be proved by the defense whether it embraces commission of another crime, and whether the other be similar in kind or part of a single design.

4. Criminal law ⇐372(10)

In prosecution for conspiracy to commit burglary of a filling station, evidence that defendant had been caught in attempted burglary of another filling station while using same tactics subsequent in time to offense for which defendant was being tried was admissible.

5. Burglary ⇐41(1)

Evidence supported convictions of burglary.

6. Conspiracy ⇐47

Evidence supported convictions of conspiracy to commit burglary.

Richard P. Harris, San Luis Obispo, for appellants.

Fred N. Howser, Attorney General, Donald D. Stoker, Deputy Attorney General, for respondent.

DRAPEAU, Justice.

On a peaceful Sunday afternoon in the quiet little city of Paso Robles the complaining witness was sitting in a chair near the cash register at his gas filling station. He was reading a Sunday paper. A colored lady came to the door, told him she could not start her car, and asked him to help her.

He went with her to the stalled car, which was parked behind the filling station, next to a grease rack. A white girl was in the rear seat. The car was so placed as to keep him away from the front of the filling station, and out of sight of the cash register.

After several minutes trying to start the engine, customers came to the front of the filling station; so he left to take care of them. Two paid for gas by signing credit slips. The next customer tendered him a $5 bill. When he went to the cash register to make change he found it had been robbed of $152.00.

The police were called. They took the white girl into custody as she was walking down a street not far from the filling station. They took into custody the colored lady, and a colored gentleman, as they were standing at a street corner.

While he was being searched at the police station, the man said to the officers: "I might as well tell you, I robbed the till." He also told the officers that the girls had nothing to do with taking the money. And in substance he repeated this statement to the district attorney.

Information was filed in the Superior Court, charging all three defendants with burglary, first count, and, in the second count, with conspiracy to commit burglary.

The white girl pleaded guilty to both counts. Judgment was suspended, and she was granted probation for five years, the first three months to be spent in the county jail.

Defendant Ross was admitted to bail. While on bail he was convicted of a felony in Los Angeles county, and sent to the penitentiary.

In this case, he pleaded guilty to the first count, not guilty to the second count, was convicted by a jury of the second count, waived time for judgment, and was sent to the penitentiary.

Defendant Ahause pleaded not guilty to both counts, was convicted on both, and sent to Tehachapi. She had a prior felony conviction.

Sentences as to both on both counts were fixed to run concurrently.

These three people left Los Angeles together the evening before the burglary, to go to San Francisco. They were driving an old 1936 jalopy, which easily heated up and was subject to vapor lock. They stopped overnight at Santa Maria, and had breakfast in San Luis Obispo.

Before reaching Paso Robles the car began to act up. Defendant Ross took the wheel from defendant Ahause and drove to the position where the complaining witness tried to start it. He said he first went across the street, and coming back, on the spur of the moment, "hit the till."

Assuming the burglary was planned by all three of these people, everything went wrong. The car really would not start. Undoubtedly this accounted for the swiftness with which they were apprehended. Water had leaked through the cylinder-head gasket and into the spark plugs.

A passing car undertook to push, and got hung up on the bumpers. Bystanders disengaged the bumpers, and part of the bumper on the jalopy came off. Defendant Ahause told them to tear the rest of the bumper off; that she had to get to San Luis Obispo right away to see her sick mother. Other kindly bystanders tried to help in various ways. One poured gasoline into the carburetor, but still the car would not go.

Defendant Ahause was visibly upset and disturbed; she told several witnesses she had to get to San Luis Obispo right away to see her sick mother. In truth she had no mother in San Luis Obispo, and she wasn't going that way anyway.

She testified that her car had not been parked behind the filling station, but was at the curb on the street—directly in conflict with the testimony of the complaining witness. She and defendant Ross pretended they did not know each other.

On the trial each of these two defendants testified that defendant Ahause had no idea that a burglary was to be committed by defendant Ross. Nonetheless, as stated, the jury convicted them.

Three assertions of error are presented:

First, it was error for the court, upon the voir dire examination of jurors, to comment

upon the fact that the defendant, Betty Ann Schrader, had entered a plea of guilty.

Secondly, it was error for the clerk to read to the jury the information filed against the three defendants, and then to state that the defendant, Betty Ann Schrader, had pleaded guilty.

Thirdly, it was error to admit in evidence the fact that the defendant, Ross, after the offense here tried, had been caught in an attempted burglary of a filling station, using the same scheme: A car drives up and asks for help; while the filling station attendant is busy at the car, the defendant rifles the till.

And defendants argue that the evidence is insufficient as a matter of law to support their convictions.

Relative to the plea of guilty by the defendant, Schrader, the record shows the following colloquy between court and counsel during the examination of a prospective juror:

(By Mr. Harris, counsel for defendants): "Q. In other words, the fact that Ross has already entered a plea on Count 1 might prejudice you against any testimony that he might give in connection with any other matters submitted here? A. I believe that's true, Mr. Harris."

(By Mr. Somogyi, assistant district attorney): "Q. And you feel that that factor would make it difficult for you to act fairly and impartially? A. Yes, sir.

"Mr. Harris: Thank you very much, Mr. Patterson.

"The Court: Well, I think we ought to have some more discussion about this matter. There may be some confusion in the juror's mind. After all, we want to get a jury here today, and I want to be sure that there is a prejudice.

"Q. You understand that this one defendant has pleaded guilty to one count in the information. That is closed; he has pleaded guilty to it. Then there is a charge of a conspiracy in the second count which he has—he is being tried upon.

"Mr. Somogyi: With two other defendants.

"Mr. Harris: One other defendant.

"The Court: One of the other defendants has pleaded guilty to both counts, and will not be tried.

"Mr. Harris: Well, now, if your honor please, I object to that on the ground that it is a prejudicial statement by the Court, and ask the Court to instruct the jury to disregard it.

"The Court: I am going to have the information read.

"Mr. Harris: I can't help that. I still make the request of the Court that you instruct the jury to disregard that. I believe that is a matter that is not properly before this jury.

"The Court: Just for the record, I deny it.

"Mr. Harris: We ask at this time, your honor, that a mistrial be declared.

"The Court: That will be denied * * *."

During the reading of the information, and before the pleas were stated, the Court made the following statement to the jury:

"The Court: Well, I will do this: The information, of course, as I have stated to the jury before, is not to be taken as evidence of the guilt of any defendant, and in this information three defendants have been charged jointly, and the plea of any one or more of the defendants to any one or more of the counts is not to be taken as evidence of the guilt of the remaining defendants to one or more of the counts. The clerk will proceed with the giving of the pleas of the respective defendants to the charges of the information, and again I want to caution the jury that the pleas of the respective defendants are not to be taken as any evidence of the guilt of the other defendants as to any particular count."

[1, 2] The information was read as directed by Section 1093 of the Penal Code. Proceedings set forth in that section are not mandatory. People v. Willard, 150 Cal. 543, 89 P. 124. The trial court quite properly could have directed the clerk not to mention the plea of the defendant, Schrader. However, under the circumstances in this case, this court is not able to say that the defendants were deprived of a substantial right. People v. Reese, 136 Cal.App. 657, 29 P.2d 450.

Was it error to admit in evidence the fact that the defendant, Ross, had been caught in an attempted burglary of a filling station, using the same tactics, but subsequent in time to the offense for which he was being tried?

However the profession may differ as to the admissibility of evidence of other crimes, it would seem that the question has been set at rest in California in the landmark case of People v. Peete, 28 Cal.2d 306, 169 P.2d 924.

[3] In that case it is said: "* * * evidence that is relevant is not excluded because it reveals the commission of an offense other than that charged. 'The general tests of the admissibility of evidence in a criminal case are: * * * does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not.' * * * 'But, whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion.'" 28 Cal.2d at page 315, 169 P.2d at page 929.

[4] In prosecutions for burglary, testimony showing a plan, scheme, or system used by defendants is properly admissible in evidence. People v. King, 4 Cal.App.2d 727, 41 P.2d 593.

Finally, with respect to defendants' argument that the evidence is insufficient to support the verdict:

[5, 6] The facts have already been recounted. It was the province of the jury to find in accordance with the theory of the people—first, that there was a burglary committed by all three defendants; and secondly, that they conspired to commit the crime.

The two defendants who stood trial went to the filling station together; by a ruse the complaining witness was called away from the station and the cash register; defendant Ross actually took the money; the actions and conduct of defendant Ahause pointed to her guilt and to her complicity in the crime.

The judgment and the order denying defendants' motion for a new trial are, and each is affirmed.

WHITE, P. J., and DORAN, J., concur.



99 Cal.App.2d 296

PEOPLE v. CUNNINGHAM.

Cr. 4471.

District Court of Appeal, Second District, Division 1, California.

Aug. 31, 1950.

Shirley Cunningham was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., for grand theft from the person, and she appealed. The District Court of Appeal, White, P. J., held that the evidence warranted the trial judge's conclusion that the crime was committed within the statutory limitation period of three years before filing of the information.

Judgment affirmed.

1. Criminal law ⇐335

In prosecution for grand theft from the person, defendant's plea of not guilty put in issue allegation of information that offense was committed on or about certain date within statutory limitation period of three years before filing of information, and burden rested on the people to show that offense occurred within such period, though they were not required to prove commission thereof on exact date alleged. Pen.Code, § 800.

2. Criminal law ⇐304(1)

Courts may draw inferences predicated on judicial notice of calendar dates of week on which certain days fall and related astronomical dates as contained in

scientific works. Code Civ.Proc. § 1875, subd. 8.

3. Criminal law ⇐304(4)

The meanings of English words and phrases and of idioms of vernacular language are proper subjects of judicial notice.

4. Criminal law ⇐323

In determining whether evidence showed that grand theft from person was committed within statutory limitation period of three years before filing of information charging such offense, trial court was justified in concluding that complaining witness, stating in answer to question as to age of her daughter, who was with witness at time of theft, that "she is six," meant that child was six years old. Code Civ.Proc. § 1875, subd. 1; Pen.Code, § 800.

5. Criminal law ⇐565

In prosecution for grand theft from the person, evidence warranted trial judge's conclusion that crime was committed in year during which information was filed and hence within statutory three-year limitation period before filing of information. Pen.Code, § 800.

6. Larceny ⇐65

Evidence supported conviction of grand theft from the person.

7. Criminal law ⇐316

Where defendant made no attempt, by her own testimony or otherwise, to contradict, explain or deny any of incriminating evidence and circumstances shown against her, trial judge was entitled to consider such circumstances in determining defendant's guilt of crime charged. Const. art. 1, § 13.

Walter L. Gordon, Jr., Los Angeles, for appellant.

Fred N. Howser, Attorney General, Stanford D. Herlick, Deputy Attorney General, for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with the crime of grand theft from the person, alleged to have been committed on or about the 23d day of September, 1949.

Trial by jury was duly waived and the cause was submitted to the court on the transcript of the proceedings had at the preliminary examination.

The court adjudged the defendant guilty as charged in the information. Motion for a new trial was denied. From the judgment of conviction defendant prosecutes this appeal.

Epitomizing the facts which gave rise to this prosecution, the record reflects that the complaining witness, a housewife, saw the defendant at a department store in the city of Los Angeles. It was about 2 o'clock in the afternoon. Complaining witness had her purse along with her and inside the purse was a coin purse containing $24 (two $10 bills and four $1 bills). While in the store the larger purse was closed. She did not open her purse while she was in the store. Defendant and another woman bumped into the complaining witness, the defendant being next to the latter. They were side by side for about five minutes when defendant left. When the complaining witness was about to pay a saleslady for a purchase she found that her purse was open and the coin purse had been abstracted therefrom. She instituted a search for the defendant and finally found her in an adjacent department store. Following the defendant out of the store the complaining witness approached her and asked if defendant had been in Grant's store with her, telling her also that the witness' coin purse was missing. The complainant asked defendant if she had it and the latter answered that she did not, at the same time exhibiting her own purse. At that point the complaining witness saw her purse beneath the blouse of the defendant; it was partly caught in defendant's brassiere and partly showing. The complainant directed the attention of the defendant to the purse and the latter denied that it belonged to the former. Complaining witness retrieved it. Thereupon police officers arrived and the defendant said to the complaining witness,

"What do you want now that you have your purse?" When she obtained her purse from the defendant, complaining witness noticed that there was $80 in it. When the defendant took the purse out of her blouse a $10 bill dropped to the sidewalk. She was arrested at that time.

The complaining witness was at the store with her "little girl". The purse was hanging on the complaining witness' arm. Defendant was a total stranger to the complainant.

A police officer testified that he had a conversation with the defendant regarding the accusation made against her. The conversation took place at the Lincoln Heights Jail on September 26th at 11 a. m. Defendant told the officer that she offered the complaining witness her purse and money back but that the complaining witness was not satisfied. Defendant admitted that she had been a professional pickpocket all her life. When asked how the complaining witness' purse got in her brassiere, defendant answered, "I'm not going to cop out to you about that." Defendant did not take the witness stand in her own behalf nor was any testimony offered in her defense.

[1] Appellant's sole contention is that the evidence is insufficient to show that the offense was committed within three years prior to the filing of the information, which is the statutory period of limitations for prosecutions for this offense. Penal Code, section 800. The provisions of the code section just cited require that the information must be filed within three years after the alleged commission of the offense. In the instant case the information was filed within three years of the date when the crime was alleged to have been committed for it is therein alleged that the offense was committed on or about September 23, 1949, and the information was filed on October 14, 1949. However, it must be conceded that appellant's plea of not guilty put in issue this allegation of the information, and while the people were not required to prove the date as alleged with exactness, the burden rested upon them to show that the offense took place within the period of limitation. People v. James, 59 Cal.App.2d 121, 122, 138 P.2d 30.

In the case now engaging our attention the only specific dates shown in the testimony are "Friday, September 23", testified to by the complaining witness on direct examination, and "September 26th", supplied by a police officer who interrogated appellant following her arrest.

The year of the offense not being shown in the testimony would appear to bring this case within the principles announced in People v. James, supra. However, a critical examination of the record reveals that on cross-examination of the complainant the following occurred:

"By Mr. Bernay:

"Q. *On this day in question,* you were in Grant's Department Store? A. This lady here?

"Q. You were in Grant's Department Store? A. Yes, I was there.

"Q. What time was it? A. About 2:00 o'clock.

"Q. Were you there alone or were you with someone? A. *I was with my little girl.*

"Q. *How old is she?* A. *She is six.*

"Q. You were shopping in Grant's Department Store? A. Yes, sir. I was going to.

"Q. When and where did you first see the defendant? A. There at Grant's." (Emphasis added.)

The plea of not guilty put the specific date, September 23, 1949 in issue. The complaining witness testified that the offense occurred "on this day in question". The only "day in question" was the day "in issue". The term "in issue" is synonymous with the term "in question". In Webster's Unabridged Dictionary, Second Edition, 1942, at page 1319, the following definition is given:

"—at or in issue. In controversy, at variance; disputed; *in question.*" (Emphasis added.)

Appellant did not challenge the correctness of the date put "in issue" by the information.

[2] There is another circumstance in evidence which gives reasonable support to an inference that the offense was proven to have been committed on Friday, September 23, 1949. The preliminary examination was held on Friday, September 30, 1949. At the time of said preliminary hearing the age of the daughter of the prosecutrix was, according to the latter's testimony, "six". Since her daughter accompanied the complainant to Grant's store on the day of the alleged theft it follows that the offense occurred at least within six years and two weeks prior to October 14, 1949, the date of the filing of the information. Courts may draw inferences predicated on judicial notice taken of calendar dates of the week on which days fall and related astronomical dates as contained in scientific works. Code Civ.Proc. § 1875, subd. 8; People v. Malone, 213 Cal. 406, 407, 2 P.2d 332; People v. Mayes, 113 Cal. 618, 624–627, 45 P. 860; People v. Chee Kee, 61 Cal. 404; In re Whitlatch, 60 Cal.App.2d 189, 193, 140 P.2d 457; Hiner v. Olson, 23 Cal.App.2d 227, 235, 72 P.2d 890, 73 P.2d 945.

An examination of the calendar for the year 1949 shows that September 23d was a Friday. There was no Friday, September 23d, in any year within six years and two weeks prior to October 14, 1949, the date when the information was filed. In fact, the last preceding year in which September 23d fell on a Friday was the year 1938. The following chart indicates the day of the week on which September 23d fell for the years 1938 through 1949:

Date	*Day of Week*	
September 23, 1938	Friday	*p. 17
September 23, 1939	Saturday	p. 11
September 23, 1940	Monday	p. 21
September 23, 1941	Tuesday	p. 14
September 23, 1942	Wednesday	p. 15
September 23, 1943	Thursday	p. 16
September 23, 1944	Saturday	p. 26
September 23, 1945	Sunday	p. 12
September 23, 1946	Monday	p. 13
September 23, 1947	Tuesday	p. 14
September 23, 1948	Thursday	p. 24
September 23, 1949	Friday	p. 17

The preliminary hearing was held on Friday, September 30, 1949, so that the record itself reveals that September 23, 1949, also fell on a Friday.

The only reasonable conclusion possible in this case is that the date of the offense was established as September 23, 1949.

The daughter of the prosecutrix who was with her on the date and at the time of the alleged offense being six years of age on September 30, 1949 when the preliminary examination was held, could not have been with the mother on a "Friday, September 23" other than in the year 1949, because during the lifetime of the six-year-old daughter, September 23 came on a Friday only in the year 1949.

[3, 4] Furthermore the meaning of the statement "six" was for the trier of fact. The meaning of English words and phrases and of idioms of the vernacular language are proper subjects of judicial notice, and the court was entitled to infer that when one states the age of a person without naming the time unit involved, that such designation refers to the number of years of age, that if any other designation of time is intended it is usually stated with particularity, such as "six weeks" or "six months". The court was justified in concluding that when the complaining witness in answer to the question concerning her daughter's age "How old is she?" replied, "She is six" that the witness clearly meant that her child was six years of age. Code Civ.Proc. § 1875, subd. 1; Clarke v. Fitch, 41 Cal. 472, 477; Estate of Winzeler, 42 Cal.App.2d 246, 249, 108 P.2d 720; People v. Thompson, 119 Cal.App. 310, 311, 312, 6 P.2d 301. The same conclusion is

* The page numbers are references to the applicable pages in The Perfect Calendar by Henry Fitch, Rev.Ed., 1930, Funk and Wagnalls Co., New York and London. The above dates may also be verified by reference to the chart found in The World Almanac and Book of Facts, New York World-Telegram, N. Y., N. Y., 1950, at page 811.

inescapable even though, as appellant urges, the complaining witness in testifying to the age of her daughter as "six" may have meant "six weeks", or "six months". In either event, the child could have been with her mother on a September 23d only in the year 1949.

[5] The question presented is whether under all the circumstances of the case, there was sufficient evidence to warrant the trial judge in concluding that the crime was committed in the year 1949, and we think it was sufficient. Proof of the appellant's guilt was overwhelming, in fact it was demonstrated by testimony, including her own admissions. The testimony and inferences to be drawn therefrom, coupled with facts which the court was entitled to take judicial notice of, was enough to satisfy the trier of fact that the date of the offense was that charged in the information. Considering all the evidence and circumstances of the case, there could hardly be any reasonable doubt that the offense was committed on or about September 23, 1949. People v. McGregar, 88 Cal. 140, 143, 145, 26 P. 97; In re Application of O'Connor, 80 Cal.App. 647, 653, 252 P. 730; People v. Bastio, 55 Cal.App. 2d 615, 617, 131 P.2d 614; People v. Vicencio, 71 Cal.App.2d 361, 363, 364, 162 P.2d 650.

[6, 7] Finally, it should be said that the foregoing authorized inferences which support the judgment of conviction, while sufficient in themselves, People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, are strengthened by the fact that the appellant made no attempt by her own testimony or otherwise, to contradict, explain or deny any of the incriminating evidence and circumstances shown against her. Therefore, as provided by our State Constitution, Article I, section 13, the trial judge was entitled to consider these circumstances in determining appellant's guilt. People v. Adamson, 27 Cal.2d 478, 486, 491, 165 P.2d 3; People v. Platnick, 71 Cal.App.2d 767, 771, 163 P.2d 766. What we have herein stated in no way militates against the holding in People v. James, supra. The facts and circumstances surrounding that case are easily distinguishable from the factual situation presented in the case at bar.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



99 Cal.App.2d 238

PEOPLE v. WALKER.

Cr. 737.

District Court of Appeal, Fourth District, California.

Aug. 28, 1950.

William Robert Walker was convicted in the Superior Court, San Diego County, John A. Hewicker, J., of assault with a deadly weapon, and he appealed. The District Court of Appeal, Griffin, J., held that the evidence was sufficient to sustain conviction and that failure of court to instruct jury on certain elements of self-defense and circumstantial evidence was not prejudicial to defendant.

Judgment affirmed.

1. Assault and battery ⇦92

Evidence sustained conviction for an assault with a deadly weapon. Pen.Code, § 245.

2. Assault and battery ⇦92

In prosecution for assault with a deadly weapon, evidence that defendant had drawn small pocket knife and used it to cut victim three times in stomach and chest sustained conclusion by jury that pocket knife was "deadly weapon". Pen.Code, § 245.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Deadly Weapon".

3. Assault and battery ⇦56

Specific intent is not an element of the crime of assault with deadly weapon, and

where evidence is sufficient to establish character of instrument as charged it is not necessary for prosecution to prove specifically that defendant intended to injure complaining witness, as such intent may then be implied from doing of an unlawful act. Pen.Code, §§ 20, 245.

4. Assault and battery ⇐92

In prosecution for assault with deadly weapon, evidence that defendant had fled scene after stabbing victim, and had made inconsistent statements to interrogating officer, established consciousness of guilt. Pen.Code, §§ 20, 245.

5. Criminal law ⇐351(2)

In prosecution for assault with deadly weapon, statement by defendant to naval intelligence officer that he had warned victim to stay away from him and that victim struck him in face, after which he drew a knife and cut victim, were inconsistent with his statements on witness stand that victim had surprised him by an attack, after which he had cut victim, and were indicative of his consciousness of guilt. Pen.Code, §§ 20, 245.

6. Criminal law ⇐351(1)

False statements for purpose of misleading or warding off suspicion are indicative of a consciousness of guilt.

7. Criminal law ⇐1160

In prosecution for assault with deadly weapon, whether defendant struck at and injured victim in reasonable self-defense was question to be passed on by jury and judge on a motion for new trial, and appellate court would not review finding adverse to defendant. Pen.Code, § 245.

8. Criminal law ⇐823(6)

In prosecution for assault with deadly weapon, an instruction that right of self-defense existed only as against an unlawful attack was not objectionable on ground that it left question of whether victim was acting lawfully for jury to decide without guiding instruction, in view of fact that jury was completely instructed on right of self-defense. Pen.Code, §§ 245, 692, 693.

9. Criminal law ⇐829(5)

Refusal by court to give jury defendant's proffered instruction on self-defense was not prejudicial where jury was fully and fairly instructed.

10. Criminal law ⇐814(17)

In prosecution for assault with deadly weapon, refusal to instruct jury on elements of circumstantial evidence was not prejudicial to defendant, where state's case rested chiefly on direct evidence. Pen. Code, §§ 245, 692, 693.

John C. Thompson, San Diego, for appellant.

Fred N. Howser, Attorney General, Donald D. Stoker, Deputy Attorney General, for respondent.

GRIFFIN, Justice.

It is charged in the information that defendant assaulted one Wilton Roy Young with a deadly weapon. He pleaded not guilty. A trial by jury resulted in a verdict of guilty.

On appeal it is contended that the verdict is contrary to the law and evidence and that the court erroneously instructed the jury. Young and a girl whose name he did not know were sitting at a bar. Defendant, a sailor in the United States Navy, entered the bar and seated himself next to the girl. Defendant bought the girl a drink of beer. She did not drink it but removed herself to a stool on the other side of Young. All parties had several drinks of beer. Apparently the girl was talking loudly and it seemed to interfere with defendant's conversation. About that time defendant reached across and slapped the girl in the face with his hand. Young got down from his stool and grabbed defendant on the left shoulder, telling him to "lay off her", to "watch it". Young testified that he made no gesture to hit defendant with his hand and that he did not see a knife nor did he see defendant put his hand in his pocket, but after a struggle he felt his stomach burning; it was cut; that he turned around, went to the front door "holding his insides in"; and that he was subsequently taken to the hospital.

A physician testified that he examined the victim and found that he had several

stab wounds, one in the left chest, one in the abdomen, and one on the right hand; that surgery was performed and consisted of an exploratory examination of his abdomen to determine if there was any injury of the intra-abdominal organs. He found no internal injuries. However, three loops of intestines, which were protruding about four inches from the abdominal wound, were replaced. The lacerations of the chest and hand were closed and approximately 100 multiple sutures were taken in the three wounds. The knife blade did not hit any of the intestines. The wound in the chest had gone no farther than the ribs. Young's recovery was rather rapid and uncomplicated.

One witness testified that she did not see the knife just before the victim staggered backwards, but earlier in the evening she saw the defendant in the possession of a pocket knife three or four inches long, with a blade of about the same length and that the defendant had it on the bar; that part of the time it had been open and part of the time it had been closed.

In his haste to make his escape the defendant left his hat and neckerchief and returned to his ship. Two days later he was apprehended and questioned by a Naval Intelligence officer. Defendant stated to him that he was sitting at the bar talking to a sailor and that during the conversation some girl sitting in the vicinity kept interrupting his conversation; that he told her to keep quiet on several occasions but that she refused to do so; that he finally "told her to shut up" and shortly thereafter Young took offense and approached him; that he told Young to stay away and that instead Young struck him in the face and that he backed in the direction of the wall; that defendant again warned him to stay away and that he then drew a knife and cut Young, but did not recall how many times; that he left the bar-room, threw the knife away, and returned to the ship.

On the witness stand the defendant testified that he was seated at the bar talking to another sailor; that they had been drinking beer; that a girl started to sit on defendant's right, placing her hand on his shoulder and that he ordered her a beer but she did not drink it and did not sit there; that she left and sat down on the other side of another sailor and kept interrupting the conversation between defendant and that sailor; that he might have slapped her but did not remember it; that Young came around from the rear, took hold of his shoulder and jerked him around; that he did not know what was happening and did not know the victim had left his stool; that the knife was lying on the bar and that he struck at Young but did not remember hitting him with his fist, but "only with a knife" and that "the only strike must have cut him". He then testified that he was "scared" and went back to the ship; that he did not think he would have struck the victim if he had not come up from behind and grabbed him and jerked him around.

On cross-examination he testified, without objection, that he had formerly been convicted of a felony involving the use of a knife but that the offense was later shown to be a misdemeanor. He then stated that the knife used was a small pocket knife, small enough to place in the pocket of "Navy Blues"; that he did not remember cutting Young three times but he must have used an underhand motion. He then testified that the knife was lying open in front of him because he was trimming or cleaning his fingernails and that he purchased the knife the day before from a shipmate on the ship.

[1, 2] The first challenge as to the sufficiency of the evidence is defendant's contention that it shows his actions were "reflexive only", and that self-defense was established as a matter of law. These contentions are without merit. The evidence and the law as applied to the evidence sufficiently established defendant's guilt of the crime with which he was charged. Sec. 245, Penal Code. The evidence as to the manner of the use of the knife and the injury inflicted thereby was such that the only rational conclusion the jury could have reached under the circumstances was that the knife was a deadly weapon. People v. Petters, 29 Cal.App.2d 48, 52, 84 P.2d 54; 3 Cal.Jur., p. 205, sec. 21; People v. McCoy,

25 Cal.2d 177, 188, 153 P.2d 315; People v. Arguilida, 85 Cal.App.2d 623, 193 P.2d 478.

The claim that the defendant did not make an unlawful attempt, with a criminal intent, to commit a violent injury upon the victim is untenable. There is no question that Young was seriously injured. Defendant's contention that the evidence only shows "that the response of the defendant was reflexive and not a premeditated or voluntary act as is required to constitute an act done with criminal intent" is equally untenable.

[3-6] Under Section 20 of the Penal Code, "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." Specific intent is not an element of the crime of assault with a deadly weapon and where the evidence is sufficient to establish the character of the instrument as charged it is not necessary for the prosecution to prove specifically that the defendant intended to injure the complaining witness. Such intent may then be implied from the doing of the unlawful act. People v. McCoy, supra; People v. Lim Dum Dong, 26 Cal.App.2d 135, 78 P.2d 1026; People v. Sanchez, 35 Cal.2d 522, 219 P.2d 9. The fact that defendant made three stabs, instead of just one as a person acting reflexively might do, might well negative defendant's contention. Defendant's consciousness of guilt is established by both flight and prior inconsistent statements. People v. Anderson, 90 Cal.App.2d 326, 333, 202 P.2d 1044. The evidence shows inconsistent statements in that defendant told the Intelligence Officer that he warned the victim to stay away from him; that the victim struck him in the face and that he again warned him and at that time he drew a knife and cut the victim. False statements for the purpose of misleading or warding off suspicion are indicative of a consciousness of guilt. People v. Anderson, supra; People v. Cole, 141 Cal. 88, 74 P. 547; People v. Cooper, 81 Cal.App.2d 110, 183 P.2d 67.

[7] The argument that the evidence established self-defense as a matter of law is without merit. Whether defendant struck at and injured the victim in reasonable self-defense was a question to be passed upon by the jury and by the judge on a motion for new trial. This adverse finding will not be reviewed on appeal. People v. Mitchell, 40 Cal.App.2d 204, 104 P.2d 545; People v. Alexander, 1 Cal.App. 2d 570, 37 P.2d 125.

As to the court's instructions, defendant charges error on the issue of self-defense. Defendant offered an instruction to the effect: "That a person assailed has the right to repel force with force; that he may imply the right to defend himself from apprehended danger to any extent which, to him is apparently necessary when he acts in a reasonable manner." And that even if the jury finds as a fact that the "complainant was not armed with any weapon at the time of the combat, nevertheless, that did not deprive the defendant of his right to defend himself with that degree of force which, to a reasonable man, might have appeared necessary under the appearances and circumstances there present." Defendant also charges error in refusing to give another proposed instruction in the language of CALJIC Inst. No. 327, p. 304, under "Homicide". As to this latter instruction defendant argues that he was prejudiced by the court's refusal to so instruct the jury because the jury was left to decide his fate without having been adequately instructed that the right of self-defense exists whether the danger of great bodily harm is real or apparent, and also that the jury was left without adequate instruction as to how to determine whether the defendant acted as a reasonable man or not. The court fully instructed the jury on the subject of self-defense and particularly stated that it was lawful for a person who was being assaulted and who had reasonable grounds for believing that bodily injury was about to be inflicted upon him to stand his ground and defend himself from such attack and in doing so he might use all force and means which he believed to be reasonably necessary, and which would appear to a reasonable person in the same or similar circumstances to be necessary to prevent the in-

jury which appeared to be imminent, and that in exercising his right to lawful self-defense he was not required to retreat; that "If an assault with a fist is being made on a person but without intent to kill or do great bodily harm and if the assault is not likely to produce great bodily injury and if the one thus attacked is not deceived as to the character of such an assault, he is not justified in using a deadly weapon in self defense"; that the right of self defense exists only against an unlawful attack; that the right does not exist even though bodily injury appears probable as against a person who, in threatening or appearing to threaten injury, is acting lawfully.

[8] In this connection defendant contends that the court erred in giving this instruction, particularly in respect to the statement that "The right of self-defense exists only as against an unlawful attack. The right does not exist, even though bodily injury appears probable, as against a person who, in threatening or appearing to threaten injury, is acting lawfully." This instruction is found in CALJIC p. 500, No. 624, which cites People v. Craig, 152 Cal. 42, 91 P. 997, and secs. 692 and 693 of the Penal Code in support thereof. The claim is that although this instruction contains the correct abstract statement of the law, it was prejudicial to defendant herein because it left a question of whether the victim was acting lawfully for the jury to decide, and gave it no further instruction to guide it as to whether he was acting lawfully.

[9] No instructions were offered by the defendant on the question of the lawfulness of the victim's acts. The evidence shows that the victim did not make an unprovoked attack. Even if it could be assumed that he did, the jury was completely instructed on the defendant's right of self defense to an assault. Defendant cannot complain because no further instructions were given on this subject. Even if it could be assumed under the evidence that defendant was entitled to have the proffered instructions on self defense given, we have carefully examined all instructions, both given and refused, and conclude that the jury was fairly and fully instructed and that no prejudice resulted to the defendant. People v. Lopez, 32 Cal.2d 673, 197 P.2d 757; People v. Moody, 62 Cal.App.2d 18, 143 P.2d 978; People v. Wheeler, 75 Cal.App.2d 360, 367, 171 P.2d 62.

The last claim is that the court failed to instruct the jury on the subject of circumstantial evidence. Defendant's position is that at least two elements of the case rest upon circumstantial evidence: (1) That criminal intent must be established by circumstantial evidence; and (2) That the standard upon which a reasonable man would act must be proved by circumstances which surrounded the occurrence. Defendant proposed an instruction that the jury was not permitted, "on circumstantial evidence alone, to find the defendant guilty of the crime charged against him unless the proved circumstances not only are *constant* with the hypothesis that the defendant is guilty of crime, but are irreconcilable with any other *national* conclusions." This instruction was refused. In addition the court refused an instruction to the effect that "When the case which has been made out by the people against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt."

[10] Assuming that the italicized portion of the first instruction may have been but typographical errors, we nevertheless conclude that under the evidence here presented, a refusal to give such instruction was not prejudicial error. It is quite apparent that the case, as made out by the people, did not rest entirely or chiefly on circumstantial evidence, but rested chiefly on direct evidence. People v. Corlett, 67 Cal.App.2d 33, 48, 153 P.2d 595, 964; People v. Lapara, 181 Cal. 66, 70, 183 p. 545. The jury was fully instructed that the defendant was presumed to be innocent until proved guilty beyond a reasonable doubt and that where the evidence "is susceptible

of two constructions or two interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt." It was further instructed with respect to all the essential elements of the crime, including intent, and was instructed extensively and correctly on all issues, including that of self defense. We conclude that no prejudicial error resulted.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



99 Cal.App.2d 137

BARDIN v. CASE et al. (two cases).
Civ. 17127, 17128.

District Court of Appeal, Second District, Division 1, California.

Aug. 22, 1950.

Rehearing Denied Sept. 11, 1950.

Hearing Denied Oct. 19, 1950.

Actions by Robert S. Bardin and by Aline S. Bardin against F. W. Case and J. M. Loyd for injuries sustained by plaintiffs in a collision between an automobile driven by Robert Bardin and an automobile operated by defendant Loyd and registered in the name of defendant Case. The two actions were consolidated for trial. The Superior Court, Los Angeles County, Frank G. Swain, J., entered judgments for the plaintiffs against the respective defendants and the defendants appealed. The District Court of Appeal, White, P. J., held that the record presented no substantial evidence to warrant an inference of contributory negligence on the part of the plaintiffs and evidence established that the automobile which collided with plaintiffs' automobile was operated with the permission of defendant Case.

Judgments affirmed.

1. Negligence ⇐136(9)

Contributory negligence, like negligence, is a question of fact for jury, except where trial court can hold as a matter of law that only one inference can be rationally drawn from evidence.

2. Automobiles ⇐245(73, 79, 88, 89)

Where on-coming motorist swerved to his left across highway and collided with plaintiffs' automobile which had turned to right in effort to avoid collision, contention that plaintiff driver could have swerved to left, and evidence that he had previously suffered a broken back, had been treated for exophthalmic goitre and had an eye condition which required him to wear tinted glasses was not sufficient to require submission to jury of question whether plaintiff driver was contributorily negligent or his wife was contributorily negligent in not taking control of vehicle prior to accident or acting to aid in prevention of accident when she saw motorist approaching.

3. Evidence ⇐54

An inference of fact must be based on substantial evidence, not conjecture.

4. Trial ⇐139(1), 142

In order to justify submission of any question of fact to jury, proof must be sufficient to raise more than a mere conjecture or surmise that fact is as alleged and must be such that a rational, well-constructed mind can reasonably draw from it conclusion that fact exists, and when evidence is not sufficient to justify such inference, court should refuse to submit question to jury.

5. Automobiles ⇐206, 207

Where on-coming motorist shot across road directly into path of plaintiffs' automobile and plaintiff husband who was driving had a second at most in which to react, he was not required to anticipate negligence on part of motorist and could not be held guilty of contributory negligence because in a moment of imminent peril he failed to take course that careful consideration after fact showed that he ought to have taken.

6. Automobiles ⇐244(22)

Evidence established that at time of collision with plaintiffs' automobile any pre-

vious restrictions on defendant driver's use of automobile were no longer in effect after defendant driver and defendant owner made their deal whereby defendant driver was to buy the automobile and that at time of collision defendant driver was operating automobile with permission of the defendant owner. Vehicle Code, § 402.

7. Automobiles ⇐19

An agreement of sale coupled with transfer of possession, irrespective of compliance with provisions of Vehicle Code regulating motor transfer, operates as a consent and permission to buyer to use automobile in way in which such property is customarily used and for all reasonable purposes. Vehicle Code, § 402.

8. Appeal and error ⇐989
Trial ⇐178

In passing on propriety and legality of granting a motion for a directed verdict, neither appellate court nor trial court is authorized to weigh evidence or determine where preponderance lies and appellate court is limited solely to considering evidence for purpose of determining whether any substantial evidence appeared which would support a verdict contrary to that directed.

9. Trial ⇐139(1), 141

The trial court may direct a verdict where evidence is undisputed, or is of such conclusive character that court, in exercise of a sound judicial discretion, will be compelled to set aside a verdict returned in opposition to it.

10. Trial ⇐68(1)

The granting or denial of a motion to reopen the case to strike out testimony is committed to sound discretion of trial judge.

11. Trial ⇐69

Where after all evidence was in and trial court had announced its conclusion to instruct jury that at time of collision with plaintiffs' automobile defendant driver had permissive use of vehicle from defendant owner, owner moved to reopen case to enable him to strike out his alleged irresponsive self-serving conclusion given by him on direct examination by his own counsel on ground that owner's counsel had not heard him make statement that after agreement to sell was made with defendant driver, owner considered automobile to belong to defendant, denial of motion was not an abuse of discretion as to have granted motion would have amounted to striking concededly competent evidence of a party's admission.

12. Appeal and error ⇐1048(6), 1056(1)

In actions by husband and by wife for injuries sustained when their automobile collided with defendant driver's on-coming automobile which had swerved across the highway in front of them, exclusion of defendant owner's cross-examination of defendant driver, and independent evidence of motorist's verbal acts and admissions concerning his interest in owner's automobile when there was no offer to prove purchase was conditional or that it was coupled with restrictions on use of automobile by defendant driver, was not reversible error. Vehicle Code, § 402.

13. Appeal and error ⇐1056(1)

In actions by husband and by wife for injuries sustained when automobile operated by defendant driver crossed highway and collided with plaintiffs' automobile, exclusion of testimony that defendant driver told defendant owner's wife on eve of his departure that he intended to go by train, as bearing on probable restrictions on defendant driver's use of automobile, was not reversible error. Vehicle Code, § 402.

Forrest A. Betts, Betts, Ely & Loomis, all of Los Angeles, William C. Ring, Los Angeles, of counsel, for appellant F. W. Case.

Walter C. Harbert, Lasher B. Gallagher, Los Angeles, for appellant J. M. Loyd.

Thomas F. McGrath, Spray, Gould & Bowers, Los Angeles, for respondents.

WHITE, Presiding Justice.

These appeals arise out of two actions brought respectively by Robert S. Bardin and his wife, Aline Bardin, to recover damages for personal injuries sustained by

them in a collision between a Dodge automobile driven by Mr. Bardin and a Plymouth automobile operated by defendant J. M. Loyd and registered in the name of defendant F. W. Case. The two actions were consolidated for trial and heard before a jury, which returned verdicts in favor of each of the plaintiffs and against both defendants. Judgments were entered on the verdicts, the judgments against defendant Case in each action being limited to $5,000.00 under the provisions of section 402 of the Vehicle Code. Each of the defendants has appealed from the respective judgments against him.

The two main contentions of appellant Case are that the court erred in instructing the jury that as a matter of law defendant Loyd was operating the Plymouth automobile with the permission of Case, and erred in instructing the jury that there was no evidence of contributory negligence on the part of plaintiffs. The only contentions of appellant Loyd are that the court erred in taking the issue of contributory negligence from the jury and in refusing Loyd's profferred instructions on the subject of contributory negligence.

Turning to the evidence, it appears that at about noon on August 24, 1947, plaintiff, with his wife as a passenger, was driving north on Highway 99 (the Ridge Route), and defendant Loyd was driving south on the same highway. The weather was clear and the pavement dry. The paved portion of the roadway contained three marked lanes. The accident occurred at a point about 25 feet north of the northerly entrance to a service station known as "Five Mile Garage" located on the east side of the highway about five miles south of the summit of the Ridge Route. As the two vehicles approached the service station, each in its proper lane, the Loyd car suddenly veered to its left, came diagonally across the road, and struck the Bardin vehicle, which had been swerved to the right in an effort to avoid the collision. When the cars came to rest, the Loyd car was on the pavement facing southeast, while plaintiffs' car faced northeast and was partly on the pavement and partly on the shoulder. The State Highway Patrol found twenty feet of skid marks behind plaintiffs' car and seventy feet of skid marks behind the car of defendant Loyd. Just above the Five-Mile Garage the roadway curves to the northwest. From the diagram contained in the appendix to appellant Case's brief, it would seem that the Loyd car did not swerve, but simply failed to follow the curve in the roadway, with the result that it proceeded directly into the path of plaintiffs' car.

There were no eyewitnesses to the accident other than the persons involved. Plaintiff Mrs. Bardin testified that her injuries caused a lapse of memory as to events preceding and following the accident, and she could recall none of the circumstances of the collision. Defendant Loyd also testified that as a result of his injuries he could not recollect the circumstances of the collision.

Considering the claim of both appellants that the jury should have been permitted to find on the issue of contributory negligence, it becomes necessary to summarize the testimony of plaintiff Robert S. Bardin. In substance, he testified that he saw the other car coming down grade in the right-hand lane when it was possibly 100 to 150 yards away. There were no cars ahead of him. When the distance between the two cars was between 125 and 150 feet, the other car suddenly changed direction and headed straight across the highway, when it became apparent to him that there was going to be a collision; that there was "absolutely nothing that could be done" about it. He headed his car for the right-hand side of the highway and immediately put on his brakes while he was two or three feet inside the lane. The shoulder to his right was about eight feet wide. The impact rendered him momentarily unconscious. On cross-examination he testified that he had maintained a speed of 35 miles per hour until he anticipated the collision. He had traveled the Ridge Route several times. He was in a position to observe the Five-Mile Garage when he was about 100 yards away from it. As he approached the garage he was aware of the possibility of automobiles going in and out and that in traversing the Ridge Route automobiles fre-

quently become hot and are parked at service stations, but he did not recall any cars parked at the time of the accident.

Defendant Loyd testified under section 2055 of the Code of Civil Procedure, that he stopped for fuel, food and a short rest of about one hour south of Merced, and stopped again for "naps" south of Fresno and Bakersfield. We did not believe he was asleep just before the accident, but did not recall the impact. He did not recall stating after the accident that he had been without sleep or that he fell asleep before the accident, and did not recall a purported statement to the Highway Patrol apparently bearing his signature. His last recollection before the accident was rounding a slight curve north of the Five-Mile Garage. He testified he was alert and his sight unimpaired. He "had in mind that having climbed most of the grapevine and starting down on the other side, I might need to have gas and oil checked." He recalled seeing the plaintiffs' car, but nothing further concerning the accident.

A doctor called by plaintiff testified on cross-examination that plaintiff Robert S. Bardin had previously suffered from a broken back, requiring extensive treatment, and that he had also treated him for an exophthalmic goitre. It was admitted that Mr. Bardin wore tinted glasses, that most of his teeth had been extracted, and that he was afflicted with hay fever. It was further undenied that Mrs. Bardin was the registered owner of the Dodge automobile and a competent motor vehicle operator.

Appellant Case urges that the jury might have found, "from conflicting evidence or inferences that plaintiffs or either of them were contributorily negligent." The argument in this respect occupies fifteen pages in appellant's brief. Summarized, it is that under the evidence the jury might have reasonably concluded that Mr. Bardin failed to act as a reasonably prudent man, in that he could have braked more sharply and turned to the left into the center or passing lane, and thus avoided the accident; and further, that Mrs. Bardin, knowing of her husband's previous back injury, his previous operation for goitre, resulting possibly in slowed reaction, and his eye condition which required tinted glasses, was negligent in not either taking control of the vehicle prior to the accident or acting to aid in prevention of the accident when she saw the vehicle of defendants approaching. The same contentions are advanced by appellant Loyd. These arguments, ably presented as they are, cannot prevail.

[1-4] There is no question here as to the principles to be applied. Contributory negligence, like negligence, is a question of fact for the jury, except where the trial court can hold as a matter of law that only one inference can be rationally drawn from the evidence. Anthony v. Hobbie, 25 Cal. 2d 814, 818, 155 P.2d 826; Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868; Kosloskye v. Cis, 70 Cal.App.2d 174, 160 P.2d 565. The question presented to us is whether, under the evidence, any inference of contributory negligence can rationally be drawn. We are of the view that the record presents no substantial evidence to warrant such an inference. The possibility of such negligence may be conceded, but that is not sufficient. An inference of fact must be based upon *substantial* evidence, not conjecture. "In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists; and, when the evidence is not sufficient to justify such inference, the court should refuse to submit the question to the jury." In re Calkins' Estate, 112 Cal. 296, 306, 44 P. 577, 580.

Appellant Case argues that the jury could have found from the evidence that Mr. Bardin, who was familiar with the route, knew or should have known, that cars might cross the highway in order to stop for service at the garage; that he saw Loyd's car change direction while 150 feet away and then believed a collision was imminent; that a collision could have been avoided only if plaintiffs' car was slowed sufficiently to enable Loyd to pass in front of it, or if plaintiffs' car was turned to the left so as to pass behind Loyd's car. It is pointed out that plaintiffs' brakes

were in good condition, and therefore their car could have been stopped within less than 113 feet, but that there were only 20 feet of skid marks behind the plaintiffs' car. The jury could have found, it is urged, that Mr. Bardin was negligent in that, perceiving the imminence of collision, he failed to turn the five or six feet to the left which would have prevented the accident.

It is argued, in effect, that Mr. Bardin should have anticipated a car turning toward the garage. The evidence is that the accident occurred 25 feet north of the north entrance to the garage. There is no evidence that Loyd gave any signal indicating an intention to turn. Plaintiff was driving at a lawful rate of speed—35 miles per hour.

Appellant Case argues further: "Mr. Bardin's testimony as to his earliest knowledge of danger and when he first applied his brakes and turned his car would not have been conclusive on the jury, who could have found from all circumstances, including the physical evidence, that he negligently failed to avail of a reasonable opportunity to avert the collision, * * *. Or the jury could have inferred from the length of plaintiff's skid marks and the fact that their speed was apparently not retarded until the last 20 feet before the impact, that their brakes were defective, or not timely applied or that they were driving at an excessive speed, either of which was negligence. * * *"

[5] The "circumstances, including the physical evidence," warrant only one conclusion—that without warning, the Loyd car shot across the road directly into the path of plaintiffs' car, and that plaintiff Mr. Bardin had perhaps a second, at the most, in which to react. Plaintiff driver was not required to anticipate negligence on the part of the other driver, Bingham v. Greenamyer, 25 Cal.App.2d 467, 77 P.2d 867, nor may he be held guilty of contributory negligence because in a moment of imminent peril he failed to take the course that careful consideration after the fact shows that he ought to have taken. Karr v. Parks, 40 Cal. 188, 193.

Further discussion along this line would serve no useful purpose. It can only be said that, had the jury been instructed upon contributory negligence and returned a verdict for the defendants, a new trial would have been mandatory and it would have been an abuse of discretion to deny it. Our conclusions in this regard apply also to the argument that Mrs. Bardin was guilty of contributory negligence, as well as to the contentions on appeal of appellant Loyd.

The court instructed the jury that there was no evidence that Loyd was acting in the scope of his employment at the time of the accident, but that defendant Case was liable if the car registered in his name was used with his permission, express or implied, and that upon this second theory, "in view of the testimony of the defendant Case himself, the defendant Loyd, at the time of the collision, was driving the automobile with the permission of Case." Appellant Case attacks this instruction upon the grounds (1) that the court erred in taking this issue from the jury, and (2) that the court abused its discretion in denying his motion to reopen the case to enable him to move to strike the testimony of Case that after a tentative agreement for the sale of the automobile to Loyd was made, "from then on I considered the car Loyd's."

Loyd was employed by defendant Case at Los Angeles. There was evidence from which it could be concluded that prior to the purported sale hereafter discussed Loyd was authorized to use the vehicle only to go to and from work and on business errands for Case, although Loyd testified that there was no restriction on his use of the vehicle. At the time of the accident Loyd was admittedly operating the vehicle for a purpose of his own, returning from Berkely, whence he had gone in connection with the enrollment of his son at the University of California. About two weeks before the happening of the accident, the question of Mr. Loyd's buying the vehicle came up, and with reference to this point Loyd testified:

"To the best of my remembrance, your Honor, Mr. Harris (an employee of Case)

was talking with Mr. Case, on the walk in front of the office, and mentioned to Mr. Case that one of his men, a field man, would like to buy a car; and that this car that I was driving had been mentioned; and so Mr. Case called me out and asked me if I would like to have the car; and I said, 'Yes'; that I would have to have transportation; but as I recall, no further conversation took place at that time, your Honor; at least no arrangements were made. I asked what the price this gentleman was offering was and Mr. Harris said $300.00.

"* * * I said I would have to have transportation and if some arrangement could be worked out, probably we could get together, or words to the same effect. * * *"

Appellant Loyd testified that no further conversations were had and nothing further was done about the contemplated transaction. However, appellant Case testified, with respect to the purchase of the vehicle: "Jim Loyd came out. I said, 'Well, Jim, we have got a chance to sell the Plymouth now and Dan James here, a truck driver, wants to buy it, and you are entitled—we thought it was only no more than fair to give you the first chance to buy it.' He said, 'Okay; I will take it'; *and from then on I considered the car Loyd's.* * * * He (Loyd) said 'I am going to put my boy in school * * * in Berkely, and I am pretty short of money right now, and I would like to make arrangements to pay for it weekly, if you are not going to be too tough on me it will be all right.' He said, 'I think after the boy gets up there and we get organized a little bit, I can pay you $10 a week on the car.' I said 'That is perfectly all right.'" With respect to the indorsement of the ownership certificate and reregistration of the vehicle, Mr. Case testified, "I told him (Loyd) when he got around to it to make the transfer, that is, so that things would be in order. He said he would." (This was never done.) Mr. Case further testified:

"Q. Did you at any time tell Mr. Loyd his use of the automobile was restricted to any particular area? A. I did.

"Q. When was that? A. When he took possession of the car.

"Q. What did you tell him? A. I told him he could drive it back and forth to home and down to the bank and to the post office or wherever I would send him.

"Q. And you told him that his use of the car was restricted for that purpose? A. That is what I told him. That was the conversation."

[6] Appellant Case devotes much of his brief to argument as to the effect of an informal sale, or agreement of sale, and the liability of the registered owner under section 402 of the Vehicle Code when a sale has been agreed upon but the statutory requirements of indorsement and delivery of the ownership certificate or notification of the Department of Motor Vehicles have not been complied with. It is argued (1) that there was no contract of sale, (2) that the existence of an agreement of sale does not per se constitute permission by the owner for the buyer to operate the vehicle without restriction, (3) that if such a contract existed, a right of possession in the buyer does not necessarily follow. The academic soundness of the arguments is not the point here. The sole question, again, is whether the record contains any substantial evidence to support a finding that Mr. Loyd, in operating the automobile for his private purposes,—driving to Berkely in the interests of his son's scholastic pursuits—did so without the permission, express or implied, of Mr. Case, the owner of the vehicle. It must be held that the evidence supports only one conclusion, that defendant Loyd was operating the vehicle with the permission of defendant Case. No trier of fact, considering the testimony of defendant Case, substantially corroborated by that of his employee Harris, could reasonably come to any conclusion other than that any previous restrictions upon Loyd's use of the car were no longer in effect after Loyd and Case had made their "deal" whereby Loyd was to buy the car. Appellant Case's testimony amounted to an admission that he "considered the car Loyd's." We are not here concerned with the actual state of the title to the vehicle,

but with the state of mind of defendant Case, who "considered the car Loyd's" and told Loyd "when he got around to it to make the transfer." To hold that in the circumstances presented there could be any doubt as to Loyd's unrestricted permission to use the vehicle as he saw fit would be to uphold a finding based upon no substantial evidence and against the unqualified admission of the party concerned.

Even viewing the evidence solely in the light of the testimony of Loyd, it is clear that an understanding was reached that Loyd was to purchase the vehicle. This understanding, coupled with possession of the vehicle by Loyd, not only warrants, but, considering all the evidence, compels, the inference that thereafter the vehicle was operated with the permission of defendant Case.

[7] It is firmly settled that an agreement of sale coupled with transfer of possession, irrespective of compliance with the provisions of the Vehicle Code regulating the mode of transfer, operates as a consent and permission to the vendee to use the car in the way in which such property is customarily used and for all reasonable purposes. Weinberg v. Whitebone, 87 Cal. App.2d 319, 196 P.2d 963; Bunch v. Kin, 2 Cal.App.2d 81, 37 P.2d 744; Votaw v. Farmers Automobile Inter-Insurance Exchange, 15 Cal.2d 24, 97 P.2d 958, 126 A.L. R. 538; Ferroni v. Pacific Finance Corp., 21 Cal.2d 773, 135 P.2d 569; Gutknecht v. Johnson, 62 Cal.App.2d 315, 144 P.2d 854.

[8, 9] We deem it appropriate, in connection with the two contentions hereinbefore discussed, to re-emphasize that in passing upon the propriety and legality of granting a motion for a directed verdict, neither this court nor the trial court is authorized to weigh evidence or determine where the preponderance lies. When the trial court has granted a nonsuit, directed a verdict, or entered judgment notwithstanding the verdict, the function of the appellate tribunal is to determine whether there is any *substantial* evidence to support a verdict contrary to that directed. In other words, we are not authorized to weigh the evidence, but are limited solely to considering the same for the purpose of determining whether any *substantial* evidence appears which would, in the instant case, support a verdict contrary to that directed. It is stated in James v. White Truck & Transfer Co., 1 Cal.App. 2d 37, 40, 36 P.2d 401, 402, "To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence; but to deprive the court of the right to exercise this power, if there be a conflict, it must be a *substantial* one." (Emphasis added.) Had the jury herein found in favor of Case on the issues of contributory negligence or permissive use, the trial court would have been bound to set the finding aside. As was said by this court in Washer v. Bank of America, 87 Cal.App.2d 501, 506, 197 P.2d 202, 206, "It is likewise settled that the trial court may direct a verdict 'where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, will be compelled to set aside a verdict returned in opposition to it.' Wilkinson v. United Railroads, 195 Cal. 185, 204, 232 P. 131, 138, quoting from Davis v. California Street Cable R. Co., 105 Cal. 131, 38 P. 647." Here, as in the Washer case, supra, we hold that only one conclusion is legally deducible from the evidence, and that any decision other than that arrived at under the direction of the trial court would have been so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal.

Since, as we have hereinbefore indicated, the verdicts rendered by the jury (the question of the amount of damages is not here involved) against the owner and the driver of the vehicle are the only verdicts supported by substantial evidence, it becomes unnecessary to consider many of the assignments of error raised by appellant Case. Any errors in the admission of evidence or rejection thereof, in the restriction of cross-examination or in the asserted "injudicious solicitude for plaintiffs" charged against the trial court, afford no ground for reversal, by reason of the provisions of section 4½, Article VI, of the Constitution of California.

However, certain other points raised by appellant Case require consideration.

It is urged that the court abused its discretion in denying Case's motion to reopen the case to enable him to strike the "irresponsive, *self-serving* conclusion of witness, F. W. Case." (Emphasis added.) It appears that this motion was not made until after all the evidence was in and the trial court announced its conclusion to instruct the jury that Loyd had "permissive use" of the vehicle. Counsel for appellant Case then stated that he had not heard such answer from the witness, and moved to strike as above stated. Appellant Case asserts that the trial judge, with "cruel injudiciousness", replied: "No, you are not going to do that. You have rested, the evidence is all in and we take it now as it is. If you are going to sleep during the evidence you cannot open it up to move to strike out important bits of evidence, because that is perfectly competent. It is out of the question. I would not have opened it up for discussion if I had the slightest idea of reopening the evidence. I brought up the subject for discussion because the evidence was closed, you had rested, and there is no reason why it should be reopened, because it is the undisputed evidence of Mr. Case as to the sale, and that carries with it the undisputed deduction, the only deduction, we can draw from that is that he gave Mr. Loyd the right to use it wherever he pleased. The law still holds him responsible while he is the registered owner; but for him to say in one breath he made the agreement with Mr. Loyd under which he was to buy the car and that he considered that after that it was Mr. Loyd's car, and in the next breath to say there is any dispute on permissive use—'I now deny that he had the right to drive it wherever he pleased'—it is an impossible position for him to take."

[10, 11] It has long been the established law that the granting or denial of such a motion is committed to the sound discretion of the trial judge. We are not here confronted with the case of an unresponsive answer by a witness, but an admission by a party under direct examination by his own counsel. Appellant Case's counsel urges that because he was suffering from a severe cold, he did not hear the answer given by the witness to a direct interrogatory propounded by counsel, cannot be made the basis for holding that the trial court abused its discretion in refusing to reopen the case. The answer was pertinent to a fundamental issue—that of permission. To have granted a motion to strike such testimony, not on the ground that the witness did not give it, but on the ground that the latter's counsel did not hear it, would amount to striking concededly competent evidence of a party's admissions. The court acted well within its discretion in denying the motion to reopen the case for the avowed purpose of accomplishing just that.

[12, 13] The contention of appellant Case that the court erred "in excluding appellant's (Case) cross-examination of defendant Loyd, and independent evidence of his verbal acts and admissions, concerning his interest in appellant's car," is without merit. Appellant offered to prove in this connection only that Loyd had told two people, prior to the accident, that he had bought the Plymouth automobile from Case. There was no offer to prove that the purchase was conditional or that it was coupled with restrictions upon the use of the car. The proffered testimony was, if anything, adverse to appellant. Nor can error be predicated upon the exclusion of evidence that Loyd told Mrs. Case on the eve of his departure for Berkeley that he intended to go by train. The probative value, if any, of this evidence, under the issues in the trial, is too slight to justify serious consideration of the alleged error as a ground for reversal.

The remaining grounds of reversal urged by appellant Case have been considered, but do not require determination in view of our conclusions upon the two main issues hereinbefore discussed. None of the asserted errors could have affected the outcome of the trial. Sec. 4½, Art. VI, Const. Calif.

The judgments appealed from are, and each is, affirmed.

DORAN and DRAPEAU, JJ., concur.

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McLAIN v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY.

Civ. 7848.

District Court of Appeal, Third District, California.

Aug. 21, 1950.

Hearing Denied Oct. 19, 1950.

Petition by George H. McLain against the Superior Court in and for the County of Sacramento for a writ of prohibition to restrain the named court from taking any further steps or proceedings based on an indictment charging petitioner with the crime of bribery in that he allegedly gave a bribe to a member of the state Legislature with intent to influence the said legislator in giving or withholding his vote on bills introduced for passage. The District Court of Appeal, Van Dyke, J., held that where petitioner before Senate committee had testified under oath to matters on which bribery prosecution was based, immunity attached and petitioner could not be prosecuted.

Peremptory writ issued directing respondent court to dismiss indictment.

1. Witnesses ⇐298

Constitutional privilege inherent in declaration that no party accused shall be compelled in a criminal case to be a witness against himself is not available to corporations, which can be required to produce their books and papers by a subpoena duces tecum. Government Code, § 9410; Const. art. 1, § 13.

2. Witnesses ⇐16

Production of books and records is ordinarily procured by service on appropriate person of a subpoena duces tecum and compulsion to testify brought about through subpoena ad testificandum, and there is no necessary connection between two writs, and although they are in many cases combined in one form, that is a mere matter of convenience and does not combine them in substance. Government Code, § 9410; Const. art. 1, § 13.

3. Witnesses ⇐297

Under statute providing that a person sworn and examined before Senate or Assembly, or any committee, cannot be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify, the claim of immunity or privilege by witness is not necessary. Government Code, § 9410.

4. Witnesses ⇐298

Where a Senate committee issued subpoena to chairman of nonprofit corporation engaged in fostering public interest in proposed constitutional amendment concerning old age assistance, and chairman appeared before committee and produced canceled checks allegedly given to an assemblyman as bribes and chairman was sworn as a witness and identified checks, and his testimony touched on alleged bribery of assemblyman, immunity attached, and bribery prosecution of chairman, based in part on his testimony, could not be maintained. Government Code, § 9410; Const. art. 1, § 13.

Kenny & Morris, Los Angeles, John L. Brannely, Sacramento, for petitioner.

J. Francis O'Shea, District Attorney, Elvin F. Sheehy, Chief Criminal Deputy, Sacramento, for respondent.

VAN DYKE, Justice.

On February 20, 1950, petitioner herein, George H. McLain, was indicted by the Grand Jury of Sacramento County. The indictment contained four counts, in each of which petitioner was charged with the crime of bribery in that he gave a bribe, consisting of the sum of $75, to John W. Evans, then a member of the State Legislature, with intent to influence the said legislator in giving or withholding his vote on bills introduced for passage. The alleged dates of bribe-giving were January 27th, February 25th, April 8th and April 15th, all in 1949. The accused has filed herein a petition for a writ of prohibition, asking that the Sacramento County Superior Court be restrained from taking any further steps or proceedings based upon the indictment, save to dismiss the same.

It is the fundamental contention of the petitioner that he cannot be prosecuted un-

der the indictment because he was required to testify before the Senate Interim Committee on Social Welfare, touching upon the matters charged in the indictment, and thereby acquired immunity.

It appears without dispute in the record that the aforesaid committee was investigating matters having to do with social welfare pursuant to the Senate resolution creating the committee. In the course of its investigations the committee turned its attention to the activities of the Citizens Committee for Old Age Pensions, a nonprofit corporation. Its corporate purposes as expressed in its articles included the acquisition of real and personal property, and the fostering and promotion of public interest in a proposed initiative constitutional amendment concerning old age assistance. Its by-laws provided that the secretary should keep all books and records required by law and have custody of the corporate seal; and its treasurer should receive and receipt for all money and property, deposit all money in bank and pay out or otherwise dispose of the same as directed by the board of trustees. Desiring production of the books and records of the corporation, the committee, acting through a sub-committee, issued a subpoena to one Charles Ohlsen, who, in response thereto, appeared before the sub-committee on November 26, 1949. He testified that he was secretary and treasurer of the corporation, elected to those offices September 12, 1949, and that George McLain, Ray Howell and he were the members of the board of trustees of the organization. The subpoena had called upon him to produce for the years 1947 to 1949, inclusive, the financial records of the corporation. He testified that he had not brought the records and documents requested for the reason that he had never had them in his possession and that they were in the possession of Mr. McLain. However, he stated that he would demand possession of the records and make every effort to produce them, whereupon the committee recessed to give him opportunity to do so.

On December 3d he again appeared and testified he had not been able to get the records; that he had requested them of Mr. McLain and had been told he could not have them and if the committee wanted them it should summon McLain; further he testified that the records were not in the offices of the Citizens Committee.

Thereafter the committee issued a subpoena addressed to the corporation and to "George H. McLain, Chairman of said Citizens Committee for Old Age Pensions" commanding them to appear before the committee on a given date "as witness in an investigation by the said committee" and commanding them to bring with them all cancelled checks, check stubs, check ledgers and bank statements of all the accounts in the name of Citizens Committee for Old Age Pensions, including, but not limited to, the payroll account, the special account and the General (rental) account, for the calendar years 1948 and 1949. Petitioner appeared and was sworn. He testified that he was chairman of the corporation and that he had received the subpoena. He was then told that he had been subpoenaed only in his capacity as chairman and in none other and was asked if he had the documents which the subpoena had required him to produce. He stated he had the records and would produce them as soon as he made a statement. Privilege to make such a statement was denied to him. Thereupon his counsel asked what particular documents they wanted the witness to hand over. Committee counsel asked first for all cancelled checks as demanded. Again petitioner stated his desire to make a statement which was again refused. Thereupon counsel for the committee suggested that if petitioner would waive immunity and allow full cross-examination he be allowed to make his statement. Petitioner replied in substance that he would not waive immunity but was ready to testify. Considerable discussion then followed between respective counsel concerning the conditions of the delivery of the records, the time that they might be kept for perusal by the committee, and the like. Counsel for the committee again asked petitioner if he had produced all the corporation's cancelled checks and the reply was that they were all there, with the exception of two bank statements and related cancelled

checks, which he said had been stolen. After some time was spent in arranging the records, petitioner stated that for the convenience of the committee "we have separated to the best of our ability the checks that have been issued to Assemblyman John Evans during 1948 and 1949 as one of our public relations counsel, so we will be very happy to turn these over to you during the time you are going through the checks." He thereupon handed the specified checks to counsel for the committee, who said, "What are these?" and petitioner replied, "Checks made payable to John W. Evans." There were twenty-two checks which petitioner had identified, as above stated, and they were all copied into the records of the committee hearing. Four of them form the basis of the grand jury indictment of petitioner. They were signed "Citizens' Committee for Old Age Pensions, George H. McLain", and bore the apparent endorsement of Mr. Evans, and also the usual stamps and punch marks indicating a clearance through the bank on which they were drawn.

By virtue of the foregoing, petitioner claims he has acquired immunity against prosecution under the provisions of Section 9410 of the Government Code, formerly Section 304 of the Political Code, which, so far as here applicable, provides as follows: "A person sworn and examined before the Senate or Assembly, or any committee, can not be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify."

This section is found among a group of sections intended to govern the matter of summoning witnesses and producing documents before committees of the legislature or one of the houses thereof. The statutes provide for the issuance of subpoenas, the service thereof, and punishment for contempt for neglecting or refusing to obey such process or to produce, upon reasonable notice, books, papers and documents in the possession or under the control of a person so subpoenaed.

The forerunner of the present legislation was enacted in 1857, Stats. 1857, chap. 95, the declared purpose of the act being "To enforce more effectually the attendance of Witnesses on the Summons of either House of the Legislature of this State, and to compel them to discover Testimony." When the codes were enacted in 1872 this legislation was substantially carried into the Political Code and found expression in Sections 300 to 304, inclusive thereof. The legislation was continued without substantial change until 1943, when, during the general codification of much of the existing legislation not theretofore placed in the various codes, the subject-matter was carried into the Government Code.

Legislation of this sort has been enacted by almost, if not all, of the state legislatures and many such statutes have been enacted by Congress. Generally speaking, they were intended to aid investigative agencies whose work might be and often was seriously impeded by witnesses claiming the constitutional privilege against self-incrimination found in the Federal constitution and in the constitution of almost all of the states, including California. See Cal.Const. Art. I, Sec. 13. The principle involved had long received recognition and enforcement in England under the common law and in the early colonial governments. As stated in 8 Wigmore on Evidence, 3d edition, Section 2250, Page 276: "The history of the privilege against self-crimination has something more than the ordinary interest of a rule of Evidence,—not only because the privilege has been given a constitutional sanction in nearly every one of our jurisdictions; nor merely because the tracing of its origin takes us so far afield, in our survey, as the administrative policy of William the Conqueror, and the criminal procedure of Louis XIV and the French Revolution; but particularly because the woof of its long story is woven across a tangled warp composed in part of the inventions of the early canonists, of the momentous contest between the Courts of the common law and of the church, and of the political and religious issues of that convulsive period in English history, the days of the dictatorial Stuarts."

Many decisions in the highest courts of this country, both state and Federal, have

been concerned with the construction and application of these so-called statutes of immunity. It will not be necessary to the decision of the issues presented here to refer to many of them.

It is the principal contention of respondent that immunity was not acquired by petitioner, not because the documents produced under the compulsion of the subpoena did not touch upon the alleged crimes for which he was later indicted, nor that the meager testimony he gave did not serve to identify and authenticate these documents, but that the production of the documents by petitioner and his testimony concerning them fell within permissible limits without the granting of immunity. Respondent contends that if anyone has documents, books and records of another in his custody and under his control which a legislative committee can properly cause to be produced a subpoena to produce may be properly served upon such person, compelling him to produce such records, and having so produced them, he may be further compelled to identify and authenticate them under oath and that if nothing more be done immunity has not been gained. On the contrary, petitioner contends that such limitations of the immunity provisions of our statute do not exist, have never been declared by our courts and that the plain language of the statute is to be given full and literal interpretation and scope. Petitioner contends that the statute represents an exercise of the legislative pardoning power and that to make it serve its purpose it must receive the broad construction claimed. They say, in effect, petitioner was subpoenaed to appear as a witness before the committee and to bring with him certain designated documents; he was sworn as a witness and required to testify; his testimony touched upon the alleged briberies for which he has been indicted and he is, therefore, by the plain language of the statute, immune to prosecution.

[1] It has long been decided that the constitutional privilege inherent in the declaration that no party accused shall be compelled in a criminal case to be a witness against himself was not available to corporations, which could be required to produce their books and papers by a subpoena duces tecum. Thus in Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538, 541, 55 L.Ed. 771, Ann.Cas. 1912D, 558, decided in 1911, the Supreme Court of the United States declared that a corporation could not resist upon such constitutional grounds the compulsory production of its books and papers. See, also, Heike v. United States, 227 U.S. 131, 33 S.Ct. 226, 57 L.Ed. 450, and Shapiro v. United States, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787. And this right of a court or properly constituted investigative body to compel the production of such records has long existed, even though they may be temporarily in the custody of someone not authorized to have them by the corporation itself.

[2] But there is a clear distinction between the admitted power of such a body as the Senate Interim Committee on Social Welfare to compel the production before it of such documents, and the right to compel testimony from the custodian of such documents which would incriminate the witness. The production of books and records is ordinarily procured by service upon appropriate persons of a subpoena duces tecum. Compulsion to testify is ordinarily brought about through subpoena ad testificandum or the swearing of a person who, although not subpoenaed, is actually in the presence of the tribunal and therefore can be made to respond to the general duty of all citizens to give testimony. There is no necessary connection between the two writs. Their functions are different and although they are in many cases combined in one form, as was the case here, nevertheless that is a mere matter of convenience and does not combine them in substance. This distinction between the two writs is noted and discussed in Wilson v. United States, supra. Discussing the nature and origin of the subpoena duces tecum the court declared that: "While a subpoena duces tecum ordinarily contains the ad testificandum clause, this cannot be regarded as essential to its validity. The power to compel the production of documents is, of course, not limited to those cases where it is sought merely to supplement or aid

the testimony of the person required to produce them. The production may be enforced independently of his testimony, and it was held long since that the writ of subpoena duces tecum was adequate for this purpose. As was said by Lord Ellenborough in Amey v. Long, 9 East, p. 484: 'The right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them.' Where the subpoena duces tecum contains the usual ad testificandum clause, still it is not necessary for the party requiring the production to have the person producing the documents sworn as a witness. They may be proved by others."

The court quoted from Summers v. Moseley, 2 Cromp. & M. 477, as follows:

"'* * * The party called upon in pursuance of such a process not as a witness, but simply to produce, would do so or not, and if he did not, I can entertain no doubt that it would have been open to the party for whom he was called to make an application to the court in the ensuing term to punish him for his contempt in not producing the document in obedience to such subpoena. Whether he could require to be sworn not ad testificandum, but true answer to make to such questions as the court should demand of him touching the possession or custody of the document, is not now the question. *Perhaps* he might; but we are clearly of opinion that he has no right to require that a party bringing him into court for the mere purpose of producing a document should have him sworn in such a way as to make him a witness in the cause, when it may often happen that he is a mere depository, and knows nothing of the documents of which he has the custody.'"

The court continued:

"Treating the requirement to produce as separable from the requirement to testify generally what one knows in the cause, it follows that the latter may be omitted from the subpoena without invalidating the former. * * *

"Where the documents of a corporation are sought, the practice has been to subpoena the officer who has them in his custody. But there would seem to be no reason why the subpoena duces tecum should not be directed to the corporation itself. Corporate existence implies amenability to legal process."

Here the subpoena was directed to the corporation and to petitioner as chairman of the board of trustees thereof and it required the production of the books and records referred to. However, when petitioner was sworn he became a witness pursuant to the ad testificandum part of the process served upon him. Indeed, there is no way in which a witness can be sworn otherwise, although, as has appeared from the statement of facts, there was a prompt declaration by counsel for the committee that petitioner had been subpoenaed merely in his capacity as chairman of the board of trustees of the corporation and not otherwise. That position was departed from when to him there was administered the usual oath administered to all witnesses. The situation may be illustrated by inquiring how a sentence for contempt would have been served had the petitioner after the administration of the oath proved contumacious. Clearly, he would have served that sentence individually and not as chairman of the board of trustees. If, therefore, after the production of the books and papers in response to the subpoena duces tecum, by which production the demands of that process had been met, the petitioner, in response to appropriate questioning, gave testimony touching the facts and acts for which he now stands under indictment, no reason appears why he should not have the immunity granted him by the statute in exchange for his constitutional privilege against self-incrimination.

[3] Before proceeding further it might well be said that although immunity was claimed at one point in the proceeding when the matter was suggested by counsel for the committee, nevertheless, under the hold-

ing of the Supreme Court in United States v. Monia, 317 U.S. 424, 63 S.Ct. 409, 412, 87 L.Ed. 376, the claim of immunity or privilege was not necessary. The Supreme Court in the Monia case, interpreting a statute to all intents and purposes identical with our own upon this point, held that where the words of the statute granting immunity were plain and did not require claim for the immunity offered, it was not necessary that such claim be made. The court said the legislation involved in that case was plain and, "on its face, means to the layman that if he is subpoenaed, and sworn, and testifies, he is to have immunity." This declaration is clearly applicable to our own statute which is equally plain upon its face, which equally declares "A person sworn and examined before the Senate or Assembly, or any committee, can not be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify."

Since the purpose of the so-called immunity statutes is to gain information by taking away the constitutional privilege of refusing to give testimony, exchanging therefor immunity, there is no reason why the immunity so voluntarily offered by the legislature should be whittled away by the courts. If the legislative fiat seems to be unduly generous, restriction should come from the legislature. The statute before us here has been long on the books and many investigations have been conducted under it. If the legislature was not satisfied with its working it has always had the remedy in its hands. Since it has not seen fit to make changes we must assume it wants the law as it is.

Applying, then, the plain language of the act to the facts here, did the petitioner, having been sworn, testify as to any fact or act touching the bribery with which he stands charged? We think he did. The term "cancelled check" is one of ordinary and general usage. Its meaning is well known. It means a check drawn, delivered, endorsed, presented, paid by the drawee bank and returned in due time to the drawer. It is to be presumed that the ordinary course of business has been followed and in respect to cancelled checks the orderly happening of the above actions is to be presumed. When permissible inferences and presumptions are considered, his testimony amounted to this: Here are four checks; they are cancelled checks of the Citizens Committee for Old Age Pensions; they were drawn and made payable to Assemblyman John W. Evans; they cleared through the Committee's bank account; they are for $75 each; they are dated January 27, February 25, April 8 and April 15, 1949; my name appears as drawer for the Committee; I was then the Committee's Chairman of the Board of Trustees.

[4] Having so testified, petitioner now stands indicted for having, on the several dates those checks bear, given bribes to Evans in the amounts for which the checks were drawn. Before the grand jury those checks were produced as being the very instruments of bribery, as being the things which constituted the bribes alleged to have been given. Without proving the facts to which petitioner testified the bribery charged would not be shown. It matters not that the same testimony could have been given by others. It was given by petitioner. Not only does it touch upon the bribery charged, but, if it be supplemented by proof of felonious intent thereby to influence the vote of Assemblyman Evans as charged, it will go far to establish the crime. When the legislative committee swore petitioner as a witness it contracted that he would be immune from prosecution for any crime touching which he might testify. When that testimony touched upon the alleged bribery of Evans, immunity attached. Petitioner cannot be prosecuted therefor.

Let the peremptory writ be issued as prayed for directing respondent court to dismiss the indictment referred to herein and in the petition.

ADAMS, P. J., and PEEK, J., concur.

KNUDSEN CREAMERY CO. v. BROCK, Director of Agriculture.
Civ. 17723.

District Court of Appeal, Second District, Division 2, California.

Aug. 16, 1950.

Rehearing Denied Sept. 1, 1950.

Hearing Granted Oct. 9, 1950.*

Knudsen Creamery Company of California, a corporation, brought an action for declaratory relief to determine the power and jurisdiction of A. A. Brock, as Director of Agriculture of the State of California, to make and enforce an order issued respecting stabilization and marketing plan for fluid milk in San Diego County Marketing Area. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., rendered judgment in defendant's favor, and plaintiff appealed. The District Court of Appeal, Wilson, J., held that plaintiff, under the Milk Control Act, was a distributor, and under marketing plan was entitled to deduct cost of transporting milk to its San Diego distributing plant from minimum price it had to pay producer.

Judgment reversed with directions.

1. Food ⇐2

Purpose of Milk Control Act is to eliminate economic disturbances and unfair trade practices in the milk industry, which threaten both the quality and adequacy of the supply of fluid milk and cream. Agricultural Code, §§ 735 et seq., 735.1 (b, d), 736.

2. Food ⇐2

The Milk Control Act is aimed primarily at what the producer shall receive and not at what the dealer or consumer shall pay. Agricultural Code, §§ 735 et seq., 736.

3. Administrative law and procedure ⇐209
Constitutional law ⇐62

Legislature has function of declaring policy and fixing primary standards, but after doing so may confer upon executive or administrative officers power to fill up the details by prescribing administrative rules and regulations.

4. Constitutional law ⇐77

A ministerial officer may not, under the guise of a rule or regulation, vary or enlarge terms or conditions of statute or compel that to be done which lies outside scope of the statute.

5. Food ⇐1

Where Milk Control Act provided that any person who purchased or handled fluid milk or fluid cream for sale was a distributor, Director had no authority to require additionally that distributor maintain milk processing plant within marketing area in which he distributed milk, to qualify as distributor. Agricultural Code, §§ 735 et seq., 735.3, 735.3(f), 736.3.

6. Food ⇐1

Where order of Director of Agriculture established a minimum price to be paid by distributors in San Diego Marketing Area for milk purchased "f. o. b. distributor's plant" and defined distributor's plant as one where milk was received, weighed, tested and processed, definition of distributor's plant as contained in order was void as being in conflict with Milk Control Act which did not include requirement that a distributor process the milk. Agricultural Code, §§ 735 et seq., 735.1(b), 735.3(f), 735.4(b) (4), 736.3.

7. Food ⇐4

Distributor which maintained milk processing plant in Los Angeles area and shipped milk processed there to San Diego plant for storage and distribution, was qualified as a distributor under Milk Control Act, and as such and under marketing plan promulgated by Director, was entitled to deduct cost of transporting milk from producer to its San Diego plant from minimum price it had to pay producer. Agricultural Code, §§ 735 et seq., 735.1(b), 735.1(d), 735.3, 735.3(f), 735.4(b) (4), 736.1, 736.3.

8. Food ⇐4

Where distributor maintained milk processing plant in Los Angeles area and shipped milk processed there to San Diego plant which was used for storage and distribution, it purchased milk "under same terms and conditions" as other distributors in San Diego area, was a distributor therein, and was entitled to benefits of marketing plan promulgated by Director for San

* Subsequent opinion 234 P.2d 26.

Diego area. Agricultural Code, §§ 735 et seq., 735.1(b), 735.1(d), 735.3, 735.3(f), 735.4(b) (4), 736.1, 736.3.

Vaughan, Brandlin & Wehrle, J. R. Vaughan, and Pat. B. Trapp, all of Los Angeles, for appellant.

Fred N. Howser, Attorney General of the State of California, Walter L. Bowers, Assistant Attorney General, for respondent.

WILSON, Justice.

The decision in this case turns upon the validity of an order issued by the Director of Agriculture with respect to the stabilization and marketing plan for fluid milk for the San Diego County Marketing Area, especially that portion of the order defining "Distributor's Plant."

Contending that the order is void and unenforceable plaintiff brought the action for declaratory relief in order to determine the power and jurisdiction of the Director to make and enforce it. From a judgment in favor of defendant plaintiff appeals.

Appellant is a distributor of fluid milk and fluid cream. It maintains a plant in the city of Los Angeles in which it processes, pasteurizes and packages in containers for resale milk which it purchases from various producers. Approximately five per cent of the fluid milk received by appellant at its Los Angeles plant is transported in packaged form to its plant in San Diego for distribution in that county.

The Milk Control Act, Div. 4, Ch. 10, Agr. Code, authorizes the Director of Agriculture to designate marketing areas "wherein he finds the conditions affecting the production, distribution and sale of fluid milk, * * * are reasonably uniform." Agr. Code, sec. 736.[1] Los Angeles county and San Diego county respectively have been designated as marketing areas and stabilization and marketing plans have been formulated establishing minimum prices which distributors must pay producers. Sec. 736.1. The minimum price to the producer is governed by the price fixed in the marketing area wherein the milk is sold and delivered to the consumer. Sec. 736.3.

Pursuant to proceedings had as required by the provisions of Chapter 13, Division 4 of the Agricultural Code, the stabilization and marketing plan for the San Diego marketing area was amended and Order Number 26 was issued by respondent effective April 1, 1949. The stabilization and marketing plan as amended establishes a minimum price to be paid by distributors for fluid milk purchased "f. o. b. distributor's plant" and provides that any distributor who purchases, receives or otherwise handles fluid milk at the producer's dairy location for sale or distribution within the San Diego County Marketing Area may deduct from the specified minimum price an amount "not in excess of the lowest rate for transportation of said commodity then in effect for public carrier * * * from point or points of shipment to such distributor's plant within the Marketing Area." A distributor's plant is defined in the order as "any building in which milk is received, weighed, tested, and processed for distribution to consumer."

Appellant's plant in San Diego is used solely for storage and distribution. By reason of the fact that no milk is processed for distribution in its San Diego plant, appellant has no "distributor's plant" within the definition contained in Order Number 26 in the San Diego County Marketing Area and therefore in computing the minimum price payable to producers it is prohibited from deducting a sum equal to the cost of transporting the fluid milk in bulk from the producer's dairy to appellant's plant in San Diego. It is permitted to deduct the cost of transporting the milk from the dairy to its distributing plant in Los Angeles.

Appellant contends that Order Number 26 as interpreted by the Director of Agriculture is void in that it is in direct conflict with the Milk Control Act; that the definition of a "Distributor's Plant" is void; that the effect of the order as interpreted is to prescribe one minimum producer's price for a marketing area applicable to

1. All sections cited in this opinion are in the Agricultural Code.

distributors whose processing facilities are located within the marketing area and another, higher minimum producer's price for the same marketing area applicable to distributors whose processing facilities are located outside the marketing area; that it is confronted with a competitive inequality which requires the distribution of milk at a loss; that it has but two alternatives: (1) Cease distribution in the area because of inequality of competitive opportunity and thereby promote local monopoly or (2) build a processing plant within the marketing area.

[1] The purposes of the Milk Control Act are, among others, to "authorize and enable the director to prescribe marketing areas and to determine prices to producers for fluid milk or fluid cream, or both, which are necessary due to varying factors of costs of production, health regulations, transportation and other factors in said marketing areas of this State, provided that the cost to distributors within any marketing area, for fluid milk or fluid cream shall be uniform with all other distributors purchasing fluid milk and fluid cream of similar grade or quality under like terms and conditions" Sec. 735.1(b), and to "eliminate economic disturbances and unfair trade practices in the milk industry which threaten both the quality and adequacy of the supply of fluid milk and cream." In re Willing, 12 Cal.2d 591, 594, 86 P.2d 663, 664. The act expressly states that it is the legislative intent that "Nothing in this chapter shall be construed as permitting or authorizing the development of conditions of monopoly in the production or distribution of fluid milk or fluid cream." Sec. 735.1(d).

[2] The act is aimed primarily at what the producer shall receive and not what the dealer or consumer shall pay. United Milk Producers v. Cecil, 47 Cal.App.2d 758, 768–9, 118 P.2d 830. In prescribing minimum prices to be paid by distributors the Director must take into consideration the "economic relationship of the price of fluid milk for the marketing area involved to the price of manufacturing milk, taking into consideration the additional costs incurred in producing and marketing fluid milk over and above such costs incurred in producing and marketing manufacturing milk." Sec. 735.4(b) (4).

A distributor is defined in section 735.3 (f) as "any person, whether or not such person is a producer or an association of producers, who purchases or handles fluid milk or fluid cream for sale, including brokers, agents, copartnerships, cooperative corporations and incorporated and unincorporated associations." Appellant contends that since it is a distributor under the statutory definition it is entitled to all the benefits of section 735.1(b) which provides that the cost to distributors within any marketing area shall be uniform with all other distributors purchasing milk under like terms and conditions; that since it is not permitted to deduct the cost of transporting the milk in bulk form from the producers' dairies to its place of distribution in San Diego, the cost to it is not uniform with that of other distributors. Appellant concedes the authority of the Director to establish reasonable regulations, including definitions, but asserts that he is without power either to enlarge or to abridge classifications established by the Legislature; that since the Legislature has defined a distributor as "any person, * * * who purchases or handles fluid milk or fluid cream for sale, * * *" the Director, by defining a distributor's plant as "any building in which milk is received, weighed, tested and processed for distribution to consumer", has placed a qualification upon the statutory definition of distributor which removes from the class of distributors all those who do not receive, weigh, test and process milk for distribution to the consumer in a plant in the San Diego County Marketing Area.

[3, 4] It is the function of the Legislature to declare a policy and fix the primary standard. To promote the purposes of the legislation and carry it into effect it may authorize an administrative or ministerial officer to "fill up the details" by prescribing administrative rules and regulations. First Industrial Loan Co. v. Daugherty, 26 Cal. 2d 545, 549, 159 P.2d 921. The rule is established, however, that a ministerial officer may not, under the guise of a rule or regulation thought necessary to carry out

the purpose of an act, vary or enlarge the terms or conditions of the legislative enactment nor compel that to be done which lies without the scope of the statute. First Industrial Loan Co. v. Daugherty, supra; Whitcomb Hotel, Inc. v. California Emp. Com., 24 Cal.2d 753, 757, 151 P.2d 233, 155 A.L.R. 405; Boone v. Kingsbury, 206 Cal. 148, 161, 273 P. 797.

The Legislature in defining a distributor has not included in the definition any requirement that he process the milk. Any person "who purchases or handles fluid milk or fluid cream for sale, including brokers, agents * * *" is a distributor. Sec. 735.3(f). Thus a broker or an agent may be a distributor without having any processing plant or being a processor. Section 735.3 containing definitions, including that of distributor, was added to the code in 1935. Stats.1935, Ch. 241, p. 922. That section has been amended six times. Stats. 1937, Ch. 3, p. 44; Ch. 57, p. 151; Stats. 1939, Ch. 941, p. 2641; Stats.1941, Ch. 1214, p. 3008; Stats.1945, Ch. 1001, p. 1930; Stats.1949, Ch. 1400, p. 2444, but in none of the amendments has the Legislature changed the definition of distributor so as to require him to maintain a processing plant in the marketing area in which he distributes fluid milk nor has it indicated any such intent or authorized the Director to make any such requirement.

[5, 6] Neither the place of receiving the milk nor the place of processing is recognized by the Legislature in setting the standards under which the Director must operate. Under section 736.3 every producer is entitled to the price established for the marketing area in which his milk is finally sold and distributed and he must bear the cost of conveying his product to that area. The cost to the distributor must be uniform with that of all other distributors in the same area purchasing milk under like terms and conditions. Sec. 735.1 (b). The Director in defining a distributor's plant has added a requirement that the milk be processed in the plant in order that the distributor may deduct the cost of transportation from the producer's dairy to his plant. He has thereby established a separate classification of processor-distributor and the cost to the distributor is not uniform with that of other distributors in the area unless he falls within such classification. If the Director can define a distributor's plant as a building where milk is received, weighed, tested and processed for distribution he could as well enlarge the definition to include other functions not required by statute. He is without authority or jurisdiction so to vary the terms of the Milk Control Act.

[7, 8] Respondent asserts that since appellant does not have a processing plant in the San Diego Marketing Area it is not purchasing milk "under the same terms and conditions" as other distributors. That appellant has a different operating procedure from other distributors in that it chooses to process its milk at a place other than where it is distributed does not affect the terms and conditions under which it *purchases* milk. Respondent has not pointed out any substantial difference in the terms or conditions under which appellant purchases its milk from producers from the terms and conditions under which those distributors having processing plants in the area purchase milk. Appellant purchases quantities of milk for distribution in San Diego county for which it must pay the minimum producer price. The point at which milk is received does not in any way affect that minimum price, nor does the place of processing the product affect the conditions of purchase, since the only transportation charge which appellant is permitted to deduct from the minimum price to the producer is the cost of transporting the milk in bulk form from the dairy to its plant within the marketing area of sale and distribution to the consumer. Contrary to respondent's contention, appellant is not seeking to deduct the cost of transporting the milk in packaged form to its San Diego plant. The fact that it stops the milk enroute for the purpose of processing it should in nowise affect the rights to which it is entitled by statute.

Respondent's contention that the producer might be compelled to pay the cost of transportation of his product to any point in the state is without merit. The evidence is

clear that there is not sufficient milk produced in the San Diego County Marketing Area to supply the requirements of that area and that about twenty per cent of the milk distributed there must be brought in from other areas. The producer need not contract to sell his product in the San Diego area if the cost of transportation would make it unprofitable. Upon the other hand, the producer might find it more profitable to pay the cost of transportation if he can thereby obtain the price for class 1 or class 2 milk which has a higher minimum price than that of class 3 or 4.

Judgment reversed with directions to make findings and conclusions and to enter judgment as follows: That the definition of "Distributor's Plant" as contained in Order Number 26 is void; that plaintiff is a distributor within the San Diego County Marketing Area; that the plant maintained by plaintiff in the San Diego County Marketing Area is a distributor's plant, and to make such other findings, conclusions and judgment as are necessary to conform with this opinion.

MOORE, P. J., and McCOMB, J., concur.



99 Cal.App.2d 155

In re GREENHILL'S ESTATE.

GREENHILL et al. v. GREENHILL et al.

Civ. 17555.

District Court of Appeal, Second District, Division 1, California.

Aug. 22, 1950.

Hearing Denied Oct. 19, 1950.

In the matter of the estate of Arthur A. Greenhill, deceased. Adelle L. Greenhill, deceased's widow, petitioned for probate of his will, which Arthur F. Greenhill and others contested. From a judgment of the Superior Court of Los Angeles County, Philip H. Richards, J., granting petitioner's motion for nonsuit at the close of contestants' evidence, admitting the will to probate and appointing petitioner as executrix, and from prior orders or decrees granting such motion, admitting the will to probate and granting petitioner letters testamentary, contestants appealed. The District Court of Appeal, White, P. J., held that contestants' evidence was insufficient to rebut the presumption of testator's testamentary capacity and that evidence of petitioner's activity in procuring execution of the will was insufficient to take to the jury the issue of her undue influence over testator.

Judgment affirmed.

1. Wills ⇐163(2)

Where confidential relation existed between testator and beneficiary of will and beneficiary unduly profits under and actively participated in procuring execution of will, presumption of beneficiary's undue influence over testator arises, and burden is on beneficiary to show that will was not induced by such influence.

2. Wills ⇐324(1)

In determining whether will contestants' evidence is sufficient to require submission of contest to jury, same rules apply as in civil cases.

3. Wills ⇐326

Every inference fairly deducible and every presumption fairly arising from evidence in will contestants' favor must be considered as facts proved in their favor on proponent's motion for nonsuit.

4. Wills ⇐326

Where evidence in will contest is fairly susceptible of two constructions or either of several inferences may reasonably be drawn therefrom, court must take view thereof most favorable to contestants on proponent's motion for nonsuit.

5. Wills ⇐326

All evidence in will contestants' favor must be taken as true and contradictory evidence disregarded on proponent's motion for nonsuit.

6. Wills ⇐324(1)

Any substantial evidence tending to prove all facts necessary to make out will contestants' case entitles them to sub-

mission of case to jury for verdict on merits.

7. Wills ⇐324(1)

Where different conclusions may be reasonably drawn by different minds from same evidence in will contest, decision must be left to triers of facts.

8. Wills ⇐326, 386

In determining will proponent's motion for nonsuit in will contest, neither trial court, nor District Court of Appeal, on appeal from judgment granting motion, can weigh evidence or pass on witnesses' credibility.

9. Wills ⇐1

A testator may dispose of his property as he wills, without consulting or satisfying wishes or views of juries or courts. Probate Code, § 20.

10. Wills ⇐324(1)

Whether a will is just or unjust in minds of others than testator is matter of opinion, and jury cannot be permitted to determine such question without substantial evidence required by law.

11. Wills ⇐155(1)

Undue influence over testator presupposes his testamentary responsibility or competency, which is essential to existence of such influence.

12. Wills ⇐52(1), 55(1)

The presumption is that testator was of sound mind at time of executing will, and burden rests on contestants thereof to show affirmatively, by preponderance of evidence, testator's mental incapacity and resulting bequest of his property in different manner than he otherwise would have bequeathed it.

13. Wills ⇐52(1)

The presumption of testator's testamentary capacity at time of executing will is rebutted only by substantial evidence that he was unable to understand and carry in his mind nature and situation of his property, his relations to his relatives and those around him, the act he was performing, and his relation to objects of his bounty.

14. Wills ⇐52(6)

To invalidate will, claimed infirmities of testator's mind or body must be shown to have had direct bearing on testamentary act.

15. Wills ⇐55(5), 164(7)

Evidence that testator was on hospital's critical list, with his death expected at any moment, when he signed will, that house physician, just two hours before will was signed, ceased questioning testator because further questioning might cause his death, that he was given pantopon, morphine and quinidine shortly after heart attack resulting in his death, and that he was in pain and nauseated shortly before signing will, was admissible as material in ascertaining effect of influence alleged to have been exerted over him by his wife, but insufficient to rebut presumption of his testamentary capacity.

16. Wills ⇐163(2)

Activity of testator's wife in procuring execution of will, naming her as principal beneficiary, must be shown to raise presumption of her undue influence over testator, even if confidential relationship existed between them solely because of husband and wife relationship.

17. Wills ⇐166(7)

Evidence of wife's opportunity to influence husband's mind in executing will, with possible interest or motive to do so, is insufficient to invalidate will on ground of wife's undue influence, but proven circumstances must be inconsistent with voluntary action by testator to overthrow will.

18. Wills ⇐324(3)

Evidence was insufficient to take to jury issue of wife's undue influence over husband in procuring his execution of will naming her as principal beneficiary.

19. Wills ⇐324(3)

To invalidate will on ground of undue influence over testator by his wife, substantial evidence that pressure was brought to bear by her directly on testamentary act must be produced.

20. Wills ⇐166(7)

Evidence that testator's wife was so situated as to have opportunity to influence testator's mind unduly at time of his execution of will or that her actions at such time were suspicious was insufficient to support finding of her undue influence over testator, in view of statutory presumption of innocence of wrongdoing. Code Civ. Proc. § 1963, subd. 1.

21. Wills ⇐322

In will contest, evidence of testator's declarations that he intended to take care of contestants, who were his children, was admissible only to show relations between them and testator and state of his mind with reference to them.

22. Wills ⇐324(3)

Evidence that testator's wife called testator's attorney, who was selected by testator and had prepared will for him, to draw another will shortly before testator's death, was insufficient to take to jury question of wife's undue influence over testator in procuring execution of will.

23. Wills ⇐384

In absence of sufficient evidence of testator's widow's activity in procuring execution of will to raise issue for jury as to her undue influence over testator, exclusion of evidence of value of estate to be received by widow under will was not prejudicial to will contestants.

24. Wills ⇐371½

Attempted appeals from orders or decrees granting will proponent's motion for nonsuit in will contest, admitting will to probate, and granting proponent letters testamentary, were dismissed as reviewable on appeal taken from judgment entered on such order or decrees.

E. P. Mulholland, Geo. W. Trammell, Long Beach, for appellants.

Perry & Bush, Redondo Beach, John R. A. Girling, Betty B. Gillette, Los Angeles, for respondents.

WHITE, Presiding Justice.

Arthur A. Greenhill died testate April 8, 1949, at the age of 65. His attested will, dated April 7, 1949, provided for legacies of $10.00 each to his four children by first and second marriages, Arthur, Lorna, Joan, and Kenneth (contestants and appellants herein), and to two stepchildren by his fourth and last marriage, Kenneth and Naomi (legatees and respondents herein). The remainder of his estate was bequeathed and devised to his widow, Adelle (petitioner and respondent herein), whom he had married four and one half months prior to his death, and she was named as executrix.

The widow, Adelle Greenhill, petitioned for probate of the will, whereupon decedent's four children by previous marriages filed their grounds of opposition thereto contesting the validity of the execution and attestation of the will, the testamentary capacity of decedent, and alleging undue influence and fraudulent representations on the part of the widow. Of these, only two grounds of opposition were relied on at the trial: (1) That the will was executed under the undue influence of the widow, and (2) that it was executed at a time when the decedent lacked testamentary capacity. At the close of contestants' introduction of evidence, proponents' motion for nonsuit was granted and judgment accordingly entered granting said motion, admitting the will to probate, appointing the widow executrix, and ordering that letters testamentary be issued upon her taking the prescribed oath.

[1] Upon this appeal contestants insist that they were entitled to have their case submitted to the jury on both of the grounds upon which the will was assailed. As to the first ground of undue influence, appellants set forth the well-established rule that where there exists a combination of three factors, namely, (1) a confidential relationship between the beneficiary and the testator, (2) undue profiting by the beneficiary under the will, and (3) actual and active participation by the beneficiary in procuring the execution of the will, a presumption of undue influence arises and the burden is on the beneficiary to show the will was not induced by his undue influence. Citing In re Estate of Graves, 202 Cal. 258, 259 P. 935; In re Estate of

Lances, 216 Cal. 397, 14 P.2d 768; In re Estate of Gallo, 61 Cal.App. 163, 214 P. 496; In re Estate of Rabinowitz, 58 Cal. App.2d 106, 135 P.2d 579; Estate of Johnson, 31 Cal.App.2d 251, 87 P.2d 900; In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384.

[2-8] As to both the first ground of undue influence and the second ground of lack of testamentary capacity, appellants emphasize the necessity of applying the well-settled rules governing the dispositions of motions for nonsuits, quoting from the Estate of Gallo, 61 Cal.App. 163, at page 173, 214 P. 496, at page 501: "'In determining whether or not in a proceeding to contest a will, the evidence produced by the contestants is sufficient to require the submission of the case to the jury the same rules apply as in civil cases. Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the contestants. Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must be taken as true, and if contradictory evidence has been given it must be disregarded. If there is any substantial evidence tending to prove in favor of the contestants all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits.' (Citing cases.)" In re Estate of Rabinowitz, supra, which was an appeal from a judgment of nonsuit, states: "* * * In other words, where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the triers of fact. In determining the motion for a nonsuit the trial court was not authorized to, nor can this court on appeal, either weigh the evidence or pass upon the credibility of witnesses." [58 Cal.App.2d 106, 135 P.2d 581.]

[9, 10] But in applying these rules another consideration must be borne in mind, so aptly expressed by this Court in the Estate of Burns, 26 Cal.App.2d 741, 748, 80 P.2d 77, 81: "Reviewing the question of the sufficiency of the evidence to sustain the judgment of nonsuit in the light of settled and established legal principles, we are confronted first of all with the fact that every person of sound mind over the age of eighteen years may dispose of his separate property by will. Prob.Code, sec. 20. As was said in an especially well-considered opinion prepared by Mr. Presiding Justice Nourse of Division Two of the First Appellate District in the Matter of the Estate of Nolan, [25 Cal.App.2d 738], 78 P.2d 456, 457, 'the property of the testator is his to dispose of as he wills, and he is not called upon to consult or satisfy the wishes or views of juries or courts (citing cases); and "whether in the minds of others a will is just or unjust is a matter of opinion, and to permit a jury to determine the question without that substantial evidence which the law requires would be to permit a jury to make the disposition irrespective of the desires of a testator." In re Estate of Donovan, 114 Cal.App. 228, 233, 299 P. 816.'"

Bearing in mind the limitations of the above rules, the record discloses the following facts: Decedent lived at Redondo Beach in Los Angeles County and was a retired businessman deriving his income from his rental properties. He had four adult children by two previous marriages with whom he maintained friendly relations, and he visited at the home of his eldest daughter, appellant Lorna A. Callahan, on the average of once a week. He was very proud of his grandchildren and often presented them and his children with gifts, not, however, constituting advancements.

The eldest daughter testified that during his third marriage, decedent suffered two or three heart attacks similar to the one from which his death ensued and his children were called to his "supposed death bed." Decedent became very "will conscious." In the words of his daughter:

"A. * * * We rather kidded about it. It was rather sort of his indoor sport. He always was having a will on the table. We weren't supposed to look at it, but we were supposed to look at it. It was

just sort of a teaser. I think he just enjoyed us looking over what he had. If one of us looked, then we joked, 'You are out of the will,' then the other one would say, 'I was out last week, so we are even.' But dad seriously said, 'You kids will never starve because you are my kids, and I will see to it that you are taken care of.' He gave us that understanding.

"Q. How often did he make a will? Was it one a year or several a year, or what? A. Well, that is hard to say. He might have made six; he may have made a dozen; I don't know.

* * * * * *

"* * * he came to my house after Mrs. Greenhill, the third Mrs. Greenhill, died; and he said he would make a temporary will. Some day or other he was going to make one that would stick, I guess, but he had me make this will."

There was further testimony by the eldest daughter that the previous wills made disposition of his estate to his four children and his grandchildren only. At one of his "supposed death beds" he told Lorna that she need not worry about the second mortgage on her home because he was going to see to it that it would be paid. There was discussion between the father and daughter about naming her as executrix of his estate. On January 21, 1948, she wrote to her father asking that she be relieved of the responsibilities attendant upon acting as executrix of his will because "the way you're bequeathing your property is so involved that I would never have a free minute for at least fifteen years after your demise." After expressing her appreciation for the confidence reposed in her by her father as well as for making her "one of your heirs," said daughter continued, "and if after reading this letter you decide to cut me out, that is all right, too. It is your money, and you have a perfect right to do what you want with it. * * *

"In the meantime, come and see me as usual. You are welcome any time. * * *"

Sometime in January, 1948, decedent met Adelle Greenhill, respondent widow herein. He saw her twice between January and July or August, 1948, visited her often thereafter, and they were married November 22, 1948. He continued his friendly visits with his children and his aforesaid wife often accompanied him.

On January 17, 1949, decedent retained Auten F. Bush as his attorney in an unlawful detainer action. The following month he visited his lawyer's office alone for the purpose of having a will drawn. Decedent instructed his attorney to draw the will so that respondent wife would receive all of his estate, subject to legacies of $10.00 to each of his children and each of the widow's children, but if she predeceased him, the estate was to be placed in trust for his grandchildren. Mr. Bush and his partner, Mr. Perry, proceeded to draw the will in accordance with the instructions given. On February 23d, Mr. Bush's secretary made a transcription of a telephone conversation she had with decedent wherein he dictated to her from a memorandum concerning a portion of his assets. Subsequently the memorandum in decedent's handwriting from which the foregoing transcription was made was delivered to Mr. Bush's office. Approximately two weeks after February 23d, both Mr. and Mrs. Greenhill visited Attorney Bush's office. By this time the will was ready for execution except that the last page was not complete in that it lacked the dates of birth of the grandchildren. Mr. Bush related the contents of the will to both Mr. and Mrs. Greenhill and told Mr. Greenhill that he would have to insert the dates before the will could be completed. After this conference, Mr. Bush testified that he recalled talking to Mrs. Greenhill over the phone "pertaining to whether or not the will was ready," and "that she either called or I have talked to her on that." As to phone conversations with Mr. Greenhill, Attorney Bush testified:

"Q. Do you recall communicating with him subsequent to this second visit? A. I had a phone conversation with him. The

last one that I can recall where—I don't know whether he called me or I called him; I don't know that; I believe he called me.

"Q. Approximately when was that? A. It was in the latter part of March, because at that conversation I asked him about those dates and told him that the will wouldn't be ready until we had those dates, and he made some remark, 'Well, I am not going to worry about that,' or something indicating that he wasn't going to be bothered right at the moment to supply the dates."

The will with the trust provisions was never completed or executed.

On April 7, 1949, at about 4:00 p. m., the decedent was stricken with a heart attack while playing cards at the Fortune Club in Gardena. Dr. Harry Breetwor, who was in the club at the time, testified:

"A. The man was cold, clammy, semi-conscious, no pulse, blood pressure was hardly discernible; we gave him a third of a grain of pantopon, which is equivalent to about a quarter of a grain of morphine, intravenously, and gradually the pulse started to pick up; and he was able to talk at that time. I asked him if he had pain in his chest, and he put his hand on his chest here. I waited about ten or fifteen minutes, and I again questioned him. I said, 'Is that pain still pretty bad?' and he shook his head yes, and then I gave him another injection of the same, a third of a grain of pantopon, intravenously. He gradually improved, and his blood pressure gradually picked up; and we were all of this time trying to get his wife. In fact, I think the club contacted the wife, and his own private physician also was called by the wife, as I understand it; and they were on their way. The man, himself, supplied the information, even though we looked at his identification to get his number; he did indicate the proper numbers to call. Then he gradually revived and improved, as far as blood pressure and pulse picked up."

Dr. Breetwor testified that the effect of the sedative, pantopon, takes place immediately and wears off in about two hours. Decedent told Dr. Breetwor how to contact Mrs. Greenhill and suggested his choice of a hospital. He was conscious all of the time. The resuscitating squad from the sheriff's office arrived and administered oxygen. Mrs. Greenhill and the family physician arrived and accompanied decedent in an ambulance to the Harbor General Hospital in Torrance. At 5:45 p. m. decedent was admitted to the hospital ward on a stretcher, where Dr. Kassel, a resident physician, attended him.

Dr. Kassel started questioning the patient and then he "stopped questioning the man because he appeared to be critically ill, and I felt that any added effort on his part might increase the possibility of a demise; and as long as his wife was there and she was able to give me an adequate story, I proceeded to question his wife." Dr. Kassel thought that the patient was under the effect of a narcotic, that he was critically ill, and that he had what was commonly known as a heart attack. The patient appeared to be suffering from pain and he also mentioned that he did have pain. Dr. Kassel felt the patient "was sick enough and required a private room; and despite that they were being occupied I had the nurse remove one of the patients from a private room and substitute Mr. Greenhill there."

Dr. Kassel was in attendance upon the testator for approximately one-half to three-quarters of an hour. During that time according to the physician, decedent "may have spoken a few words" to his wife. During this interval, according to the testimony of Dr. Kassel, respondent wife inquired "if it would be possible to bring a lawyer so that Mr. Greenhill might sign his will, or make out his will." Dr. Kassel referred her to a nurse to make the telephone call asking the attorney to come to the hospital.

Because he was of the opinion that the testator might "die at any minute" Dr. Kassel placed him on what is known as the "critical list."

The physician prescribed quinidine, a preparation intended to "cause the heart to quiet down so that it may return to a

normal rhythm." According to his testimony, in order "to ease the pain and apprehension on the part of the patient," he "also prescribed morphine, ordered the nurse to give him one dose medically, and then ordered her to give him doses subsequently, as required, on the part of the patient." In answer to a question as to how much morphine he ordered the nurse to give the patient, the physician testified: "A quarter of a grain, medically, and then to continue that every three hours, as required by the patient, for the control of his pain."

In describing the pain suffered by testator, Dr. Kassel testified, "Well, it is described differently by individuals. I don't know whether you can call it pain. Many people describe it as an oppression from the chest as though they had a steel wire bound and being tightened, pressing their chest. Some authorities in medicine describe it as being, perhaps, the most severe pain that an individual can tolerate. Some people think it is a gnawing ache, some a sharp pain; it is described variously."

The doctor then testified as follows:

"Q. Does that bring with it any premonition of death or feeling of imminence of death? A. Peculiarly, in this condition they say that the individual has an impending feeling of death. They get the feeling that they are going to die."

Dr. Kassel also testified that he did not give testator a "complete examination," that he "thought he was very ill and the less done with him the better." Oxygen was ordered for the patient. Dr. Kassel was in attendance upon testator from 5:55 p. m. until 6:30 or 6:45 p. m. and returned again at 10:25 p. m. The physician testified that while he was with the testator the latter was fully awake and conscious and talked rationally insofar as the questions directed to him were concerned.

With reference to medication administered to testator the hospital nurse testified that at 6:30 p. m. the patient "was given a quarter grain of morphine by hypo," and "at 6:35 he was given three grains of quinidine, as ordered. At 7:00 he was transferred to a private room. * * * At 8:00 he was resting quietly. At 9:00 he was given 300 milligrams of dicumarol, as ordered. And I have, color seems somewhat improved, pulse fair, with dozing at intervals. And at 11:00 he had three more grains of quinidine, as ordered, and that is all I have charted."

With reference to the arrival of Attorney Bush and execution of the will, the aforesaid hospital nurse testified that respondent Mrs. Greenhill "came to the office and she was very upset, and she wanted to notify Mr. Bush." Because the telephones were located some considerable distance away the nurse volunteered that "if she would give me the number I would get in touch with Mr. Bush for her."

The nurse called Attorney Bush, advised him that Mr. Greenhill was in the hospital, "that he was critically ill and that Mrs. Greenhill wanted to see him." The attorney advised that he "would be down as soon as he could," which message was transmitted by the nurse to respondent Mrs. Greenhill.

The nurse also testified that prior to being moved into a private room, testator "knew that he was in a county hospital, and he knew that he was out in the ward; and he didn't like it," and that "he was more satisfied when he was in a private room."

Coming now to the circumstances immediately surrounding the preparation and execution of the testamentary document in question, the record reflects that about 6:30 o'clock on the evening of April 7, 1949, Attorney Bush received a telephone call at his home from a then unidentified lady who said, "This is the Harbor General Hospital, and we have a patient here by the name of Arthur A. Greenhill who has asked that you come over right away and bring the will which you have prepared." Mr. Bush asked Mr. Richardson, his dinner guest, to accompany him and the two of them drove to the hospital, stopping en route at Mr. Bush's office to pick up the incomplete will. They arrived at the hospital about 7:00 p. m. where the

guard directed them to Ward C-9. Mr. Bush testified that Mr. Greenhill was lying in a hospital bed—

"* * * He was, as I recall it now they had part of the bed raised so he wasn't sitting up, but, I believe, he was at an angle there; his back was, maybe, at a fifteen- or twenty-degree angle from the floor. He had on an oxygen mask, and, well, when I came in he shook hands with me—just—I didn't offer my hand to him, he offered his to me, and I was careful not to grasp his hand, and he gave me a pretty firm grip. I don't mean to imply that it was a strong grip, but he gave me an ordinary grip, which impressed me at the time; with that mask on there, and, of course, anything like that gave me the impression that the man must be sick.

* * * * * *

"* * * when I first went in there, I asked him, 'What are you doing here, and what is the matter?' And he said he had had a heart attack, and then he told me, he said, 'I was over at the Fortune Club playing cards, and I had two 2's and two ace's and drew the third ace, and it was too much for me.' And he was kind of joking about it, jovial; he didn't—I guess—excuse me. He appeared to be regarding it in a humorous manner, the incident."

The attorney testified that Mr. Greenhill asked him if he had the will and he answered, "I have it, but it is not completed because, as you know, we have never had the dates of the births of the grandchildren. * * * But I can redraft the will that everything goes to Mrs. Greenhill. You won't need the trust anyway; this is really an emergency." Mr. Greenhill told him to "go ahead and draw it up."

During this conversation, Mr. Richardson was standing in the doorway of the room and Mr. Bush asked him to come in, introduced him to Mr. Greenhill and they shook hands in a firm handshake. Mr. Richardson testified that Mr. Greenhill had on an oxygen mask that he took on and off. Mr. Bush and Mr. Richardson then left and went down to one of the nurse's offices where Mr. Bush prepared the will. Mr. Bush copied the previously prepared will in longhand, omitting the trust provisions, and in doing so, pointed out to both the nurse and Mr. Richardson that he was copying the previously prepared will. He and Mr. Richardson then returned to Mr. Greenhill's room. Mrs. Greenhill either entered the room before them or right after them. Mr. Bush asked Mr. Greenhill if he wished to read the will and Mr. Greenhill requested Mr. Bush to read it to him, which he did. Mr. Bush asked Mr. Greenhill if that was the way he wished the will and Mr. Greenhill "said words to the effect that yes, it was that he wanted to leave everything to his wife, and that the last six or eight months of his life, apparently the length of time that he had been married or known Mrs. Greenhill, had been the happiest of his life.

* * * * * *

"* * * I had been standing toward the foot of the bed, and as he was asked to sign the will—Mrs. Greenhill at that time had entered the room, and she made a move toward him—and he said, 'No,' he said, 'I want this young man'—or something to that effect—'at the end of the bed,' and he pointed to me to hold him up while he signed it; and I stepped over there and put my arm around him and held him up into a sitting position, and he signed it with the papers on his lap."

At Mr. Bush's suggestion, Mr. Greenhill also initialled the first page of the will. During the second visit to the room, Mr. Richardson testified that the patient appeared alert, that he was coughing or was nauseated and that he had a little pan into which he regurgitated.

According to the testimony of both Mr. Bush and Mr. Richardson the will was executed with the proper formalities. Mr. Greenhill died at 1:58 p. m. the following day.

The record further discloses that the hospital nurse testified that while Attorney Bush and his friend and attesting witness, Mr. Richardson, were in the room the nurse entered to ask testator "if he was still nauseated, and how he felt. * * *

He said he felt better. I asked him if he was having any pain, and he told me no."

On the basis of this evidence, appellants contend that they were entitled to have the issues of lack of testamentary capacity and undue influence submitted to the jury.

[11] Inasmuch as undue influence is said to presuppose testamentary responsibility or competency, and to require it as essential to the existence of undue influence, 1 Page on Wills, 3d Ed.1941, sec. 185, p. 369; 26 Cal.Jur. 642, the issue of competency will be considered first. Appellants emphasize that when Mr. Greenhill signed the purported will:

(1) he was on the "critical list" when death was expected any moment;

(2) he had been placed in a private room from whence another patient had been removed expressly for the accommodation of decedent;

(3) just two hours before the will in question was signed the house physician ceased his preliminary questioning of the decedent because, in his opinion, any further questioning of the decedent might result in his death;

(4) he was not able to breathe sufficiently unless he had an oxygen mask;

(5) shortly after his heart attack at the Fortune Club, Dr. Breetwor gave him a third of a grain of pantopon; at 6:30 p. m. the nurse at the hospital gave him a quarter grain of morphine, and at 6:35 p. m. she gave him three grains of quinidine.

(6) At exactly 7:00 p. m., according to the hospital nurse and the hospital charts, the decedent was in pain and was nauseated.

[12] In the Estate of Llewellyn, 83 Cal.App.2d 534, 189 P.2d 822, 835, 191 P.2d 419, this Court held that a verdict should have been directed in favor of the proponent of the will, and reversed the judgment. The right of the trial court to direct a verdict in a will contest is the same as its right to grant a nonsuit. In re Estate of Bemmerly, 110 Cal.App 550, 294 P. 33. In the Llewellyn case, this Court said: "The presumption always is that a person was of 'sound mind' at the time of the execution of his will, and the burden therefore always rests upon the contestants to show affirmatively, and by a preponderance of the evidence, the incapacity of the testator, and the further fact that except for alleged infirmities of mind or body, he bequeathed his property in a manner that he otherwise would not have done.

[13] "Giving a consideration to all of the foregoing evidence introduced by contestants and respondents, we must hold that it falls far short of constituting what the law regards as a rebuttal of the presumption of testamentary capacity at the time of the execution of the will, the existence of which is destroyed only when by *substantial* evidence it is shown that a testator was unable to understand and carry in his mind the nature and situation of his property, his relations to his relatives and those around him, incapable of understanding the act he is performing, and the relation in which he stands to the objects of his bounty if any."

[14, 15] The claimed infirmities of mind or body must be shown to have had a direct bearing upon the testamentary act. In re Estate of Russell, 80 Cal.App.2d 711, 182 P.2d 318. While the factors stressed by appellants are material in ascertaining the effect of the influence alleged to have been exerted, considering the physical and mental condition of the testator, they fall far short of constituting a rebuttal of the presumption of testamentary capacity. There was no evidence presented showing any irrationality on the part of the testator or that he was not conscious of his surroundings and his acts either before or during the time of the execution of his will. This total lack of evidence plus the fact that the executed will contained essentially the same provisions as a previously prepared will left the trial court with no alternative other than to grant a nonsuit as to the issue of lack of testamentary capacity.

[16] As to the issue of undue influence, appellants claim a prima facie show-

ing of the three factors constituting a presumption of undue influence: (1) a confidential relationship between respondent wife and testator; (2) undue profit by respondent wife under the will; and (3) activity on the part of respondent wife in procuring the execution of the will. As to the first factor, appellants rely solely upon the relationship of husband and wife, citing In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384, 388: "A fiduciary relationship exists between husband and wife in respect to the issue of undue influence in a will contest, and where such fiduciary relationship is combined with unduly profiting by the will, and its being unnatural, and activity on the part of the proponent in procuring its execution, we have persuasive evidence of undue influence." Conceding a confidential relationship based solely on the husband and wife relationship, activity on the part of respondent in procuring execution of the will must be shown to raise a presumption of undue influence. The appellants set forth the following facts as evidence of such activity:

(1) Sometime after February, 1948, respondent wife called Bush, the attorney, twice to inquire whether the will was completed;

(2) Respondent wife on one occasion called at Mr. Bush's office with the decedent in reference to the preparation of the will;

(3) After Dr. Kassel, the resident physician at the Harbor General Hospital, had completed his first examination of Mr. Greenhill, respondent wife approached the doctor and inquired if it would be possible to bring in a lawyer to make his will;

(4) After this conversation with Dr. Kassel, respondent wife went to the nurse and procured her to call the attorney and request that he come to the hospital to make the will;

(5) Respondent wife was in the decedent's room throughout the time that the will, as prepared by the attorney at the hospital, was read to the testator and when it was executed by him.

[17] In the Estate of Llewellyn, supra, with reference to activity on the part of the person charged with exercising undue influence, this Court stated, 83 Cal.App. 2d at page 565, 189 P.2d at page 840: "In the instant case the evidence conclusively shows that the will was prepared from directions given by the testator to his attorney and there is very strong evidence that it was the testator's voluntary act. In re Estate of Fraser, 75 Cal. App.2d 99, 104, 170 P.2d 704. The evidence in the case at bar of activity on the part of appellant is far more lacking in substantiality than that present in In re Estate of Hamburger, 126 Cal.App. 455, 463, 464, 14 P.2d 802, wherein it was held that a motion for nonsuit was properly granted. In the case now engaging our attention, nothing more was shown than the presence of an opportunity for appellant to influence the testator's mind with a possible interest or motive so to do. This is totally insufficient. Before a testamentary document will be overthrown because of the exercise of undue influence, the proven circumstances must be inconsistent with voluntary action on the part of the testator."

In the Estate of Burns, 26 Cal.App.2d 741, 750, 80 P.2d 77, 82, wherein a judgment of nonsuit was affirmed, this Court said: "There is nothing in the record before us inconsistent with the idea that the testatrix executed the will here in controversy without any previous suggestion of such action by anyone, and entirely of her own free will, without influence or coercion of any kind. The burden was on the contestants to show the contrary, and it is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence, but before a will can be overthrown, the circumstances must be inconsistent with voluntary action on the part of the testatrix. In re Estate of Morcel, 162 Cal. 188, 121 P. 733; In re Estate of Donovan, 114 Cal.App. 228, 299 P. 816. See, also, In re Estate of Presho, 196 Cal. 639, 238 P. 944, and In re Estate of McDevitt, supra [95 Cal. 17, 30 P. 101]. The evidence in this case,

when weighed by the standard here enunciated, falls far short of showing any such undue influence as in effect destroyed the testatrix' free agency and overwhelmed her volition at the time of making the will with which we are here concerned."

[18] The five instances of activity on the part of the respondent wife set forth by appellants herein fall far short of sufficient evidence to warrant determination of the issue of undue influence by a jury.

For support of the statement just made it becomes necessary to do no more than cite the following cases, in which the evidence was much stronger than appears in the instant case, and yet was held insufficient to justify the setting aside of the testamentary documents there under consideration: In re Estate of Perkins, 195 Cal. 699, 235 P. 45; In re Estate of Clark, 170 Cal. 418, 149 P. 828; In re Estate of Purcell, 164 Cal. 300, 128 P. 932; In re Estate of Casarotti, 184 Cal. 73, 192 P. 1085; In re Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; In re Estate of Garvey, 38 Cal.App.2d 449, 101 P.2d 551.

[19-22] In the case at bar we fail to perceive any substantial evidence that pressure was brought to bear by respondent widow directly upon the testamentary act, and it is the law that such evidence must be produced. In re Estate of Arnold, 16 Cal.2d 573, 577, 107 P.2d 25; In re Estate of Carithers, 156 Cal. 422, 428, 105 P. 127; In re Estate of Gleason, 164 Cal. 756, 765, 130 P. 872. Conceding that the evidence herein is sufficient to show that respondent wife was so situated as to have an opportunity to unduly influence the mind of the testator, or that the actions and conduct of the said respondent might be regarded as suspicious, such evidence is insufficient to support a finding of undue influence. There is a presumption that one is innocent of crime or wrongdoing. Code Civ.Proc. sec. 1963, subd. 1. The declarations of testator that he intended to "take care" of appellants was admissible only to show the relations between them and the state of the testator's mind with reference to his children. Securing an attorney to draw a will for another has been held not to constitute participation. In re Estate of Hull, 63 Cal.App.2d 135, 139, 142, 146 P.2d 242. In the instant case the evidence conclusively shows that Attorney Bush was testator's attorney, selected originally by him, represented him in other litigation, and had, as heretofore noted prepared a previous will for him. In Re Estate of Hamburger, 126 Cal.App. 455, 463, 464, 14 P.2d 802, wherein it was held that a motion for nonsuit was properly granted, the evidence of activity was much stronger in substantiality than is present in the case now engaging our attention.

[23] Appellants also claim the trial court erred in refusing to admit evidence showing the value of the estate to be received by the widow. In view of the fact that a nonsuit should have been granted in the trial court on the issue of undue influence because of lack of evidence as to activity on the part of the respondent widow, the trial court's ruling on admissibility of this evidence is of little consequence and certainly not prejudicial.

[24] The attempted appeals from the order or decree granting motion for nonsuit, the order or decree admitting will to probate, and the order or decree granting letters testamentary are, and each is, dismissed for the reason that in the instant case such orders and decrees are reviewable on an appeal from the judgment entered thereon. The judgment is affirmed.

DRAPEAU, J., concurs.

DORAN, J., dissents.

Hearing denied; CARTER, J., dissenting.

99 Cal.App.2d 151

HENNESSEY v. PUERTAS.
Civ. 17345.

District Court of Appeal, Second District, Division 1, California.
Aug. 22, 1950.

Action by William Hennessey against Bonifacio Puertas, Jr., for an order quashing a writ of execution and vacating and declaring void a purported sheriff's sale under the writ. The Superior Court, San Luis Obispo County, Ray B. Lyon, J., entered an order quashing the writ, and the defendant appealed. The District Court of Appeal, White, P. J., held that since the judgment constituted only a declaration of the rights and duties of the parties under the provisions of the lease, order quashing the writ was proper.

Orders affirmed.

Execution ⇐7

Where lease provided for increase in rental if lessee erected buildings on premises and used them for financial gain, and lessor brought action for determination of rental value of addition to premises, judgment by agreement that lessor was entitled to rent of $75 per month was merely declaratory of rights of parties and was not a money judgment on which execution could issue.

Renetzky & Davis, Laura O. Coffield, all of San Luis Obispo, for appellant.

A. H. Brazil, San Luis Obispo, for respondent.

WHITE, Presiding Justice.

Plaintiff has appealed from an order of the superior court quashing a writ of execution, vacating and declaring void a purported sheriff's sale under the writ, and denying plaintiff's motion to strike certain affidavits filed by defendant. The question presented is whether the judgment under which the writ was issued is a judgment for the payment of money or merely a judgment declaratory of the rights of the parties under the terms of a lease.

Plaintiff in his complaint filed November 12, 1942, set forth the terms of a certain lease between plaintiff as lessor and one Miller as lessee, which lease was assigned to defendant, successor to the lessee. The lease contained the following provision: "It is agreed by and between the parties hereto that Lessee may erect other buildings on said premises in addition to the frame building now situate thereon. If said buildings are to be erected and are to be used for financial gain, as distinguished from occupancy by Lessee or his agents for a dwelling, then it is agreed that the Lessor hereunder is entitled to an increase in the amount of rent; and if the parties hereto cannot agree upon the amount of increase then and in that event the amount shall be determined and fixed by the arbitration, the said Lessor and Lessee each appointing an arbitrator, and in case the two arbitrators so selected cannot agree, then John J. Hutchins, attorney at Law, Paso Robles, California, shall appoint a third arbitrator, and the decision of any two of the said arbitrators, delivered in writing to the parties hereto shall be conclusive evidence and binding upon the parties hereto."

Plaintiff further alleged that defendant erected improvements for use in his business and not as a dwelling; that plaintiff informed defendant that he had appointed an arbitrator to determine the increase in rent pursuant to the terms of the lease, but that defendant refused to appoint an arbitrator.

The prayer of the complaint was as follows:

"1. That this honorable court determine the rental value of said addition to the premises described herein as and from the 4th day of September, 1942, or that this Court appoint sufficient appraisers or arbitrators to determine the reasonable rental value of said addition.

"2. That this honorable court award this plaintiff an increase of rental in the amount found reasonable from September 4, 1942 to the termination of said lease.

"3. For a reasonable amount as and for attorney fees for plaintiff; costs of suit; and for such other and further relief as is meet and proper in the premises."

On December 21, 1943, the parties entered into a stipulation which recited the provision of the lease above quoted and that "the facts set forth in the complaint are true" and then provided:

"Now, Therefore, it is agreed that a judgment shall be entered in the premises in favor of plaintiff and against defendant providing that said plaintiff shall be entitled to rents from said defendant for the premises described in said lease for the sum of $75.00 on the 10th day of September, 1942, and $75.00 on the 10th day of each and every month thereafter up to the 10th day of February, 1951, inclusive.

"It is hereby agreed that judgment shall be entered herein at Court."

Pursuant to the stipulation judgment was entered as follows: "That Defendant, Bonifacio Puertas, Jr., pay to plaintiff, William Hennessey, the sum of $75.00 on the 10th day of September, 1942, and $75.00 on the 10th day of each and every month thereafter up to the 10th day of February, 1951, inclusive, subject to the terms and conditions of that certain lease, a copy of which is affixed to the complaint on file herein and therein marked Exhibit 'A', as and for rents on that certain premises * * *."

Nothing further of importance on this appeal occurred in the action, until August 17, 1948, when plaintiff secured the issuance of a writ of execution by presenting to the clerk of the superior court an affidavit that the sum of $1,322.50 was unpaid on the judgment. The writ was delivered to the Sheriff of Fresno County, who levied upon and sold real property of the defendant. Defendant then moved to quash the writ and vacate the sale, supporting the motion with affidavits. The court in its decision on the motion found: "That the judgment heretofore entered in the above-entitled case was judgment of declaratory relief establishing the rental to be paid by the lessee under the terms of the agreement referred to in the original complaint; that the said judgment prescribed the payment of $75.00 per month according to the terms of said lease and did not constitute a judgment for said sum, enabling the plaintiff to secure a writ of execution thereon; * * *."

The decision of the judge of the court below was obviously correct. The plaintiff's complaint in the action sought only declaratory relief, with an incidental award of costs and attorney's fees. The stipulation for judgment does not provide that plaintiff shall recover $75 per month from defendant, but that "said plaintiff *shall be entitled to rents* from said defendant for the premises described in said lease" of $75 per month. The inept language of the judgment, that defendant "pay to plaintiff" $75 per month, cannot control, in view of the record above recited and the further language of the judgment that such payment is "subject to the terms and conditions of that certain lease." The plaintiff by his action sought only declaratory relief; the stipulation for judgment clearly contemplated only declaratory relief; and the judgment itself, while it provides that defendant "pay * * * to plaintiff", further provides that such payment is "subject to" the terms of the lease."

The only reasonable construction is that the judgment constitutes a declaration of the rights and duties of the parties under the provisions of the lease, and no more. The construction urged by appellant would require a holding that defendant had in effect authorized confession of judgment for any unpaid rent accruing at any time in the future. The error of such a construction, in the light of the record, is manifest. At the time the action was brought, the plaintiff had no cause of action for unpaid rent except for such increased rent as might be awarded pursuant to the provision for increased rent if improvements were added. We have considered the authorities cited by appellant and do not deem them applicable here.

Our conclusion upon the main question presented renders it unnecessary to consider the merits of appellant's contention that the affidavits filed by respondent in support

of his motion should have been stricken. Irrespective of the affidavits, the court's decision was correct.

The orders appealed from are, and each is, affirmed.

DORAN and DRAPEAU, JJ., concur.



99 Cal.App.2d 274

Ex parte McLAIN.
Cr. 4510.

District Court of Appeal, Second District, Division 1, California.

Aug. 30, 1950.

Habeas corpus proceeding by George H. McLain, who had been committed for constructive contempt for failure to comply with order to produce specified books and papers. The District Court of Appeal, Per Curiam, held the order and affidavit to be fatally defective in that they did not set forth the materiality and pertinency of the books and papers called for.

Writ granted and petitioner discharged.

1. Witnesses ⇐21

Witness otherwise orderly and respectful cannot be adjudged guilty of constructive contempt for failure to comply with order to produce certain books and papers unless the order adjudging witness in contempt affirmatively sets forth the materiality and pertinency of the books and papers. Government Code, §§ 9405, 9408.

2. Witnesses ⇐21

In constructive contempt for failure to comply with order to produce specified books and papers, not only the order adjudging witness in contempt, but also the affidavit must sufficiently charge the alleged facts constituting the offense. Government Code, §§ 9405, 9408.

3. Witnesses ⇐21

Where affidavit forming basis of proceeding for constructive contempt for failure to comply with order to produce certain books and papers merely stated as a conclusion that such books and papers were material, and only statement of materiality in the order adjudging witness in contempt was by reference to the affidavit, the affidavit and order were fatally defective.

Kenny & Morris, Los Angeles, for petitioner.

William E. Simpson, District Attorney, Jere J. Sullivan, Deputy District Attorney, Los Angeles, for respondent.

Miller and Kroloff, Nat Brown, Jr., By Jack J. Miller, all of Stockton, J. D. Strauss, Sacramento, and A. C. Morrison and Owen K. Kuns, Los Angeles, for Senate Interim Committee on Social Welfare, real party in interest.

PER CURIAM.

During the 1949 session of the California Legislature a committee named "The Senate Interim Committee on Social Welfare" was created by Senate resolution.

Pursuant to its powers of investigation, the Committee served upon Citizens Committee for Old Age Pensions, a corporation, and George H. McLain, as chairman of its Board of Trustees, a subpoena duces tecum, calling for the production of the following books, papers, and documents:

(1) For the period January 1, 1948, to date the book or ledger in which is entered the funds received by the Citizens Committee for Old Age Pensions.

(2) For the period January 1, 1948, to date the columnar journal in which all checks and disbursements of the Citizens Committee for Old Age Pensions were listed.

(3) For the period January 1, 1948, to date all books and ledgers containing the date which the above described books and ledgers contained; if the above books and

ledgers have been replaced by others, due to change in accounting procedures or for any other cause.

(4) All vouchers supporting expenditures from the petty cash fund or cash imprest fund of the Citizens Committee for Old Age Pensions for the period January 1, 1948, to date.

(5) The minutes of the meetings of the Board of Directors of the Citizens Committee for Old Age Pensions for the period from January 1, 1948, to date.

Mr. McLain appeared before the Committee, in response to the subpoena; but refused, on advice of counsel, to answer questions or to produce the records called for.

Upon representation to the Superior Court by counsel for the Committee, an order was made directing Mr. McLain to produce the records. Gov.Code, sec. 9408. In this order the records are described as stated in this opinion, but no statement is made as to their materiality or pertinency. Section 9405 of the Government Code declares a contempt to refuse to produce under subpoena any *material* and proper books, papers and documents. (Emphasis added.)

Mr. McLain again appeared before the Committee and again refused to produce the records.

Thereupon an affidavit was filed in the Superior Court, setting forth the facts above stated, and praying that Mr. McLain be adjudged guilty of contempt. This affidavit makes the following averments with respect to materiality and pertinency of the records:

"That, based upon evidence in its possession, the said Senate Interim Committee has determined that each of the books, papers, and documents specified in said subpena *duces tecum* is material to the matters now under investigation by the said Senate Interim Committee, and the production of such books, papers and documents is necessary in order to enable said Senate Interim Committee properly to perform the duties imposed upon it and to report to the Senate of the State of California pursuant to said Senate Resolution No. 162.

"That each of the books, papers and documents specified in said subpena *duces tecum* is material to the matters now under investigation by the said Senate Interim Committee and that the production of such books, papers and documents is necessary in order to enable said Senate Interim Committee properly to perform the duties imposed upon it and to report to the Senate of the State of California pursuant to said Senate Resolution No. 162."

The Court adjudged Mr. McLain guilty of contempt, and ordered him committed to the custody of the county sheriff until he produced the records.

Mr. McLain petitions this Court for a writ of habeas corpus. His petition is based principally upon the contention that the affidavit upon which the contempt proceedings are based is fatally defective. He contends that it nowhere states in what respect the records were material and pertinent for the use of the Committee in its investigative procedure.

[1] The rule here to be applied is set forth in Re Battelle, 207 Cal. 227, 277 P. 725, 65 A.L.R. 1497, approved in Re Wells, 29 Cal.2d 200, 173 P.2d 811, and for the purposes of this inquiry paraphrased as follows: A witness who is otherwise orderly and respectful cannot be adjudged guilty of contempt unless the order affirmatively sets forth the materiality and pertinency of the books and papers called for.

[2] In cases of constructive contempt, as is this, not only the order but also the affidavit upon which it is based must sufficiently charge the alleged facts constituting the offense. In re Davis, 31 Cal.2d 451, 189 P.2d 283.

[3] Applying this test to the order, and to the affidavit, it becomes immediately apparent that each of them is lacking in the essential allegations of materiality and pertinency of the records, and that the Superior Court was without jurisdiction to hear the case, or to adjudge contempt. The affidavit states conclusions; and the only

statement of materiality in the order is by reference to the affidavit.

It is unnecessary, in view of the foregoing conclusion, to determine the issues raised by petitioner with regard to unreasonable search and seizures or the validity of the powers of the legislative committee; however, it should be noted, that petitioner's contentions relating thereto are not without merit. This case turns upon elementary principles of due process of law. Before any man may be imprisoned he is to know in the affidavit charging him with constructive contempt in what respect records which he is ordered to produce are material to the investigation—legislative, executive, or judicial—under way.

The writ is granted and the petitioner discharged from custody.



99 Cal.App.2d 251

BLODGETT et al. v. WALKER SCOTT CORPORATION.
Civ. 3985.

District Court of Appeal, Fourth District, California.

Aug. 29, 1950.

Rehearing Denied Sept. 15, 1950.

Hearing Denied Oct. 26, 1950.

Action by Joel Blodgett, by and through his guardian ad litem, Della Blodgett, and another, against Walker Scott Corporation, for injuries sustained by the minor plaintiff while riding on moving escalator in store. From judgment for defendant by the Superior Court of San Diego County, C. M. Monroe, J., plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that the evidence was sufficient to support findings that accident was caused by act of boy in leaning far over banister of escalator, and that defendant was not negligent.

Affirmed.

1. Evidence ⇐571(6)

In action by boy against store for injuries sustained on moving escalator, state inspector's testimony that escalator complied with all applicable safety regulations, while it was not conclusive, was entitled to some weight.

2. Trial ⇐165

In action by boy against store for injuries sustained on moving escalator, tried to court without jury, fact that court refused to grant non-suit did not establish that plaintiff made prima facie case.

3. Stipulations ⇐14(11)

In action by boy against store for injuries sustained on moving escalator, fact that trial judge viewed escalator in operation in absence of boy, was not improper, in view of fact that both parties stipulated that judge might inspect escalator alone.

4. Appeal and error ⇐1008(1)
Carriers ⇐318(1)

In action by boy against store for injuries sustained while riding on escalator, question of store's negligence was one of fact for trial court and evidence supported finding that store was not negligent.

5. Carriers ⇐281

Operator of escalator is not responsible as insurer for safety of child passengers.

F. W. Powell; Thomas P. Golden, San Diego, for appellants.

Gray, Cary, Ames & Driscoll, San Diego, for respondent.

BARNARD, Presiding Justice.

The minor plaintiff, being two months less than 11 years old, was injured while riding on an escalator between the first and second floors of a store operated by the defendant. This escalator had a banister on each side, 11 inches in width at the top, which was stationary except for a moving handrail along the middle. Near the outer edge of the banister, and at the "apex" or angle where it passed through the ceiling, there was a triangular guard plate which was about 18½ inches from the nearest edge of the tread of the escalator upon which people stood.

Shortly before the accident the boy, with his parents, had gone to the second floor on this escalator. On their return to the first floor the boy asked and received his mother's permission to ride up again. The parents stood a few feet from the bottom and watched him until he was about half way up, and then looked elsewhere. While he was leaning across the banister and looking down his head came in contact with the guard plate at the "apex", causing the injuries complained of. The escalator was stopped and the boy ran down past the other occupants to where his parents stood.

The complaint alleged that this escalator was so negligently "maintained and operated" by the defendant as "to be wholly unfit and dangerous for public use." After a trial without a jury, and an inspection of the premises by agreement of the parties, the court found that it was not true: that the defendant maintained or operated this escalator carelessly or negligently; that it was unfit or dangerous for public use; that the defendants had, or should have had, knowledge of any dangerous or unfit condition; or that any act of negligence on its part was the proximate cause of the accident. The plaintiffs have appealed from a judgment in favor of the defendant.

Claiming insufficiency of the evidence, it is argued that there was no guard plate at the "apex"; that an elevator starter, who was the only attendant, saw and realized the boy's dangerous position, but did not warn him or stop the escalator; that instead of doing her duty she asked the maintenance supervisor to stop it; that the court's refusal to grant a nonsuit discloses a prima facie case, which was not overcome by respondent's evidence; that the testimony of a state inspector related only to a minimum standard, while a higher degree of care was here required; that the testimony that the boy leaned over the banister related only to his conduct, and not to the issue as to respondent's negligence; and that the fact that the trial judge viewed the escalator in operation is of no weight since the boy was not then present.

[1] These contentions are not sustained by the record. While the boy's mother testified that she did not see the triangular guard plate, several witnesses testified that it was there at the time. The elevator starter testified that she was standing near the escalator and saw the boy leaning over the railing; that she had seen other children leaning over, but not that far; that the moving handrail was opposite the middle of his chest and the rest of his body extended beyond the rail; that she yelled to the maintenance supervisor who was nearer the escalator than she was; that he "made a dive for the button", and stopped it; and that before it stopped the boy's head hit the triangular guard. The maintenance supervisor testified that when the elevator starter called his attention he saw the boy "leaning over", and "riding on the rail, almost on to his stomach"; that he "hollered" at the boy and immediately "slipped over to the button" and stopped the escalator. The state inspector's testimony that this escalator complied with all applicable safety regulations, while it may not be conclusive, is entitled to some weight. Moreover, he testified that this installation was of equal standard with the best, that the condition at the "apex" conformed to accepted standards, and that it was practically the same design as that used in all escalators.

[2, 3] The fact that a nonsuit was denied is immaterial since different rules apply when the judge is to weigh the evidence. Both parties expressed a desire to have the judge inspect the escalator, and stipulated that he might do so alone. This was for the obvious purpose of having him observe the actual situation, and there is no merit in the contention here made in this regard.

[4] The question was one of fact for the trial court, Kataoka v. May Dept. Stores Co., 60 Cal.App.2d 177, 140 P.2d 467; Reynolds v. May Dept. Stores Co., 8 Cir., 127 F.2d 396, and the evidence supports the findings made. The situation here was summarized by the trial judge, in making his decision: "It seems to me plain, as a physical fact, that the only way this

accident could have happened is by the child leaning so far that his body was lying on the handrail," and "I cannot see that the weight of the evidence would justify a finding that the proprietors were bound to anticipate an action of that sort."

[5] The appellants further contend that the operator of an escalator is bound by the same degree of care as that required of a common carrier; that in such cases even more care is required when the passenger is a child; and that these principles should logically be so extended as to hold operators of escalators, elevators or common carriers "responsible as insurers for the safety of child passengers." Aside from other considerations, the facts here raise a doubt as to the advisability of such an extension of the existing rules.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



HUGHES v. OREB et al.

Civ. 17431.

District Court of Appeal, Second District, Division 3, California.

Aug. 25, 1950.

As Modified on Denial of Rehearing Sept. 19, 1950.

Hearing Granted Oct. 23, 1950.*

Action by William J. B. Hughes against Nick K. Oreb, O. H. Ledbetter and H. J. Greenwood and another for false arrest and imprisonment. The Superior Court of Los Angeles County, William S. Baird, J., rendered judgment on a directed verdict as to defendants Greenwood and Ledbetter and entered judgment of nonsuit against plaintiff as to defendant Oreb and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that evidence produced by plaintiff was sufficient to have supported a finding by jury that it was at instigation of defendant Oreb that plaintiff was arrested without process for a crime he did not commit, and that arresting police officers had failed to establish as matter of law defense of probable cause.

Judgments reversed.

1. Trial ⇐165

On motion for nonsuit all evidence in favor of plaintiff will be assumed to be true and will be construed most strongly in his favor.

2. False imprisonment ⇐15(1, 2)

One who participates in the unlawful arrest or imprisonment, or who authorizes, encourages, directs, or assists an officer to do the unlawful act, or procures an unlawful arrest without process, is liable for false imprisonment. Pen. Code, § 236.

3. False imprisonment ⇐31, 39

In action for false arrest and imprisonment, evidence that plaintiff had been arrested and imprisoned after passing two silver dollars at a defendant's saloon, that he suffered damages, that such defendant had subsequently informed him that officers were arresting persons passing silver dollars as suspects in burglary of defendant's home, established a cause of action for false arrest and imprisonment, and whether defendant had instigated plaintiff's arrest was question for jury. Pen. Code, § 236.

4. False imprisonment ⇐22

In action for false arrest and imprisonment, probable cause on part of defendant to believe that plaintiff was guilty of burglarizing defendant's home was a matter of defense and disproof of same was not a part of plaintiff's case.

5. False imprisonment ⇐22

In action for false arrest and imprisonment, after plaintiff had alleged and proved that arrest was without warrant and his imprisonment had followed, presumption arose that imprisonment was unlawful and burden rested on defendants to allege and prove lawfulness or justification therefor. Pen.Code, §§ 236, 836.

6. False imprisonment ⇐7(3)

An officer is liable in damages as for false imprisonment if he makes an unlawful arrest without process for a felony without reasonable ground for believing the

* Subsequent opinion 228 P.2d 550.

person arrested to have committed it. Pen. Code, § 836.

7. False imprisonment ⇐7(3)

If reasonable grounds exist for believing a person arrested to have committed a felony, officer making arrest without warrant is not liable as for false imprisonment even though arrest is subsequently shown to be improper. Pen. Code, §§ 236, 836.

8. False imprisonment ⇐39

In action for false arrest and imprisonment, court must determine as matter of law whether facts constituted probable cause for the arresting officers to believe that person arrested had committed a felony. Pen. Code, § 836.

9. Arrest ⇐63(4)

Before peace officer is justified in making an arrest without warrant he must have a belief, founded upon relevant facts, circumstances or credible information presented at time of arrest, that person proposed to be arrested has in fact committed a felony. Pen. Code § 836.

10. Appeal and error ⇐1008(1)

Question of the existence of probable cause to believe that one is guilty of a crime, so as to justify peace officer in making arrest without process, must be determined as matter of law from facts and circumstances of the case and appellate court is not bound by conclusions of trial court in that regard. Pen. Code, § 836.

11. Trial ⇐178

On motion for directed verdict, all evidence in favor of plaintiff must be assumed to be true and must be construed most strongly in his favor.

12. Arrest ⇐63(4)

Where plaintiff was arrested and imprisoned on suspicion of having committed a felony because he used two silver dollars to pay for drinks in a defendant's saloon the day after such defendant's home was burglarized and a number of silver dollars taken therefrom, defendant police officers who arrested plaintiff without warrant had no probable cause to believe that plaintiff had committed the burglary, and arrest and imprisonment was not justified. Pen. Code, §§ 236, 836.

Entenza & Gramer, Los Angeles, M. E. Storrie, Los Angeles, of counsel, for appellant.

Nick K. Oreb, Crider, Runkle & Tilson, Los Angeles, for respondent.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, Roland Wilson, Deputy City Attorney, John F. Feldmeier, Deputy City Attorney, all of Los Angeles, for respondents, O. H. Ledbetter and H. J. Greenwood.

SHINN, Presiding Justice.

Plaintiff appeals from a judgment of nonsuit against him as to defendant Oreb; from the judgment on a directed verdict as to defendants Greenwood and Ledbetter; and from the order (nonappealable) denying his motion for a new trial. (The City of Los Angeles was originally named as a defendant, but the action as to it was dismissed before trial.)

The facts which gave rise to plaintiff's cause of action for false arrest and imprisonment in which he sought conpensatory damages of $25,000 and $10,000 exemplary damages, are as follows:

On February 1, 1948, at about 12:30 a. m., plaintiff entered the Hawaiian Gardens, an establishment owned and operated by Nick K. Oreb in San Pedro. According to plaintiff's testimony, he ordered two drinks for which he paid with silver dollars, receiving some change each time. He testified that during the evening he noticed three men watching him and he later identified these men as Oreb, and Officers Ledbetter and Greenwood; that when he started to get down from his stool at the bar he backed into one of these men (Officer Greenwood) who asked him where he was going; he replied that he was going home "if it is any of your business," whereupon the officer informed him that he had better "come with us." The two men, who were in plain clothes, took plaintiff's arms and informed

him that they had some questions to ask him. Plaintiff objected to the restraint and told the men, whom he did not as yet know to be police officers, that if they had any questions to ask him it could be done there. Apparently they then told plaintiff that they were police officers but refused to prove it to him and when plaintiff resisted them, handcuffs were put on him and he was taken to a car outside the bar. On the way out of the establishment plaintiff asked some of the patrons to witness what was happening to him—that he was being kidnapped. The officers took plaintiff to the San Pedro police station where a momentary stop was made at the booking desk before plaintiff was taken to a closed room where the handcuffs were removed and he was searched and questioned over his resistance. He testified that Officer Greenwood "kicked me in the groin with his knee, he struck me in the stomach with his fist, and when I bent over he struck me in the face, and I pleaded with him not to strike me again. He said, 'Are you going to answer our questions?' I said, 'Yes. Give me a moment to recover.'" After he had been questioned and searched he demanded to know why he had been brought there and was informed that he was being booked "on suspicion of 459." Plaintiff testified that he had previously demanded permission to get in touch with his attorney and that Officer Ledbetter had said, "What are you doing with an attorney, wise guy?" and that he ought to know what "suspicion of 459" meant since he had an attorney. (Evidently the charge was later explained to him.) Plaintiff was not allowed to call either his attorneys or his mother because both of the calls would have resulted in charges. Subsequent to the searching and questioning of plaintiff he was taken to the booking desk and from there to a cell where he was confined, except for meals, for thirty three hours. On the Monday morning following his arrest he was questioned again by two men in plain clothes as to where he had been on a certain night and where he got the two silver dollars used to pay for the drinks. He testified that this was the first time he had heard any mention of the silver dollars. After this questioning, he was fingerprinted, samples of his handwriting were taken, and after he had regained possession of his personal effects, he was released from custody. After his release, plaintiff went back to the Hawaiian Gardens to get his hat, which he had left on the night of his arrest, and at that time had a conversation with Nick Oreb who told him that his home had been burglarized and some silver dollars taken the night before plaintiff's arrest, that "they had been picking up everybody who passed silver dollars, that they had picked up a boy or two on Sunday, at about ten a. m., who had admitted burglarizing his (Oreb's) home, and that he had an appointment to go down there and identify his property, confront the suspects" who had confessed 24 hours before plaintiff was released from jail.

At the close of plaintiff's testimony, his attorney rested and the attorney for Nick K. Oreb moved for and was granted a nonsuit on the ground that there was no proof of any allegation of the complaint so far as defendant Oreb was concerned.

The first question presented for determination is whether the trial court was justified in granting the motion of nonsuit as to defendant Oreb.

[1] A motion for a nonsuit involves the legal effect of admitted facts. When made at the close of plaintiff's case it in purpose and effect operates as a demurrer to the evidence, assuming that all the evidence in favor of the plaintiff, if relevant to the issues, is true. It is well settled that all the evidence and reasonable inferences must be construed most strongly in favor of the plaintiff, all contradictory evidence being disregarded. 9 Cal.Jur. 551, 552, 553; Milana v. Credit Discount Co., 27 Cal.2d 335, 343, 163 P.2d 869, 165 A.L.R. 621; Barnett v. La Mesa Post No. 282, 15 Cal.2d 191, 99 P.2d 650.

Plaintiff alleged that on February 1, 1948, at about 1:00 o'clock a.m., the defendant Nick K. Oreb did wilfully, deliberately, and without any legal cause, direct and cause two police officers to arrest him and take him into custody and confine him in jail, without any warrant or other authority,

that he has suffered damages, etc., and that he was not guilty of any crime.

[2, 3] One is liable for false imprisonment who participates in the unlawful arrest or imprisonment, or who authorizes, encourages, directs, or assists an officer to do the unlawful act, or procures an unlawful arrest without process. Kaufman v. Brown, 93 Cal.App.2d 508, 209 P.2d 156; Collins v. Owens, 77 Cal.App.2d 713, 176 P.2d 372; Miller v. Fano, 134 Cal. 103, 66 P. 183; 12 Cal.Jur. 433, 434; Friskstad v. Medcraft, 100 Cal.App. 188, 279 P. 840; Wood v. Lehne, 30 Cal.App.2d 222, 226, 85 P.2d 910; Montalbano v. Rainbow Gardens, Ltd., 9 Cal.App.2d 661, 50 P.2d 972; Moffatt v. Buffums', Inc., 21 Cal.App.2d 371, 375, 69 P.2d 424. The question is whether plaintiff's evidence met this test. Inasmuch as all plaintiff need allege and prove to constitute a cause of action for false arrest and imprisonment is that he was, at the instigation of defendant, arrested and imprisoned without process, and the damages suffered because of such arrest and imprisonment, it would seem that the judgment of nonsuit should not have been granted. From plaintiff's testimony, as to his conversation with defendant Oreb, we find that Oreb said "he was very sorry that this ever happened, and that he (Oreb) shouldn't have even reported it to the police, but that he didn't have any more use for the cops that I had, but that he was paying taxes and entitled to their cooperation in the protection of his property;" also that the police were picking up everybody who passed silver dollars. Taking the evidence most favorable to plaintiff, in support of his cause of action against defendant Oreb, as true, it was reasonable to infer that plaintiff was arrested because he had used silver dollars to pay for drinks purchased in the saloon and that Oreb had reported this to the two police officers knowing and intending that plaintiff would be arrested solely on the strength of Oreb's statement that plaintiff had passed silver dollars. According to his admission, Oreb knew that such arrests were being made. It may well be that this method of detecting the guilty person originated with the officers and that Oreb had not advised it. Nevertheless, if he knew or expected that an arrest would result from his pointing out plaintiff to the officers, it was a proper question for the jury whether he had such knowledge and intended to cause plaintiff's arrest.

[4, 5] Probable cause, on the part of defendant Oreb, to believe that plaintiff was the one guilty of burglarizing his home the night before the arrest was a matter of defense and disproof of probable cause was no part of plaintiff's case. Ah Fong v. Sternes, 79 Cal. 30, 21 P. 381; Collins v. Owens, 77 Cal.App.2d 713, 176 P.2d 372; People v. Agnew, 16 Cal.2d 655, 107 P.2d 601. The arrest without a warrant, and the imprisonment that followed, having been alleged and proved, a presumption arose that the imprisonment was unlawful and the burden rested upon the defendant to allege and prove the lawfulness or justification therefor. Kaufman v. Brown, 93 Cal.App.2d 508, 209 P.2d 156; People v. Agnew, 16 Cal.2d 655, 663, 107 P.2d 601.

False imprisonment is defined by section 236 of the Penal Code as "the unlawful violation of the personal liberty of another." Ware v. Dunn, 80 Cal.App.2d 936, 183 P.2d 128. Each case must be decided on its own facts to determine whether the particular defendant "authorized, encouraged [directed] or assisted" an officer to arrest the plaintiff. Turner v. Elliott, 91 Cal. App.2d 901, 904, 206 P.2d 48, 49. The evidence produced by the plaintiff was sufficient to have supported a finding by a jury that it was at the instigation of defendant Oreb that plaintiff was arrested, without process, for a crime he did not commit. As we have pointed out, any justification defendant may have had was a matter of defense. People v. Agnew, 16 Cal.2d 655, 664, 107 P.2d 601. In the Agnew case, it was said that it should be a simple matter for the one assuming to make a citizen's arrest without process to show justification for such arrest if any such justification exists and that the facts constituting such claimed justification would ordinarily lie peculiarly within his knowledge. It would appear, therefore, that the trial court improperly granted the motion for a nonsuit as to defendant Oreb

[6-11] The other question presented for determination is whether the trial court was correct in directing a verdict in favor of defendant officers, Ledbetter and Greenwood. Section 836, Penal Code, provides that a peace officer may make an arrest without a warrant when a felony has in fact been committed and he has reasonable cause to believe the person arrested to have committed it; or on a charge made, upon a reasonable cause, of the commission of a felony by the party arrested. An officer is liable in damages as for false imprisonment if he makes an unlawful arrest without process for a felony without reasonable ground for believing the person arrested to have committed it. On the other hand, if reasonable grounds exist, the officer is not liable, even though the arrest is subsequently shown to be improper. Korkman v. Hanlon Dry Dock & Shipbuilding Co., 53 Cal. App. 147, 199 P. 880; Salo v. Smith, 25 Cal. App. 295, 143 P. 322; 12 Cal.Jur., p. 432. The court must determine, as a matter of law, whether the facts, as they appear, or are found to have existed, constituted probable cause or warranted a reasonable man in the belief that the charge was true. Van Fleet v. West American Ins. Co., 5 Cal. App.2d 125, 42 P.2d 378, 43 P.2d 557. "Belief," rather than "suspicion," that the person proposed to be arrested has in fact committed a felony, is required by Penal Code, section 836, before a peace officer is justified in making an arrest. Such belief must be founded upon relevant facts, circumstances or credible information conveyed to him. Cook v. Singer Sewing Machine Co., 138 Cal.App. 418, 32 P.2d 430. The facts presented at the time are determinative. People v. Hupp, 61 Cal.App.2d 447, 143 P.2d 84. The question of the existence of probable cause to believe that one is guilty of a crime must be determined as a matter of law from the facts and circumstances of the case. Hill v. Nelson, 71 Cal.App.2d 528, 162 P.2d 927; Michel v. Smith, 188 Cal. 199, 205 P. 113. A reviewing court is therefore not bound by the conclusions of the trial court in that regard. Allen v. McCoy, 135 Cal.App. 500, 27 P.2d 423, 28 P.2d 56; Michel v. Smith, supra. The rule which governs in the matter of nonsuits also applies to directed verdicts.

[12] A review of the entire record with the above rule in mind reveals that plaintiff was arrested and imprisoned on suspicion of having committed a felony because he used two silver dollars to pay for drinks which he ordered in defendant Oreb's saloon the day after said defendant's home had been burglarized and a number of silver dollars taken therefrom. This, then, is the evidence from which the trial court found that defendant officers had probable cause to believe that plaintiff was the one who had burglarized defendant Oreb's home. We must decline to go on record as holding that possession by plaintiff of two or three silver dollars, without any other relevant circumstance, furnished reasonable ground for belief that he had stolen silver dollars from Oreb.

We conclude that the trial court improperly directed verdicts in favor of defendant officers Ledbetter and Greenwood, in that they failed to establish, as a matter of law, the defense of probable cause.

The judgments appealed from are reversed; the attempted appeal from the order denying a new trial is dismissed.

WOOD and VALLÉE, JJ., concur.

In re REIZIAN'S ESTATE.

BALOIAN v. JOHNS et al.
Civ. 17481.

District Court of Appeal, Second District, Division 3, California.

Aug. 30, 1950.

Rehearing Denied Sept. 30, 1950.

Hearing Granted Oct. 26, 1950.*

Proceeding in the matter of the estate of Toorig Reizian, deceased, wherein Charles G. Baloian filed a petition. The Superior Court of Los Angeles County, Joseph M. Maltby, J., decreed distribution of a parcel of realty to Henry Arten Baloian, and E. M. Johns, coadministrator, appealed. The District Court of Appeal, Vallée, J., held that evidence supported determination that parcel was separate property of deceased.

Affirmed.

1. Husband and wife ⇐262(1)

Where deceased acquired property during marriage in her name alone and title remained in her name until death, there was a presumption that it was her separate property, and such presumption was itself evidence. Civ.Code, § 164.

2. Husband and wife ⇐264

In probate proceeding, evidence sustained finding that property acquired by deceased during marriage in her name alone, for which she had signed a note, and had secured policies of insurance thereon in her name, was the separate property of the deceased, and not community property. Civ.Code, § 164.

3. Husband and wife ⇐266

Where husband and deceased wife had executed separate wills and each contained statement that all property possessed was community property, the separate wills did not constitute an agreement between the parties and did not transmute parcel of realty from separate property of wife to community property.

4. Evidence ⇐236(3)

In proceeding to determine whether property of deceased was her separate property, statement in will by deceased that all property she was possessed of was community property was a declaration against interest and admissible in evidence.

5. Appeal and error ⇐1008(1)

Where presumption that certain property was separate property of deceased conflicted with statement in her will that all property she possessed was community property, weight to be given such statement was for trial court and its determination could not be disturbed on appeal.

William Kinley, Long Beach, for appellant and coadministrator.

Roland C. Swaffield, Long Beach, for respondent.

VALLÉE, Justice.

Appeal from a decree of distribution. The only part of the decree attacked is that distributing a parcel of realty to respondent Henry Arten Baloian.

In the decree the court found that the parcel of realty was the separate property of the deceased. Appellant insists the finding is without support in the evidence.

[1] The property was acquired by deceased during marriage in her name alone. Title remained in her name until her death. The presumption is that it was her separate property. Civ.Code, § 164. The presumption itself is evidence. Stafford v. Martinoni, 192 Cal. 724, 738, 221 P. 919. The presumption is sufficient to sustain the finding that the property was the separate property of the deceased. Volquards v. Myers, 23 Cal.App. 500, 504, 138 P. 963; Rhea v. Thomson, 115 Cal.App. 466, 471, 1 P.2d 1091; Palen v. Palen, 28 Cal.App. 2d 602, 604, 83 P.2d 36. It was for the trial court to determine whether the evidence of appellant was sufficient to overthrow the presumption. Stafford v. Martinoni, 192 Cal. 724, 738, 221 P. 919.

* Subsequent opinion 227 P.2d 249.

[2] The presumption was buttressed by other evidence. When the deceased purchased the property she alone signed a note, as a part of the purchase price, and a deed of trust securing the same. She alone paid the note. She secured policies of insurance on the property showing that she was the owner. The evidence sustains the finding that the property was the separate property of the deceased.

[3-5] On July 6, 1945, the deceased and her husband executed separate wills. Each will contained this statement: "I further declare that all of the property of which I am possessed is community property." Appellant argues that by the execution of the wills the deceased and her husband agreed that all their property was community property and thereby transmuted the parcel in controversy from separate property of the wife to community property. There is no evidence of any express agreement to that effect. The separate wills did not constitute an agreement between the parties. There is no evidence that the will of the deceased was made pursuant to an agreement or understanding between them. The statement in the will of the husband was a self-serving declaration. The statement in the will of the deceased was a declaration against interest and admissible in evidence as such. Wilson v. Wilson, 76 Cal.App.2d 119, 124, 172 P.2d 568. Whether in a particular case a husband and wife have agreed to transmute the character of property is a question of fact for the trial court. Wheeland v. Rodgers, 20 Cal.2d 218, 222, 124 P.2d 816; Estate of Wooten, 64 Cal.App.2d 96, 102, 148 P.2d 33; 3 Cal.Jur. 10-Yr. Supp., p. 573, sec. 75; p. 642, sec. 128. The declaration against interest merely created a conflict with the presumption and the evidence supporting the presumption. The weight to be given the declaration of the deceased as against the presumption that the property was her separate property, and the other evidence in support thereof, was for the trial court. Estate of Lissner, 27 Cal.App.2d 570, 576, 81 P.2d 448; Monnette v. Title Ins. etc. Co., 107 Cal.App. 313, 316, 317, 323, 290 P. 668. Its determination cannot be disturbed on appeal.

Affirmed. Respondent to recover his costs on appeal.

SHINN, P. J., and PARKER WOOD, J., concur.



99 Cal.App.2d 236

PEOPLE v. JAHN.

Cr. 4453.

District Court of Appeal, Second District, Division 1, California.

Aug. 28, 1950.

Hearing Denied Sept. 25, 1950.

Leslie E. Jahn was convicted in the Superior Court of Los Angeles County, William M. Byrne, J., for incest, and he appealed. The District Court of Appeal, Doran, J., held that defendant's 16 year old daughter, with whom the act charged was committed, was not an accomplice, so that corroboration of her testimony against defendant was unnecessary to warrant conviction.

Judgment affirmed.

1. Criminal law ⇐507(7)

A female, participating in incestuous intercourse as result of force, fraud or undue influence or when too young to be able to give legal assent, is not accomplice of man involved, so that her testimony against him need not be corroborated to warrant his conviction of incest. Pen.Code, § 285.

2. Criminal law ⇐507(7)

A 16 year old girl was not her father's accomplice in incestuous intercourse between them, as she was too young to con-

sent thereto as matter of law, so that corroboration of her testimony against father was unnecessary to warrant his conviction of incest. Pen.Code, § 285.

Gladys Towles Root, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Gilbert Harelson, Deputy Attorney General, for respondent.

DORAN, Justice.

This is an appeal from the judgment. Defendant was charged by information with the crime of incest in three counts and adjudged guilty as charged. Defendant waived a jury. The act was committed with defendant's daughter who was 16 years of age.

It is contended on appeal, quoting from appellant's brief, that "The verdict is contrary to the law and to the evidence.

"(1) *The witness, Laura Lou Jahn, is an accomplice.*

"At the outset it is the desire of the appellant to set forth his position with conciseness and with frankness. He concedes the holding of recent cases that in the crime of incest where the participating party is under the age of eighteen she is held not to be an accomplice for the reason that she cannot consent to an act of sexual intercourse legally and therefore her testimony need not be corroborated.

"People v. Pettis, 95 Cal.App.2d 790, 213 P.2d 731;

"People v. Stoll, 84 Cal.App. 99, 257 P. 583;

"People v. Hamilton, 88 Cal.App.2d 398, 198 P.2d 907.

"Counsel for Appellant states that it is her honest and sincere conviction that these cases do not give true service to the legislative intent as regards Penal Code section 285, defining incest", and that "There is not sufficient corroboration of the testimony of the accomplice".

[1] In People v. Stratton, 141 Cal. 604, 75 P. 166, 168, which is an incest case, appears the following, "If the prosecutrix, *being of the legal age of consent,* consents to the incestuous intercourse, unquestionably she is particeps criminis, and her testimony, like that of any other accomplice, uncorroborated, is insufficient to uphold a conviction. (Citing case.) *But if,* upon the other hand, she is the victim of force, or fraud, or undue influence, *or is too young to be able to give legal assent,* so that she does not willfully and willingly join in the incestuous act, *she cannot be regarded as an accomplice.*" There appears to be no division of opinion on this question as contended by appellant but, on the contrary, the law is uniform in support of the Stratton case. People v. Johnson, 115 Cal.App. 704, 705, 2 P.2d 216; People v. Herman, 97 Cal.App.2d 272, 217 P.2d 440; People v. Hamilton, 88 Cal.App.2d 398, 198 P.2d 907.

[2] It appears well settled therefore that consent could not be given as a matter of law and that in such circumstances the law relating to the necessary corroboration of accomplices does not apply.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; SCHAUER, J., dissenting.



98 Cal.App.2d 780

SCHWARTZ v. PREMIUM PRODUCTS CO. et al.

Civ. 14346.

District Court of Appeal, First District, Division 2, California.

Aug. 7, 1950.

Action by Frances B. Schwartz, as personal representative of Nellie A. Cannon, deceased, against Premium Products Company, a corporation and others, for alleged wrongful death of plaintiff's mother. The Superior Court, City and County of San Francisco, William F. Traverso, J., entered judgment on a verdict for the plaintiff and the defendants appealed on the ground that

the award was excessive. The District Court of Appeal, Dooling, J., held that where mother had agreed with married daughter that if daughter should have child, mother would care for it to permit daughter to continue her employment and child had been born at time of trial and daughter had discontinued her employment, in determining the amount of the award the jury was entitled to include the pecuniary loss of the anticipated benefits from mother's services, even though there was no evidence of the value of such services.

Judgment affirmed.

Death ⇐77

Where married daughter had agreed with mother that if daughter should have child mother would care for it to permit daughter to continue her employment and child had been born at time of daughter's action for death of mother and daughter had discontinued her employment, in determining amount of award pecuniary loss of anticipated benefits from mother's services could be included, even though there was no evidence of the value of such services.

Hadsell, Sweet, Ingalls & Murman, San Francisco, for appellants.

Hallinan, MacInnis & Zamloch, James Martin MacInnis, San Francisco, William F. Cleary, San Francisco, of counsel, for respondent.

DOOLING, Justice.

Defendants appeal from a judgment for $7,500 following the verdict of a jury. The action was one by an adult daughter for the wrongful death of her mother and the sole point argued on appeal is the claimed excessiveness of the award.

The evidence showed that the daughter was married shortly before her mother's death; that her father had died when plaintiff was eleven years old and plaintiff, an only child, had been raised and supported by her mother to maturity and continued to live with her until her marriage. The mother owned her own home and for some years a family of friends had occupied a part of it. Plaintiff was employed and she testified that both before her marriage and afterwards it had been arranged with her mother that plaintiff and her husband would live with the mother in her home as soon as arrangements could be made to have the friends who were living there move to another residence, and that if plaintiff should have a child the mother would take care of it during the daytime thus permitting plaintiff to continue with her employment. At the time of the trial a child had been born and plaintiff had discontinued working. The mother was 59 years of age with an average life expectancy of 15.13 years. 58 C.J.S. page 1212.

Plaintiff was entitled to a recovery of her actual pecuniary loss from the death of her mother. We cannot agree with appellants that under the evidence the deprivation of society and comfort was the complete measure of that loss. The jury was entitled to include the pecuniary loss incident to the deprivation of the anticipated benefits which would have accrued from the mother's services in the home under the arrangement which we must assume the jury found to have been made as plaintiff testified.

Appellants argue that there is no evidence of the value of these services. There need not be. The jury may draw on its own knowledge of the value of services of that character. In re Estate of Rheinhertz, 82 Cal.App.2d 156, 160, 185 P.2d 858, 186 P.2d 755 and cases cited.

No purpose would be served by discussing the cases cited by appellants. In the opening brief appellants say: "No decision constitutes a clear cut precedent for a similar holding in a later case." We may add that none of the cases cited presents a fact situation comparable to the one here presented.

Judgment affirmed.

NOURSE, P. J., concurs.

99 Cal.App.2d 216

EDWARDS v. PEOPLE.

Cr. 2203.

District Court of Appeal, Third District, California.

Aug. 25, 1950.

John D. Edwards was convicted of robbery and thereafter filed a petition for a writ of error coram nobis. The Superior Court, San Joaquin County, George F. Buck, J., denied writ, and petitioner appealed. The District Court of Appeal, Adams, P. J., held that where matters relied upon by petitioner were or could have been presented on his appeal from his judgment of conviction, or were presented in his former petitions for writs that were denied, and petition for writ of error coram nobis alleged no fact which was unknown to petitioner at time of his original trial or could not have been discovered by him at any time earlier than time when his petition for writ was filed, trial court properly denied writ.

Appeal dismissed.

Criminal law ⇐997

Where matters relied upon by petitioner were or could have been presented on petitioner's appeal from his judgment of conviction, or were presented in his former petitions for writs that were denied, and petition for writ of error coram nobis alleged no fact which was unknown to petitioner at time of his original trial, or could not, in exercise of due diligence, have been discovered by him at any time earlier than time when his petition for writ was filed, trial court properly denied writ.

John D. Edwards, in pro per.

Fred N. Howser, Attorney General, By Gail A. Strader, Deputy, for respondent.

ADAMS, Presiding Justice.

In October, 1947, appellant and one McConnell were charged with robbery committed in San Joaquin County. Edwards was also charged with two priors which he admitted. After the conviction of both defendants Edwards was adjudged to be an habitual criminal. Both defendants appealed and the judgments were affirmed by this court. People v. McConnell, 86 Cal. App.2d 578, 195 P.2d 34. Thereafter Edwards in numerous proceedings sought to secure relief. He made various applications to the Superior Court of Sacramento County, to the Supreme Court of California, to the United States Supreme Court, Edwards v. Heinze, 337 U.S. 947, 69 S.Ct. 1506, 93 L.Ed. 1750, and to this court, all of which were denied.

In August, 1949, the present action was initiated in the Superior Court of San Joaquin County by the filing of a petition for a writ of error coram nobis. That court held a hearing thereon, at which evidence was presented. On November 1, 1949, the writ was denied. This appeal was taken from the judgment in that proceeding.

Respondent has filed herein a motion to dismiss said appeal on the ground that it is without merit and frivolous. Both the appeal on its merits and said motion to dismiss are now before us.

The limitations of the scope of review by writ of error coram nobis have been definitely fixed in several recent decisions of our California Supreme Court, which have been followed by decisions of this court. In re Lindley, 29 Cal.2d 709, 725–726, 177 P.2d 918; People v. Tuthill, 32 Cal.2d 819, 821, 198 P.2d 505; People v. Shorts, 32 Cal.2d 502, 513, 197 P.2d 330; People v. Adamson, 34 Cal.2d 320, 326, 210 P.2d 13; People v. Malone, 96 Cal. App.2d 270, 215 P.2d 109; People v. Chapman, 96 Cal.App.2d 668, 216 P.2d 112. In both the Malone and Chapman cases motions for dismissal of the appeals, which had been taken from orders denying writs of error coram nobis, were granted.

Such must be the order in this case since the matters relied upon by appellant are such as were or could have been presented on his appeal from his judgment of conviction, or were presented in his former petitions for writs that were denied. Appellant's petition to the Superior Court of San Joaquin County alleges no fact

which was unknown to him at his original trial, or could not, in the exercise of due diligence have been discovered by him at any time earlier than the time when his petition for the writ was filed in this proceeding. The record before us presents no grounds for review by way of writ of error coram nobis, nor any matter reviewable by appeal from the decision of the trial court. The appeal appearing to be frivolous and without merit it is hereby dismissed.

VAN DYKE and PEEK, JJ., concur.



99 Cal.App.2d 30

NEBEL et al. v. GUYER et al.

Civ. 7687.

Sac. 6027.

District Court of Appeal, Third District, California.

Aug. 17, 1950.

J. W. Nebel and Glenn Nebel brought action against Frank L. Guyer, Emmeline Guyer, and H. C. Flournoy for a mandatory injunction to require removal of a building which allegedly encroached slightly on lot of plaintiffs. The Superior Court of Plumas County, J. O. Moncur, J., rendered a judgment for the defendants, and the plaintiffs appealed. The District Court of Appeal, Adams, P. J., held that, as plaintiffs were relying on a bare legal right unsupported by any damage shown, they were not entitled to a mandatory injunction.

Affirmed.

1. Boundaries ⇐3(6)

Where landlord who owned a large lot, and who rented the easterly 50 feet of the lot measured from a fence, entered into agreement with tenants for sale of 50 feet of the lot, and thereafter tenants advised landlord that they would like to have a little more land to the west of their lot, and landlord without further compensation agreed to give them additional land, and thereupon they measured off 66 feet west from fence, and to mark the dividing line they cut a notch in front fence and on rear fence they drove a pin, boundary line fixed controlled over distances when it was later discovered that easterly fence was 3 feet out in street.

2. Injunction ⇐50

A mandatory injunction will not be granted at the instance of an owner of realty to compel an adjoining owner to remove a slight encroachment if no damages had been suffered because of the encroachment and there exists an adequate remedy at law.

3. Injunction ⇐51

Where it was apparent that plaintiffs, in asking for removal of portion of defendant's building which allegedly encroached a small amount on plaintiffs' lot, were relying on a bare legal right unsupported by any damage shown, plaintiffs were not entitled to a mandatory injunction.

4. Injunction ⇐51

Where encroachment of a building on the land of another is slight, cost of removal will be great, and corresponding benefit to owner of realty on which the building encroaches will be small, or compensation in damages can be had, a court will ordinarily decline to compel removal, and will leave the complaining party to his remedy at law.

5. Injunction ⇐23

Where issuance of an injunction will cause great injury to defendant and will confer very little benefit on complainant in comparison, it is proper to refuse an injunction, especially where the right is doubtful or where money damages will compensate complainant.

Wm. M. Macmillan, Quincy, Bertram D. Janes, Portola, for appellants.

Walter E. Hettman, Herbert Chamberlin, San Francisco, for respondents.

ADAMS, Presiding Justice.

Plaintiffs brought this action to compel defendants Frank L. and Emmeline Guyer to remove a building which they claimed

was constructed in part on the lot of plaintiffs. They also prayed for $500 punitive damages. After trial by the court sitting without a jury, plaintiffs appealed from a judgment for defendants.

The evidence shows that defendant Flournoy owned a large lot on the north side of Main Street in Quincy, Plumas County, which was bounded on the east by Church Street. Plaintiffs were tenants of Flournoy, occupying the easterly 50 feet of his lot, measured from a fence running north and south along Church Street, and had been such tenants for about eight years, occupying a dwelling thereon. In November, 1945, they decided to purchase the property they were renting and entered into an agreement with Flournoy whereby they were to purchase same upon terms therein set forth. Not long after the agreement was had, they advised Flournoy they would like a little more land to the west of their lot; and without further compensation, Flournoy agreed to give same to them. Thereupon, plaintiffs and Flournoy measured off 66 feet west from the fence along Church Street. To mark the dividing line they cut a notch in the front fence, and on the rear fence, 125 feet back, they drove a pin.

In November, 1946, defendants Guyer purchased from Flournoy the remaining portion of Flournoy's lot, measuring 100 feet along Main Street. In arranging for the purchase, Flournoy pointed out to them the marks indicating the west line of plaintiffs' lot. Later, the Guyers constructed a medical office building on their lot, all west of the line marked as aforesaid.

Plaintiffs saw the building being constructed and made no protest; but later they had a survey on their property made and the surveyor reported that the lot sold to them extended about 3 feet into Church Street. In other words it was the surveyor's conclusion that the fence along the Church Street side of the lot was out in the street, thus including in Flournoy's property a portion of the street itself. Plaintiffs then sought to move their west line westerly to compensate for the 3 feet of the street within the fence. Assuming such extension the surveyor testified that at the front of the property defendants' building extended 48/100ths of a foot and the eaves 155/100ths feet onto plaintiffs' lot, but that toward the rear of the building it did not encroach at all. The total encroachment of both building and eaves, if there was such encroachment, was but 203/100ths feet.

The trial court found that, in view of the line fixed by the markings made by plaintiffs and Flournoy, that line was plaintiffs' west line regardless of the developments resulting from the survey, and therefore no part of the medical building was on plaintiffs' lot. It also found that defendants had never interfered with plaintiffs' quiet and peaceable enjoyment of their property; that if any encroachment existed it was not of such a nature or extent as to occasion any damage or detriment to plaintiffs on their property; and that all the acts of defendants in the erection of their building were done in good faith and in the belief that said building was erected wholly upon their property. Furthermore the trial court took the position that even if a slight encroachment did exist, the damage to plaintiffs, if any, was too small to warrant the court in compelling the Guyers to move their building. It suggested to plaintiffs that by amendment they convert their action into one for damages actually suffered, if any, instead of asking the court to compel removal of the building; and it granted time for plaintiffs to so amend. Plaintiffs failed to amend. Appellants contend that the finding that no part of defendants' building encroaches upon plaintiffs' lot, is not sustained by the evidence. A somewhat similar situation was considered by this court in Arnold v. Hanson, 91 Cal.App.2d 15, 204 P.2d 97, in which we held that where a subdivider marks corners of lots and purchasers rely upon them, such marks are monuments fixing the boundaries and prevail over a later survey. Furthermore, Flournoy did not agree to convey any specific quantity of land to plaintiffs. He wanted to and did fix the west boundary, after donating an additional 16 feet at plaintiffs' request; and plaintiffs participated in fixing that line. In Togni v. Slocomb, 12 Cal.App. 733, 735, 108 P. 723, 724, this court said: "Certainly, the grantors, if

owning the land, had a right to fix the boundaries of the land which they conveyed."

[1-3] The boundary line fixed as the west line of plaintiffs' land controls over distances, since markings were made establishing the west boundary. But regardless of whether or not defendants' building did slightly encroach upon plaintiffs' lot, plaintiffs failed to show that they were damaged by the alleged encroachment. The portion of the lot which they claimed was being occupied by defendant's building had been used by plaintiffs only for the planting of flowers; and it was not alleged or shown by testimony that any of said plants even had been destroyed. In fact the testimony shows that while the building was being erected no injury to them appeared, and that it was only subsequently, when defendants removed a fence in front of their lot, that Mrs. Nebel protested that she had planted flowers in front of it to hide it and did not want them trampled upon; that defendants took down their front fence and that left plaintiffs' side open so that dogs or anyone could get in there, and as she did not want it open they put up a line fence from the back to the front walk. And plaintiff J. W. Nebel admitted that the only time he felt imposed upon was after he had the survey made. It is therefore apparent that plaintiffs, in asking for the removal of the portion of defendants' building which they claim encroaches upon their lot, are relying upon a bare legal right unsupported by any damage shown. In Rothaermel v. Amerige, 55 Cal.App. 273, 203 P. 833, the rule, since relied upon in decisions of our courts, was laid down that a mandatory injunction will not be granted at the instance of an owner to compel an adjoining owner to remove a slight encroachment where plaintiff has not suffered any damage and there exists an adequate remedy at law. The same rule was stated in McKean v. Alliance Land Co., 200 Cal. 396, 398-399, 253 P. 134, citing the foregoing case, denying removal, and holding that even though an encroachment was found to exist, $10 was adequate to compensate plaintiffs for any damage suffered, there being no evidence that the encroachment caused any actual damage to them. In Blackfield v. Thomas Allec Corp., 128 Cal.App. 348, 17 P.2d 165, it was held, on authority of the foregoing cases, that an injunction compelling the removal of a part of an encroaching wall, which did not actually interfere with the use of the property encroached upon, should not be compelled where such injury as occurred readily could be compensated in damages. Also see Mertens v. Berendsen, 213 Cal. 111, 115, 1 P.2d 440; Ukhtomski v. Tioga Mutual Water Co., 12 Cal.App.2d 726, 728, 55 P.2d 1251; Baldocchi v. Four Fifty Sutter Corp., 129 Cal.App. 383, 393, 18 P.2d 682; Morris v. George, 57 Cal.App. 2d 665, 679-680, 135 P.2d 195.

[4, 5] The rule was early recognized that where the encroachment is slight, the cost of removal will be great and the corresponding benefit to the adjoining owner small, or compensation in damages can be had, a court will ordinarily decline to compel removal, and will leave the complaining party to his remedy at law. See 1 Corpus Juris, 1209, 2 C.J.S., Adjoining Landowners, § 36. Also see 32 Corpus Juris, 77-78, 43 C.J.S., Injunctions, § 30, where it is said that when the issuance of an injunction will cause great injury to defendant and will confer very little benefit upon complainant in comparison it is proper to refuse an injunction, especially where the right is doubtful or where money damages will compensate plaintiff.

There is here no evidence that the salability of plaintiffs' land is in any wise affected. That the value of the portion of plaintiffs' property encroached upon, if it did so encroach, is obviously very little, since the whole 16 feet that Flournoy added to the original 50-foot lot was given to plaintiffs without payment therefor. Obviously a removal of the part of defendants' building which the claimed overlap covers would be expensive as compared to any loss sustained by plaintiffs; and no bad faith on the part of defendants was shown.

We therefore conclude that, regardless of whether or not the trial court's finding that defendants' building did not encroach upon plaintiffs' land finds support in the evidence—though we cannot say that it

does not—plaintiffs' plea for removal of the building was properly denied on the ground that they could be compensated adequately for actual damage suffered, if any, and that no proper grounds for compelling a removal of defendants' building had been proven.

The judgment is affirmed.

VAN DYKE and PEEK, JJ., concur.



99 Cal.App.2d 105

AGNEW v. CITY OF LOS ANGELES et al.
Civ. 17410.

District Court of Appeal, Second District, Division 3, California.

Aug. 21, 1950.

Rehearing Denied Aug. 31, 1950.

Proceeding by R. W. Agnew against the City of Los Angeles and another, for writ of mandate, to compel the city to issue a permit to install electrical work. From a judgment of the Superior Court of Los Angeles County, Arnold Praeger, J., in favor of plaintiff, the defendant appealed. The District Court of Appeal, Shinn, P. J., held that ordinance involved was not sufficiently pleaded by mere reference to the ordinance in petition by number.

Judgment reversed.

Vallée, J., dissented.

1. Municipal corporations ⇐122(1)

Where electrical contractor brought mandamus to compel city to issue him a permit to install electrical work and challenged validity of requirements in city ordinance that he pay $100 to defray inspection expenses and furnish a $1,000 damage bond, but contractor in petition referred to ordinance only by number, ordinance was not sufficiently pleaded to bring it before court for consideration. Code Civ.Proc. § 459.

2. Municipal corporations ⇐122(1)

An ordinance may be pleaded by referring to its title and the day of its passage, but mere reference to ordinance by its number is not sufficient. Code Civ.Proc. § 459.

3. Pleading ⇐350(3)

Upon motion for judgment on the pleadings, as on demurrer, court considers only the pleadings.

4. Pleading ⇐350(3)

Power of court to render judgment on the pleadings should not be exercised so as to permit consideration of facts not pleaded.

5. Stipulations ⇐14(10)

Where electrical contractor brought mandamus to compel city to issue a permit to install electrical work and challenged the validity of ordinance provisions but in his petition referred to ordinance only by number, stipulation between parties that ordinance contained such provisions would not support judgment in favor of contractor on the pleadings, in absence of showing of consent by parties that stipulation be considered by court. Code Civ Proc. § 459.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, Joseph N. Owen, Deputy City Attorney, and James A. Doherty, Deputy City Attorney, all of Los Angeles, for appellants.

R. W. Agnew, in pro. per.

SHINN, Presiding Justice.

Plaintiff brought this proceeding for a Writ of Mandate to compel the City of Los Angeles to issue him a permit to install electrical work. He alleged that he holds a state license as an electrical contractor; that the city refused to issue a permit until he had paid $100 to defray expenses of inspections and other charges and had given a bond of $1,000 conditioned for the payment of damages that might be suffered by any person through the violation of the building ordinance by him. He challenged the validity of these requirements on constitutional grounds. In his petition he referred to the ordinance in question by number but did not attempt to plead it in any other manner. The city

answered and alleged that plaintiff had failed to comply with the ordinance by making the deposit and giving the bond required thereby. The answer of the city did not plead the ordinance, although it was referred to by number.

The parties entered into a stipulation for the purpose of simplifying the issues to be tried. It was stipulated that plaintiff holds a state license and that the ordinance in question contains certain provisions, copies of which were attached to the stipulation.

Plaintiff filed a written motion for judgment on the pleadings and the stipulation. The motion was granted. Defendant appeals from the judgment, which denied plaintiff a Writ of Mandate but declared the invalidity of the ordinance provisions which require the deposit and the bond.

[1, 2] Defendant's first point is that the ordinance was not pleaded so as to bring it before the court for consideration. This point is well taken. An ordinance may be pleaded by referring to its title and the day of its passage. Code Civ.Proc. § 459. Mere reference to an ordinance by number is not sufficient. Redwood Theatres v. City of Modesto, 86 Cal.App.2d 907, 196 P.2d 119; Bandini Estate Co. v. Payne, 10 Cal.App.2d 623, 52 P.2d 959.

It is assumed by the parties that the court deemed the stipulation to be sufficient to place the entire ordinance before the court on the motion notwithstanding any insufficiency of the pleadings. The record does not support this assumption. It does not appear that the stipulation was entered into for use on a motion for judgment on the pleadings. Although plaintiff specified the stipulation, as well as the pleadings in his motion, the record does not show that the parties consented that the stipulation should be considered by the court, as was done in North Side, etc., Ass'n v. Hillside, etc., Park, 70 Cal.App.2d 609, 613, 161 P.2d 618, nor does it appear that the court considered it. Upon the contrary, the judgment recites that the court had heard the arguments of the parties and had "read and considered the respective briefs and pleadings of the parties", etc. The record contains a certified copy of "Stipulation of facts and city ordinances." Attached to the stipulation as exhibits are a photostat of plaintiff's state contractor's license and what purports to be a photostat of certain amendments to the Los Angeles Municipal Code relating to the $100 payment and the $1,000 bond. These exhibits are identified in the stipulation. However, there are also exhibits purporting to contain ordinance provisions for "permit service fees—advance collection," provisions relating to "permits," provisions relating to permit fees and numerous other matters. As a supplement to the clerk's transcript there are copies of what purport to be provisions of certain other sections of the municipal code. Except for the first two exhibits mentioned the remainder are not authenticated by the stipulation.

[3] Upon a motion for judgment on the pleadings, as on demurrer, the court considers only the pleadings. North Side, etc., Ass'n v. Hillside, etc., Park, supra; Price v. Price, 85 Cal.App.2d 732, 194 P.2d 101; Grant v. Aerodraulics Co., 91 Cal.App.2d 68, 204 P.2d 683; National Automobile Ins. Co. v. Winter, 58 Cal.App.2d 11, 16, 136 P.2d 22; Merchants' Ice, etc., Co. v. Globe Brewing Co., 73 Cal.App.2d 828, 833, 167 P.2d 503; Kleiner v. Garrison, 82 Cal.App.2d 442, 445, 187 P.2d 57.

[4, 5] The power of the court to render judgment on the pleadings should not be exercised so as to permit of the consideration of facts that are not pleaded. There are other methods of summary procedure where the facts are not in dispute or may be readily established. Aside from the fact that the record indicates the court did not consider the stipulation, it would be assumed that it was not considered for the reason that it could not properly have been used as a basis for the motion.

The question of the validity of the ordinance can be put in issue only by amended pleadings and the entire ordinance should be pleaded in the manner provided by law. The stipulation was not intended to serve the purpose of an amendment of the petition, and if that had been its purpose, the record would have been greatly confused,

since only fragments of the ordinance were included and numerous of the attached exhibits were not verified by the stipulation. These latter are relevant to the provision requiring the payment of $100 for a permit. It is impossible to tell from the record whether the unverified additions to the stipulations were considered by the court or whether the court deemed the entire ordinance to be in evidence. Under these circumstances we find ourselves without a proper record upon which to determine the validity of the ordinance provisions in question.

The judgment (denominated a "Judgment and Order") is reversed.

WOOD, J., concurs.

VALLÉE, Justice.

I dissent. The motion of plaintiff was for "judgment on the pleadings herein and the stipulation on file herein and on the ground that no issue of fact remains herein and that the sole issue is one of law clearly entitling plaintiff to judgment herein." It was this motion which was granted. The stipulation reads: "It is hereby stipulated and agreed by and between the plaintiff and the defendants, above entitled, as to the issues of fact herein and the Los Angeles City Ordinances herein concerned, as follows. * * *" It was then agreed that plaintiff is an electrical contractor licensed by the state and by the County of Los Angeles and that the ordinances attached thereto are ordinances of the City of Los Angeles. Various ordinances and provisions of others are set forth. I construe the stipulation to mean that all ordinance provisions necessary to a determination of the case were set forth in the stipulation and that the only question before the court was one of law. Defendants appeared on the hearing of the motion and argued on the theory that all of the facts were before the court and that only a question of law was involved. Plaintiff says in his brief that defendants "appeared on the motion for judgment and earnestly argued only the validity of their ordinance; the question of the propriety of the motion for judgment was not raised by the appellants in the lower court." This statement is not denied by defendants. We must accept it as asserting the fact correctly. De Mirjian v. Lutinsky, 77 Cal. App.2d 915, 916, 177 P.2d 50; Standard Iron Works v. Maryland Casualty Co., 56 Cal.App. 600, 601, 206 P. 136. Under these circumstances defendants should not now be permitted to say "that neither the trial court in the first instance, nor this Court upon review, may go outside the pleadings themselves in deciding whether the motion was properly granted." The appeal should be decided on its merits.

Rehearing denied; VALLÉE, J., dissenting.

35 Cal.2d 849

Ex parte MITCHELL.
Cr. 5025.

Supreme Court of California, in Bank.
Sept. 7, 1950.

Original proceeding in the matter of the application of Marie Mitchell, also known as Brenda Allen, for a writ of habeas corpus on the ground that her conviction was the result of perjured testimony on the part of members of the police department of the city of Los Angeles. The Supreme Court, Shenk, J., issued the writ, and upon its return ordered a reference. The referee found that the questioned testimony had been truthful, and the petitioner presented exceptions to the findings. The Supreme Court reviewed the record and held that the petitioner had not sustained the burden of proving by a preponderance of the substantial, credible evidence that perjured testimony was knowingly presented by the prosecution and that such testimony established an essential element of her conviction.

Writ discharged and petitioner remanded to custody.

1. Habeas corpus ⇐90

Where reference is ordered in habeas corpus proceeding, court is not bound by findings of fact made by referee, but such findings are entitled to important consideration, since referee had opportunity to observe demeanor of those who appeared before him and to weigh what was said in connection with their manner on witness stand.

2. Habeas corpus ⇐85(1)

In habeas corpus proceeding by prisoner to secure release on ground that her conviction was result of perjured testimony, evidence was insufficient to authorize the setting aside of judgment of conviction.

3. Habeas corpus ⇐85(1)

In habeas corpus proceeding, where petitioner alleged that her conviction was result of perjured testimony presented by members of police department, burden was on petitioner to show by preponderance of substantial, credible evidence that perjured testimony was knowingly presented by prosecution and that such testimony established an essential of her conviction

4. Habeas corpus ⇐30(1)

Petitioner seeking relief by habeas corpus on ground that prosecution knowingly used perjured testimony to obtain conviction was not entitled to release on basis of testimony withheld by her at trial.

5. Habeas corpus ⇐90

In habeas corpus proceeding, where petitioner sought release on ground that her conviction was result of perjured testimony on part of members of police department, question of willful withholding of evidence by state not having been presented prior to order of reference or in hearing before referee was not issue in case.

6. Habeas corpus ⇐90

Where police woman was called as witness by petitioner seeking release by habeas corpus on ground that prosecution obtained conviction by use of perjured testimony on part of members of police department, said witness' refusal to testify on ground that her testimony would tend to incriminate her did not constitute willful suppression of evidence by state.

John J. Bradley, Max Solomon, Los Angeles, for appellant.

W. E. Simpson, District Attorney, Los Angeles County, Jere J. Sullivan, and Robert Wheeler, Deputies District Attorney, all of Los Angeles, for respondent.

SHENK, Justice.

By this preceeding in habeas corpus the petitioner is seeking her release from the custody of the sheriff of Los Angeles County. She alleges that her conviction was the result of perjured testimony on the part of members of the police department of the city of Los Angeles and that thereby her constitutional rights were unlawfully invaded.

The petitioner was convicted in September 1948 of an attempt to commit the crime

of pandering.[1] The trial was before the court without a jury. She was sentenced to the State Institution for Women at Tehachapi. She filed an application for probation which was granted on condition that she serve one year in the county jail. A motion for a new trial was denied. The judgment and the order were affirmed. People v. Mitchell, 91 Cal.App.2d 214, 205 P.2d 101. A hearing in this court was denied in May, 1949, and the petitioner commenced to serve her time in the county jail. In July, 1949, an investigation was in progress before the county grand jury involving certain members of the Los Angeles police department.

On July 7, 1949, Audrey Davis appeared before the grand jury and was subjected to direct and cross-examination concerning certain matters that had taken place during the course of the prosecution of the petitioner. She was a policewoman in the police department of the city of Los Angeles and was one of the principal witnesses on behalf of the prosecution against the petitioner. At the hearing before the grand jury she stated that she had sworn falsely at the petitioner's trial. She also stated that Charles Stoker had committed perjury at the trial and had influenced her to swear falsely. Stoker was a sergeant in the police department and was the officer to whom Audrey Davis was required to report in the performance of her duties.

After the testimony of Audrey Davis before the grand jury became known to her, the petitioner filed an application for a writ of habeas corpus in the District Court of Appeal, 2nd Appellate District, basing her application upon the same grounds set forth in the present petition. That application was denied on August 3, 1949. On August 10th she filed her application for a writ of habeas corpus in this court and the writ was issued. Upon the return to the writ a reference was ordered. The Honorable William F. Traverso, judge of the superior court in and for the city and county of San Francisco, was appointed to take testimony bearing upon the following questions and to make findings of fact thereon:

1. Did any witness who testified at the trial of Marie Mitchell, also known as Brenda Allen, on the charge of attempted pandering, a felony, in action No. 119980 in the Superior Court, Los Angeles County, commit perjury as defined in section 118 of the Penal Code; that is, did any such witness give false testimony as to any material matter which he or she knew to be false?

2. In the event that any such witness so falsely testified, did any representative of the State of California responsible for the presentation of the testimony, including any police officer, cause or suffer such testimony to be introduced knowing that such testimony as given was false?

A hearing was held by the referee in Los Angeles on October 31, 1949. Witnesses were called including the petitioner and Audrey Davis on behalf of the petitioner and Sergeant Stoker on behalf of the respondents. Transcripts of certain testimony before the grand jury and at the petitioner's trial were introduced in evidence. On the basis of all of the evidence introduced, the referee made fourteen specific findings of fact to the effect that the testimony of Audrey Davis and Charles Stoker given at the petitioner's trial was truthful. The answer to the first question was therefore in the negative and it became unnecessary to answer the second question. Following the filing of the findings and report of the referee, the petitioner presented exceptions to the findings. The record before the referee and in turn the record before us in this proceeding consists of the petition for the writ; the respondent's objection to the issuance

1. Stats. 1911, p. 9, provides, "Any person who shall procure a female inmate for a house of prostitution, or who, by promises, * * * or by any device or scheme, shall cause, induce, persuade or encourage a female person to become an inmate of a house of prostitution, or shall procure for a female person a place as an inmate in a house of prostitution * * * shall be guilty of a felony, to wit: pandering * * *" with punishment of not less than one nor more than ten years.

thereof; the transcript of the oral testimony taken at the hearing before the referee—covering 164 pages; the transcript of the testimony of Audrey Davis at the trial of the petitioner, and the transcript of testimony of Audrey Davis and Sergeant Stoker before the grand jury in July 1949.

In order to understand the nature of the charge of perjury, it is necessary to relate in some detail the facts in support of the judgment of conviction and the testimony taken before the grand jury.

At the petitioner's trial Audrey Davis testified to the following effect: She was a policewoman who worked under the direction of Sergeant Stoker. Stoker told her that he suspected that prostitutes were living at a certain hotel and that he was suspicious of the management of the hotel. He instructed her to reside at the hotel and pose there as a prostitute to see if she could obtain information to substantiate his suspicions. He gave her the number of a telephone exchange service that he believed was being used by prostitutes generally and told her to try to become listed on that exchange. She established a residence at the hotel as directed and became acquainted with some of the people there. She attempted to subscribe to the telephone exchange service but was unsuccessful. After about three weeks, in the afternoon of May 2, 1948, the petitioner called her at the hotel, identified herself as Brenda Allen, and said she had a mutual friend who had given her Audrey Davis' telephone number. She said she understood that Audrey Davis was a prostitute who was out of work, and said she would like to talk over a business proposition with her. An appointment for an hour later was made. The petitioner gave Audrey Davis instructions as to how to reach her address and furnished her the petitioner's telephone number. This was the same number that Stoker had given her as the number of the telephone exchange service. Audrey Davis then telephoned Stoker and told him what had happened. Prior to that time Stoker had never mentioned the petitioner's name to Audrey Davis or said that his purpose was to obtain information about the petitioner. Stoker told Audrey Davis to see the petitioner according to her arrangement. He told her that he would also proceed to the house and would hide outside in order to be available for assistance if trouble developed. Audrey Davis went to the petitioner's house and found her in her front yard flower garden. They went inside the house and engaged in conversation. The petitioner said she conducted a house of prostitution and gave various details of her operations. She questioned Audrey Davis about her experience and ability in that activity, and then told her she would arrange for a medical examination in order that she could start to work. The petitioner stated that she would telephone her the next day about eleven o'clock in the morning regarding the examination. The petitioner then called a taxicab by telephone for Audrey Davis. While they were waiting for the taxicab, an unidentified man called at the front door; the petitioner admitted him and escorted him to another part of the house. The petitioner returned and told Audrey Davis that the man was "an old customer" who was a "thirty dollar trick" and that if she wanted to make fifteen dollars quickly, she could "take the trick." The policewoman made excuses. The petitioner said that she had expected another girl to be available, and urged Audrey Davis to engage in an act of prostitution with the unidentified man. The taxicab arrived and Audrey Davis left, explaining that she had an appointment. On the next day about eleven o'clock in the morning, the petitioner again telephoned Audrey Davis. She said she was unable to have her see a doctor that day, but would arrange for an examination the next day. She told Audrey Davis that after the examination she could definitely start employment the next day at one o'clock in the afternoon. She also said that one of her girls might leave that night and if so Audrey Davis could begin work earlier. She asked Audrey Davis to telephone her about eight o'clock in the evening to find out whether she should begin work earlier.

Audrey Davis called several times, but each time was informed that the petitioner was not available.

According to the petitioner's allegations Sergeant Stoker testified at the trial that Audrey Davis called him and stated that the petitioner had called her by telephone; that he went to the petitioner's address and concealed himself across the street in some shrubbery before Audrey Davis arrived; that he saw Audrey Davis arrive, saw an unidentified man arrive later, and saw Audrey Davis leave.

Before the grand jury Audrey Davis testified that Sergeant Stoker had persuaded her to tell falsehoods at the petitioner's trial in order to bolster his case against the petitioner. In particular she stated that she had testified falsely in saying that the petitioner had made the original telephone call to her. She said that she herself had made that call. She said that when the Sergeant had given her the telephone number of the exchange service, he had informed her that it was the number used by the petitioner and had instructed her to use the number to call the petitioner in order to try to secure employment with her as a prostitute. She further testified that she did not call Stoker or anyone else to inform him that she was going to the petitioner's house, so that in her opinion Stoker was not telling the truth when he testified that he went to the house after receiving such a call. As to whether the petitioner called her on May 3, 1948, she stated that she could not recall. She also stated to the grand jury that she was formerly in love with Sergeant Stoker and for that reason had acceded to his request to bear false witness against the petitioner. She stated that she had more recently fallen out with Stoker and was now telling the truth. She did not, however, recant her testimony with reference to meeting the petitioner at the latter's house or the conversation that followed between the petitioner and herself at that time. She repeated her testimony as to those particular events in detail.

As a ground for her release from custody, the petitioner asserts that Audrey Davis falsely testified at the trial when she said, (1) that she was called by telephone originally by the petitioner on May 2nd, (2) that she telephoned Stoker before visiting the petitioner on May 2nd, (3) that she had never discussed the petitioner with Stoker before May 2nd, (4) that the petitioner urged her to engage in prostitution while at her house on May 2nd, and (5) that the petitioner again called her on the morning of May 3rd. The petitioner also alleges that Stoker testified falsely at the trial when he stated that he had not mentioned the petitioner to Audrey Davis prior to May 2nd; that he received the telephone call from Audrey Davis on May 2nd; and that he stationed himself outside the petitioner's house on May 2nd after receiving such a call and saw persons arriving.

Evidence on these issues of fact was taken at the hearing before the referee. Audrey Davis was called on behalf of the petitioner. She refused to answer pertinent questions on the ground that the answers would tend to incriminate her and she was excused. Charles Stoker, called on behalf of respondent, testified to the truth of his testimony at the petitioner's trial and denied that he had done anything to influence Audrey Davis to testify falsely at the trial. Stoker's testimony before the grand jury was introduced in evidence. In his testimony there, Stoker also asserted the truth of his testimony at the trial and denied influencing Audrey Davis' testimony. As to Audrey Davis' motive for changing her testimony, Stoker testified before the grand jury that Audrey Davis' friendship for him had abruptly ended when her father arrived in the city. He testified that her father was a former policer officer and a close friend of several members of the Los Angeles police department who were being investigated by the grand jury and about whom Stoker had earlier given damaging testimony.

The petitioner did not testify at her trial but she did testify before the referee. She denied making the original telephone call to Audrey Davis, but admitted talking to her twice on the telephone and admitted that she had had a personal interview with

her at her house. She denied having any conversation with Audrey Davis over the telephone or in person about prostitution and denied in particular having urged Audrey Davis to engage in an act of prostitution while at the petitioner's house.

As stated, the referee found against the petitioner as to every item of asserted perjury, and the petitioner excepted to the findings. It was conceded at the hearing on the exceptions that if the testimony of Audrey Davis and Charles Stoker at the trial of the petitioner be found to be false with respect to any essential facts, their action would constitute state action as contemplated by the authorities. Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791; In re Mooney, 10 Cal.2d 1, 73 P.2d 554; In re Lindley, 29 Cal.2d 709, 722, 177 P.2d 918; In re De La Roi, 27 Cal.2d 354, 164 P.2d 10. The exceptions to the findings were on the ground that they lacked support in the evidence or were contrary to it.

[1-3] Although this court is not bound by the findings of fact made by the referee, his findings are entitled to important consideration. The referee "had an opportunity to observe the demeanor of those who appeared before him and to weigh what they said in connection with their manner on the witness stand." In re De La Roi, 27 Cal.2d 354, 364, 164 P.2d 10, 15. In the present proceeding, however, it is not necessary to rely solely on the credence given particular testimony by the referee. An independent review of the record not only justifies but impels the conclusion that the petitioner has not sustained the burden of proof required of her in order to set aside the judgment of conviction. See In re Lindley, 29 Cal.2d 709, 722, 177 P.2d 918. The petitioner must show by a preponderance of substantial, credible evidence that perjured testimony was knowingly presented by the prosecution, In re Mooney, 10 Cal.2d 1, 15, 73 P.2d 554, and that such testimony established an essential element of her conviction. See In re Lindley, supra, 29 Cal.2d 709, 722, 177 P.2d 918; In re De La Roi, 28 Cal.2d 264, 269, 169 P.2d 363; In re De La Roi, supra, 27 Cal. 2d 354, 365, 164 P.2d 10; In re Egan, 24 Cal.2d 323, 335, 149 P.2d 693. Cf. Lisenba v. California, 314 U.S. 219, 236–237, 62 S.Ct. 280, 86 L.Ed. 166. This she has failed to do.

[4] The crucial testimony at the petitioner's trial was Audrey Davis' testimony concerning the meeting and conversation with the petitioner at her house on May 2, 1948. That evidence was sufficient alone to convict the petitioner. It was referred to by the trial judge when he orally rendered his decision.[2] This testimony was not recanted by Audrey Davis. Its truthfulness must be deemed to have been established by the judgment of conviction and by the decision on appeal. Although the petitioner denied its truth before the referee, her silence as to this damaging evidence at her trial weighs heavily against her in the present proceeding. She is now endeavoring to set aside the judgment of the court in finding her guilty on evidence undisputed by her at her trial and not discredited by any witness but herself before the referee. She had an opportunity to present at her trial what she now claims to be the truth, and declined to do so. She is thus in the position of withholding her testimony at her trial and reserving a case for her possible later release. This she may not do. See In re Manchester, 33 Cal. 2d 740, 742, 204 P.2d 881; In re Swain, 34 Cal.2d 300, 209 P.2d 793.

The petitioner has failed to prove false the testimony that established the elements

2. The trial judge stated, "In addition, the facts * * * establish that the defendant, while Miss Davis was visiting her * * *, sought to prevail upon her to have and accomplish an act of sexual intercourse with * * * an 'old customer', and when Miss Davis demurred * * *, the defendant further urged her to accept the proffered employment. * * * Thus it is quite plain that the acts of the defendant would have resulted in the commission of [pandering] but for the refusal of Miss Davis * *." Reporter's Transcript on appeal, p. 275, in People v. Mitchell, 91 Cal.App.2d 214, 205 P.2d 101.

of her crime and it becomes unnecessary to make any nice inquiry into the asserted perjuries as to other testimony. It is enough to say that Sergeant Stoker's testimony before the referee was alone sufficient, if believed, to support the referee's findings. The motives of Audrey Davis in testifying as she did before the grand jury served greatly to discredit her, and the testimony of Stoker before that body also reflected on her credibility.

[5, 6] In her exceptions to the findings of the referee the petitioner presents for the first time the point that the instructions embodied in the questions furnished by this court to the referee did not, but should have, contained a request for a determination as to whether any prosecuting official deliberately withheld information which would have been beneficial to the defense if it had been given. A sufficient answer is that nowhere in her petition for the writ of habeas corpus is it alleged that any prosecuting official withheld information that would have been beneficial to her cause. That question was not raised prior to the order of reference, nor was it presented on the hearing before the referee. It is not an issue in the case. Nevertheless it is asserted that there was a willful suppression of evidence by the state when Audrey Davis, called as a witness before the referee, refused to answer on the ground that her testimony would tend to incriminate her. As stated, Audrey Davis was called as a witness on behalf of the petitioner. Thus we have the unusual contention that the successful assertion by a defendant's witness of the constitutional protection against self-incrimination is a willful suppression of evidence on the part of the state. The constitutional right is of course available to any witness, and the contention is groundless. Furthermore, it is impossible to conjecture what she would have said if she had testified before the referee. In other words, there is no way of knowing whether she would then have repudiated her testimony at the trial or her testimony before the grand jury.

The exceptions to the findings of the referee are overruled, and those findings are adopted as the findings of this court.

The writ is discharged and the petitioner is remanded to custody.

EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.



99 Cal.App.2d 293

NEUSTADT v. SKERNSWELL.

Civ. 14431.

District Court of Appeal, First District, Division 2, California.

Aug. 31, 1950.

Hearing Denied Oct. 26, 1950.

Julius Neustadt brought an action against Joseph Skernswell to establish a trust in real property. On defendant's appeal from an interlocutory decree, the District Court of Appeal, First Appellate District, Division 1, reversed the judgment that defendant's demurrer to the complaint be sustained with leave for the plaintiff to amend. Thereafter plaintiff filed two amended complaints to which demurrers were sustained and a third amendment complaint to which demurrer was overruled. Defendant filed an answer and a cross-complaint, and plaintiff's demurrer to the cross-complaint was overruled, and his motion to strike was denied. Plaintiff had the cause set for trial for September 30, 1949. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered an order granting defendant's motion to dismiss the proceedings, and the plaintiff appealed. The District Court of Appeal, First Appellate District, Division 2, Nourse, P. J., held that defendant was entitled to have the proceedings dismissed because trial was not had within three years after filing of the remittitur.

Affirmed.

1. Dismissal and nonsuit ⇐60(1)

Since section of code of civil procedure, providing for dismissal of action unless brought to trial within three years of filing of remittitur with county clerk on reversal of judgment on appeal is clear and unambiguous, such section is not open

to judicial interpretation. Code Civ.Proc. § 583.

2. Dismissal and nonsuit ⇐60(1)

Section of code of civil procedure, providing for dismissal of action unless brought to trial within three years after filing of remittitur with county clerk on reversal of judgment on appeal, is mandatory. Code Civ.Proc. § 583.

3. Appeal and error ⇐927(2)

Where motion to dismiss action for delay in trial was heard upon conflicting affidavits, appellate court would assume that lower court found facts to be as asserted by moving and prevailing party. Code Civ.Proc. § 583.

4. Dismissal and nonsuit ⇐60(6)

In code section providing for dismissal of action for delay in trial, exception found in some portions of section, excusing delay when written stipulation extending time has been made, is not incorporated into last portion of section relating to causes remanded for new trial after appeal, and that portion of section admits of no stipulation, written or oral. Code Civ.Proc. § 583.

5. Dismissal and nonsuit ⇐60(2)

Where appeal was taken and judgment reversed with cause remanded for new trial and remittitur was filed with county clerk on July 31, 1945, and thereafter complaint was amended three times and cause was finally set for trial for September 30, 1949, defendant was entitled to have proceedings dismissed because trial was not had within three years of filing of remittitur. Code Civ.Proc. § 583.

Joseph A. Brown, San Francisco, for appellant.

Marcel E. Cerf, Robinson & Leland, San Francisco, for respondent.

NOURSE, Presiding Justice.

In an action to establish a trust in real property plaintiff had an interlocutory decree from which defendant appealed. Division One of this court reversed the judgment with directions to sustain the demurrer to the complaint with leave to amend. The remittitur went down July 31, 1945. There followed an amended complaint, a demurrer thereto and motion to strike. The demurrer was sustained and the motion to strike was granted. A second amended complaint was filed and the demurrer thereto was sustained. A demurrer to a third amended complaint was overruled and, on September 30, 1947, defendant filed an answer and cross-complaint. On November 12, 1947, plaintiff's demurrer to the cross-complaint was overruled and his motion to strike was denied. Plaintiff's answer to the cross-complaint was filed January 15, 1948. The pleadings then having been settled the cause was ready for trial as of that date.

On June 2, 1948, plaintiff filed a notice of motion to set the cause for trial. The motion came on the calendar August 11, 1948, but was dropped because plaintiff failed to appear. One year later—August 9, 1949, pursuant to notice given June 2, 1949, plaintiff had the cause set for trial for September 30, 1949. Thereupon defendant moved to dismiss the proceedings because trial was not had within three years of the filing of the remittitur with the county clerk on reversal of the judgment on appeal. This motion was made and granted pursuant to the provisions of section 583 of the Code of Civil Procedure reading (in part): "When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from an order granting a new trial and such order is affirmed on appeal), the action must be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court." The appeal here is from such an order.

[1, 2] The code section is clear and unambiguous and hence is not open to "judicial interpretation". That it is mandatory under the circumstances noted has been held on numerous occasions. See Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 122, 47 P.2d 716; Breakstone

v. Giannini, 70 Cal.App.2d 224, 229, 160 P.2d 887.

[3-5] The only debatable question raised on the appeal is whether respondent is estopped by his conduct to raise the bar of the statute. Appellant's counsel filed a lengthy affidavit in the superior court reciting conversations with one of the attorneys for respondent from which he argues that the long delay was agreed to. The respondent's counsel filed a similar affidavit categorically denying all these statements of fact. In denying appellant's plea for relief on this ground we must assume that the trial court accepted as true the facts as stated by respondent. Lieb v. Lager, 9 Cal.App.2d 324, 326, 49 P.2d 886. It should be noted however that the portion of section 583 applicable here does not incorporate the exception found in the other portions of the section excusing the delay when a written stipulation extending time has been made. Cases holding that the "written" stipulation might be excused under certain exceptional circumstances have no application to the last sentence of the section which is applicable here and which admits of no stipulation written or oral.

Order affirmed.

We concur:

GOODELL and DOOLING, JJ., concur.



99 Cal.App.2d 269

HARRINGTON et al. v. EVANS.
Civ. 14499.

District Court of Appeal, First District, Division 2, California.

Aug. 30, 1950.

Suit by James Harrington and others against Charles H. Evans, individually and doing business under the firm name and style of Evans Auto & Truck Rental Company, and another, for injuries sustained in motor vehicle collision. The Superior Court for Alameda County, A. J. Woolsey, J., entered judgment on a verdict in favor of plaintiffs and the named defendant appealed. The District Court of Appeal, Nourse, P. J., held that any lack of jurisdiction of appellant had been waived and that dismissal of operator of motor vehicle as a party defendant was not prejudicial error.

Judgment affirmed.

1. Appearance ⇐9(4)

Where trial court found on conflicting evidence that summons had been served on party named as defendant by amendment of complaint, any lack of jurisdiction was waived by his general and special demurrer, raising the issue of sufficiency of the complaint, and his answer on the merits.

2. Automobiles ⇐234

In suit against alleged owner of motor vehicle for injuries sustained in collision therewith, operator of vehicle was a "proper party", but not a "necessary party", or "indispensable party". Vehicle Code, § 402(c, d).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Indispensable Party", "Necessary Party" and "Proper Party".

3. Parties ⇐18, 29

Persons who should normally be made parties in order to enable court to do complete justice are "necessary parties", but if their interests are separable from the others, and particularly if their presence in the suit cannot be obtained, they are not "indispensable parties" without whom the court cannot proceed.

4. Parties ⇐75(1)

Proceeding in absence of a proper or necessary party is not jurisdictional, but error at the most, dependent upon the circumstances.

5. Automobiles ⇐192(1)

Lack of final adjudication of the liability of operator of automobile does not affect the statutory liability of the owner. Vehicle Code, § 402(c, d).

6. Appeal and error ⇐1024(3)

In suit against alleged owner of motor vehicle from which operator of vehicle

was dropped as a party defendant, whether plaintiffs had exercised due diligence in efforts to find and serve operator with summons was a question for trial court under conflicting evidence. Vehicle Code, § 402(c, d).

7. Appeal and error ⇐877(2)

Where defendant by verified answer and testimony disclaimed all right of ownership in motor vehicle involved in collision, he could not contend on appeal that dismissal of operator as a party defendant was prejudicial error, since he was in no position to insist upon statutory right of an owner against operator. Vehicle Code, § 402(c, d).

8. Automobiles ⇐192(2, 11)

Provisions of Vehicle Code, relating to primary liability of owner of motor vehicle without negligence on his part, do not relieve him from liability for negligence, such as lending vehicle to a known incompetent or careless driver or lending a vehicle having dangerous mechanical defects. Vehicle Code, § 402(c, d).

9. Appeal and error ⇐1036(5)

Where defendant in suit for injuries sustained in motor vehicle collision contended that he was merely using vehicle with owner's permission and disclaimed any right of ownership therein and jury returned a general verdict against him without disclosing for what type of negligence or in what capacity he was adjudged liable, dismissal of operator of vehicle as a party defendant was not prejudicial error. Vehicle Code, § 402(c, d).

10. Pleading ⇐345(1.4)

Where defendant was sued as owner of motor vehicle for injuries sustained in collision therewith, proof that he was in fact the bailee and not owner of vehicle would not render denial of his motion for judgment on the pleadings erroneous. Vehicle Code, §§ 66, 68.

11. Automobiles ⇐242(5)

Defendant's ownership of motor vehicle involved in collision could be inferred from fact that he permitted it to be used on public streets with name of his company painted thereon and without license plates, registration card or other means of showing ownership.

12. Automobiles ⇐246(17)

Where defendant in suit for injuries sustained in motor vehicle collision denied ownership of vehicle, the distinction drawn in definitions of owner and registered owner in Vehicle Code justified instruction that jury could disbelieve his testimony as to ownership and draw inference of ownership from proof that he permitted vehicle to be used on public streets with name of his company painted thereon and without license plates, registration card or other means of showing ownership. Vehicle Code, §§ 66, 68.

Schofield, Hanson & Sholars, Allison E. Schofield, Raymond L. Hanson, Brunswig Sholars, and Thomas M. Jenkins, all of San Francisco, for appellant.

Thomas L. Berkley, C. Wayne White, of Berkeley, Terry A. Francois, of San Francisco, and Joseph G. Kennedy, of Berkeley, for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued for personal injuries arising from a motor vehicle collision. The defendants were named as "Charles J. Evans, individually, doing business under the firm name and style of Evans Auto and Truck Rental Company, John Coffee." Plaintiffs were granted leave to amend the name of the individual to "Charles H. Evans." Proof was made that summons was served on Charles H. and the trial court found on conflicting evidence that that was true. The cause went to trial on the complaint and the answer of Charles H. Evans after his demurrer was overruled. The jury returned a verdict in favor of plaintiffs. Charles H. Evans appeals for himself and the Evans Auto and Truck Rental Company.

[1] The first ground urged is that the trial court was without jurisdiction to substitute appellant and to proceed with the trial in his name. If there was any lack of jurisdiction the question was waived by his

demurrer and answer on the merits. His demurrer was both general and special, thus raising the issue of the sufficiency of the complaint which bears no relation to the question of service of summons. His answer raised all the issues of fact upon which the case was tried.

In Security Loan & Trust Co. etc. v. Boston & S. R. Fruit Co., 126 Cal. 418, 421, 58 P. 941, 59 P. 296, one of the objections raised to the question of jurisdiction of the defendant on substituted service was that the complaint did not state a cause of action against the defendant. This was held a waiver of the defense of want of jurisdiction. In accord are Olcese v. Justice's Court, 156 Cal. 82, 87, 103 P. 317; Raps v. Raps, 20 Cal.2d 382, 385, 125 P.2d 826; Judson v. Superior Court, 21 Cal.2d 11, 13, 129 P.2d 361; Lacey v. Bertone, 33 Cal.2d 649, 651, 203 P.2d 755. In the Lacey case the court said: "This rule is ordinarily applied when the defect consists in a failure to serve summons or give the notice required to bring the party before the court originally." [33 Cal.2d 649, 203 P.2d 757] Thus the appellant made himself a defendant for all purposes of the trial. This disposes of the first four grounds urged by appellant because since appellant waived the question of jurisdiction it is immaterial how the substitution was made.

[2, 3] The fifth ground—the dismissal of the driver of the motor vehicle as a party defendant—raises a question of "prejudicial" error only. It is argued that since appellant "as owner" had the right of subrogation against Coffee the driver under section 402(c) of the Vehicle Code, the latter should have been kept in the case for the purpose of securing a judgment against him. Appellant argues the point on the assumption that Coffee was both a necessary and an indispensable party. In this assumption he is in error. Coffee was a proper party defendant, but neither a necessary nor an indispensable one. This whole subject is discussed at length in Bank of California National Ass'n v. Superior Court, 16 Cal.2d 516, 520 et seq., 106 P.2d 879. There the court in 16 Cal.2d at page 521, 106 P.2d at page 883, quoted with approval Clark, Code Pleading, p. 245, note 21, as follows: "'It has been objected that the terms "necessary" and "indispensable" convey the same idea. * * * But a distinction has been drawn. While necessary parties are so interested in the controversy that they should normally be made parties in order to enable the court to do complete justice, yet if their interests are separable from the rest and particularly where their presence in the suit cannot be obtained, they are not indispensable parties. The latter are those without whom the court cannot proceed.'"

[4, 5] When a party is found to be indispensable it is improper for the court to proceed without bringing him in. When he is found to be a proper or necessary party proceeding in his absence is not jurisdictional but error at the most, dependent upon the circumstances. The authorities are in accord that lack of final adjudication of the liability of the operator of the car does not affect the statutory liability of the owner. This is true in such cases as where the operator is dead or without the jurisdiction or can not be served. See Baugh v. Rogers, 24 Cal.2d 200, 220, 148 P.2d 633, 152 A.L.R. 1043, and citations. Holland v. Kodimer, 11 Cal.2d 40, 43, 77 P.2d 843; Broome v. Kern Valley Packing Co., 6 Cal. App.2d 256, 44 P.2d 430; Sutton v. Tanger, 115 Cal.App. 267, 1 P.2d 521; Sayles v. Peters, 11 Cal.App.2d 401, 54 P.2d 94; Lee v. Deasy, 19 Cal.App.2d 667, 66 P.2d 175; National Automobile Ins. Co. v. Cunningham, 41 Cal.App.2d 828, 107 P.2d 643.

[6] There was some evidence here that the operator was outside the State for several months following the accident. Appellant claims that he had returned and was living in San Francisco for sometime before the trial. The matter of the diligence of respondent in endeavoring to find and serve him was a question for the trial court to decide.

The question here is further complicated by the insistence of the appellant that he was not at anytime the owner of the vehicle. It was his contention throughout the trial that the vehicle was owned by one McCord and was used by appellant in his business, presumably under permission of

the true owner. This defense was raised in his answer but he did not demand that McCord be made a party. His demand that the operator be made a party was refused for the reasons above stated. This situation would make a case fundamentally different from those cited which hold that when the *owner* is sued the operator should be joined and which apply section 402(c) of the Vehicle Code to cases in which the owner is sued to enforce his primary liability.

[7] But the appellant is in no position to raise any of these questions. He pleaded in his answer and testified as a witness that he was not the owner of the vehicle. He went further and testified that the true owner was one McCord. This position is wholly inconsistent with the position of his counsel taken in some portions of his brief on this appeal. If he was not the owner at the time of the accident, he is not entitled to insist upon the right of an owner under either section 402(c) or 402 (d) of the Vehicle Code. Those sections are limited to and fix the privileges of an owner—not of a bailee, a lessee or one holding merely by permission express or implied. Hence the appellant, having by his verified answer and by his testimony disclaimed all right of ownership, may not now, by way of argument alone, assume an entirely inconsistent position.

If, as his argument here implies, he was a bailee of the owner then under section 402(d) of the Vehicle Code "such bailee and such driver shall both be deemed operators of the vehicle of the owner within the meaning of subdivisions (c) and (d) of this section."

[8, 9] The jury returned a general verdict against appellant. It did not determine in what capacity he was adjudged liable. The sections of the Vehicle Code noted relate to the primary liability of the owner without negligence on his part. They do not purport to deny his liability for negligence—i. e., his lending the vehicle to a known incompetent or careless driver or the lending of the vehicle having serious and dangerous mechanical defects. Likewise a bailee might be grossly negligent in the same respects and his liability for damage would not be limited by the code sections. As we have said, the record does not disclose for what type of negligence, or in what capacity, defendant was held. It is sufficient that the jury could find him negligent under either theory. Hence appellant has not shown error.

[10] Appellant's motion for judgment on the pleadings was properly denied. Plaintiffs sued the defendant as owner and Coffee as operator. If during the course of the trial defendant was shown to have been the bailee there was nothing wrong with the pleading.

[11] The instruction stating that ownership in defendant could be inferred from the fact that he permitted the truck to be used on the public streets with the name of his company painted thereon and with no license plates, registration card, or other means of showing ownership was proper. Tieman v. Red Top Cab Co., 117 Cal.App. 40, 45, 3 P.2d 381.

[12] Appellant complains of another instruction telling the jury it could disbelieve his testimony as to ownership and draw the inference of ownership from proof of the facts heretofore stated. The instruction was proper in view of the distinction drawn in the definitions of "owner" and "registered owner" in sections 66 and 68 of the Vehicle Code, and it was a wise precaution on the part of the trial court to let the jury know that it was not necessary to find that the appellant was a "registered owner."

We find no prejudicial error.

Judgment affrmed.

GOODELL and DOOLING, JJ., concur.

99 Cal.App.2d 258

AIR PURIFICATION, Inc. v. CARLE et al.
Civ. 4000.

District Court of Appeal, Fourth District, California.
Aug. 29, 1950.

Air Purification, Inc., sued Paul Carle and others for a declaratory judgment establishing a constructive trust in a patent application and plaintiff's ownership thereof. From a judgment of the Superior Court of San Diego County, L. N. Turrentine, J., for plaintiff, defendants appealed. The District Court of Appeal, Griffin, J., held that the evidence supported the trial court's finding that named defendant wrongfully and surreptitiously undertook to conceive, in his own behalf, certain improvements and refinements in an air cleaner covered by plaintiff's patent, so as to entitle plaintiff to all benefits of another patent applied for by defendant and an accounting therefor by defendant as trustee.

Judgment affirmed.

1. Joint adventures ⇐4(1)

One who was member of joint venture and an incorporator, director and officer of corporation organized to carry out purposes of venture was equitably barred from taking or claiming any profit or obtaining any secret advantage from corporation in his dealings therewith and from attempting to enrich himself by virtue of his fiduciary obligation thereto.

2. Joint adventures ⇐4(1)

One co-adventurer, gaining advantage for himself over other adventurers in violation of his duty to act in utmost good faith toward them becomes a constructive trustee for them.

3. Joint adventures ⇐4(1)

A trust relationship is inherent in association of joint adventurers for common purpose, and one of parties thereto will not be allowed to deal with subject-matter of association for his own advantage.

4. Joint adventures ⇐1.14

Generally, relationship of joint adventurers may be terminated by their mutual consent.

5. Joint adventures ⇐1.14, 4(1)

A member of joint venture for purposes of inventing, patenting and marketing air purification devices for adventurers' joint and mutual benefit did not orally terminate venture as to him by walking out of members' meeting in which ideas incorporated in device invented by him were rejected by other members, and hence was not at liberty to obtain patent thereon in his own name and appropriate it to his own use, where he continued to be stockholder and officer of corporation organized to carry on venture and participated in demonstration of his device with possibility of sale by corporation of rights accrued thereunder.

6. Joint adventures ⇐1.14, 4(1)

Where no time is fixed for termination of joint venture, agreement remains in full force until its purpose is accomplished or parties definitely ascertain that such purpose cannot be accomplished, and neither party has right to withdraw from venture on ground that it is no longer advantageous to him or for purpose of acting independently to his co-adventurers' exclusion while agreement is in force.

7. Trusts ⇐110

In corporation's action for declaratory judgment establishing constructive trust for plaintiff's benefit in patent application by defendant officer of corporation, which was organized to carry on joint adventure of defendant and others to invent, patent and market air purification devices for their mutual benefit, evidence supported trial court's finding that defendant wrongfully and surreptitiously undertook to conceive, in his own behalf, certain improvements and refinements in device covered by corporation's patent so as to entitle corporation to all benefits of another patent applied for by defendant and to an accounting by him as trustee.

Pat A. McCormick, Los Angeles, Floyd H. Norris, Los Angeles, of counsel, for appellants.

Luce, Forward, Lee & Kunzel, San Diego, and Chas. L. Nichols, Los Angeles, for respondent.

GRIFFIN, Justice.

Plaintiff corporation brought this action for declaratory relief seeking to establish a constructive trust covering a patent application and asked the court to decree that the plaintiff was the true and actual owner thereof and that the defendants assign and deliver the same to the plaintiff. The trial judge prepared his own findings and found generally that in October, 1947, one Ray, defendant Paul Carle, and one Hardy, entered upon and engaged in a joint venture to invent and turn to account devices for the purification of air including devices for impelling the movement of air, gases and liquids, and to protect all such devices with all possible patent protection, for their joint and mutual benefit; that they jointly filed an application for patent No. 20256 in 1948, embracing the ideas and inventions theretofore conceived by them in the course of said joint venture; that about that time one Van Keuren and one Nelson joined in said joint venture with the mutual consent of all concerned and that they organized plaintiff corporation for the purpose of taking over and carrying on said joint venture, and each co-adventurer assigned his interest in said joint venture and became the owner of shares of capital stock of plaintiff corporation in proportion to his interest in the joint venture; that thereafter the application for the patent above mentioned was assigned to plaintiff corporation which now owns it; that plaintiff took over and carried on the business of said joint venture; that the shareholders became and ever since have been officers and directors of plaintiff corporation and defendant Carle was at all times and still is a director and vice president of that corporation; that each of the parties agreed orally to continue to devote his best talents and efforts and necessary time in furtherance of the aforesaid inventions of plaintiff and its business affairs to the end that each of them should enjoy the fullest measure of financial benefit therefrom.

The court then specifically found: "That prior to the 23rd day of November, 1948, and in violation of his fiduciary obligation to plaintiff, defendant Paul Carle wrongfully and surreptitiously undertook to conceive in his own behalf certain improvements and refinements upon and relating to the inventions and devices of plaintiff, and in so doing made use of materials belonging to plaintiff for such experimentations. That on said date of November 23, 1948, defendant Paul Carle caused to be filed in his own behalf an application for patent No. 61679 covering such new improvements and innovations, all of which relate to and are intended to achieve the same end results as the inventions and devices of plaintiff but simply contemplate the use of varying means and methods."

It was then found that an actual controversy did exist in respect to patent No. 61679 and the inventions covered thereby; that the plaintiff is the true and equitable owner of and entitled to all of the benefits of that patent as applied for by the defendant, and all amendments and improvements thereon, and that defendant, as trustee, is accountable to plaintiff for its use and benefit.

Defendants' attack is directed to the quoted portion of the findings above recited and they argue that the uncontradicted evidence shows that there were no surreptitious acts on the part of the defendant Carle; that in truth and fact he acted in the utmost good faith with his coadventurers at all times, as evidenced by the fact that when he had first conceived the idea for patent No. 61679, in the latter days of May, 1948, he made a full disclosure to Ray and Van Keuren and insisted that they adopt his idea and that they proceed to erect a rotor along the principles suggested by him, to the exclusion of everything else; that the remaining members of the corporation rejected his ideas and therefore he was entitled and at liberty to develop his ideas after a full disclosure to plaintiff corporation and its officers, and was then authorized to build, in his own private capacity, a rotor designated as No. 5, at his own expense, and that said rotor, the patent rights thereon and the rights thereto, became his own individual property, and that the trial court had no right or jurisdiction to award these rights to plaintiff.

For a proper determination of this issue it will be necessary to review some portions of the evidence bearing on the subject.

In 1947, defendant Carle and his two joint adventurers developed the idea of encasing a power driver rotor or blower in a housing, injecting a fluid into the air stream thus created to emulsify the dust, dirt, etc., and passing such stream through a condenser to eliminate the fluid and emulsion thereby permitting clean air to be discharged from the other side of the air cleaner. Such a machine was built and was referred to as "Form No. 1". While testing it the parties discovered it would eliminate smoke. This machine did not create a satisfactory emulsion and the parties decided to build another in order to correct this condition. Ray suggested placing closely spaced rings or plates perpendicular to and around the rotor in order to bring the water and impure air into more intimate contract thereby securing proper emulsification. Another model was similarly built but only one ring or plate was built into it. This reflected marked improvement despite the fact that multiple plates or rings were not used. However, instead of following up Ray's idea, Hardy and defendant Carle built a new model based on the original idea, referred to as "Form No. 2". Additional working capital was needed. In this connection they brought Van Keuren into the joint venture to assist Ray in his efforts to sell such air cleaner. Van Keuren interested Nelson in the project. Nelson put up $15,000 to continue the work for a 15 per cent interest in the business or of any corporation thereafter to be formed by the parties to take over and carry out the joint venture. This money was distributed to the remaining members, including defendant Carle, "as eating money" and a portion was retained for the purchase of material and carrying on the program. In 1948, Form No. 2 was tested by the corporation. Its cleaning efficiency was found satisfactory but was not economical. Later the corporation was formed. The Union Oil Company desired to have the Stanford Research Institute test the air cleaner so the parties constructed Forms No. 3A and 3B, which contained plates and spacers. Later, Hardy withdrew from the venture because of some disagreement in ideas with defendant Carle and he sold his interest to Nelson. After Forms No. 3A and 3B were completed they were taken to the university at Palo Alto for testing. No. 3B was brought back by defendant Carle for the purpose of further testing and it was then decided to build a new model. Defendant Carle wanted one made with all rings; the others wanted one made so that rings and plates would be interchangeable. The duty and responsibility of designing and building the new model was entrusted to defendant Carle. He built Form No. 4 containing a series of alternating plates and rings which created a tortuous or interrupted passage through the cleaner. Ray and Van Keuren were out of town endeavoring to interest prospective buyers of air cleaners in the new device. In August, 1948, Ray caused two drawings to be made showing his ideas about a series of rings, one showing the rings staggered in a plane and in the other the rings were all in the same plane. In October, 1948, the parties continued to test Form No. 4, and about this time defendant Carle absented himself from the plant where the work was being carried on. Ray phoned him daily, advising him of the progress of the tests they were making on Form No. 4. Carle did not give his coadventurers any intimation as to what, if any, work he was carrying on during his absence. About two weeks later defendant Carle phoned Ray and invited him to call at his home. Upon arriving Carle showed Ray a model, Form No. 5, which defendant Carle stated he had built with staggered rings separated by spacers.

Thereafter, Van Keuren and Nelson were called in by defendant Carle and had similar discussions with him. Ray testified that Carle then told him Form No. 5 was a great improvement over what plaintiffs were doing and that he thought he would take out an application for a patent in his own name. He further testified that this form conformed to the ideas he represented on his drawings and that if Carle should take out a patent it should be assigned to the corporation. Ray told Carle that it was not a new invention but merely one of the

new improvements or refinements they had all been discussing for some time. Carle told Van Keuren that before he would assign any rights in and to his new invention the corporation stock would have to be reallocated with different amounts of shares for each stockholder, with Carle holding the majority of the stock. Van Keuren told him that he did not believe that he had invented anything new; that he had only improved on their present cleaner and that any member of the joint venture might have perfected some improvement as a result of his efforts, such as he and Mr. Ray had done in perfecting the condenser. Apparently no final arrangements were completed in this respect.

The testimony of Van Keuren and Nelson is that the only difference between Form No. 4 and Form No. 5 was that in Form No. 4 the rings were separated by plates and in Form No. 5 the rings were separated by spacers. Ray described Form No. 5 as being similar to the drawings he had previously made about his own ideas as to rings being staggered in a plane.

Although it is denied by defendant Carle, there is evidence that certain materials belonging to plaintiff, such as the motors, the pump, and the saw mandrel type bearing, spacers, rings, plates, base plates, etc. were used by defendant in the construction of his claimed Form No. 5. The evidence further indicates that thereafter plaintiff built a model designated as Form No. 5, which was similar to Form No. 5 built by defendant Carle, took it to Pasadena for testing; that defendant Carle went along for the purpose of the tests; and plaintiff paid all of the expenses of the trip.

Thereafter, Carle stated that he had about reached the end of his ropes financially and that some more money would have to be brought in if the work was to be continued. Nelson, with the knowledge and consent of Carle, put up another $5,000. It was not until December, 1948, that plaintiff discovered that defendant Carle had filed an application for a patent on this so-called new invention. Thereafter, this action was instituted to establish a constructive trust in respect to the returns of this patent right.

The evidence clearly shows that the object and purpose of the formation of the joint venture was to develop and perfect an efficient air cleaner and that the efforts of all parties should be expended to this end. There is testimony that when the new members were brought into the joint venture all agreed that the men, other than Mr. Nelson, would "put in their time and efforts toward the objective of developing an air cleaner capable of receiving adequate patent protection and thereby being saleable or licenseable" and that Mr. Nelson then said in their presence: "You are not committing me to do anything but even if I get an idea I will give it to the corporation". There is testimony that "Mr. Carle brought up the subject and stated 'We have got to have $25,000 to carry this work on. We must have eating money and we must have development money for buying materials, etc., to carry it through to the point of where we can get adequate patents and saleability of our rights, or licensing of our rights'"; that Hardy said "Van (Van Keuren), if you will bring in the money and if you will agree to put in your time toward sales as we will put in our time toward further development, let's divide all of the 85 per cent four ways * * *. Mr. Carle expressed in substance that that suited him"; that it was there very clearly stated that the assets of the corporation would be "the proposed assignment of a patent, process of a patent application to be filed and such suggestions and outgrowths to it as would be indicated and advised by the patent attorneys, and that it was proposed those be assigned to the corporation as assets for which we would receive the necessary stock."

[1, 2] Defendant Carle admits the existence of a joint venture and that he was an officer of plaintiff corporation organized to carry out the purposes of such joint venture; that he was one of the incorporators and at all times a director thereof. He admits that, as a member of this joint venture and as an officer of the corporation, he was required to act in the utmost good faith towards his coadventurers. San Francisco Iron etc. Co. v. American Milling, etc. Co.,

115 Cal.App. 238, 248, 1 P.2d 1008. He was thereby accordingly barred from taking or claiming any profit or obtaining any secret advantage from plaintiff in his dealings with it, and any attempt to enrich himself by virtue of his fiduciary obligation to it would be at once obnoxious to the principles of equity. Andrews v. Bush, 109 Cal.App. 511, 517, 293 P. 152. The principle is well established that where one coadventurer gains an advantage for himself under such conditions he becomes a constructive trustee for his coadventurers. MacIsaac v. Pozzo, 26 Cal.2d 809, 161 P.2d 449; Swarthout v. Gentry, 62 Cal.App.2d 68, 144 P.2d 38; Koyer v. Willmon, 150 Cal. 785, 90 P. 135. In the latter case it was held that where a partnership was entered into for the purpose of buying a particular lot of land, each of the partners occupies the position of a trustee to the other with regard to all the partnership transactions, including the transactions contemplated by the firm and constituting the object or purpose for which the partnership was formed, and if one of the partners, after securing an option on the lot while acting for the firm, subsequently purchased it in his own name and with his individual money, he becomes a constructive trustee for his copartner to the extent of the latter's interest in the partnership.

[3] Likewise, in Hendrickson v. California Talc Co., 55 Cal.App.2d 467, 130 P. 2d 806, this court held that a trust relationship is inherent in such an association for a common purpose, and one of the parties will not be allowed to deal with the subject matter of the association for his own advantage.

[4, 5] The force of defendant's argument is that the remaining members of the corporation rejected the ideas incorporated in defendant's Form No. 5, and therefore he was at liberty to proceed, in his own name, to obtain such a patent right and to appropriate it to his own use, and that when he walked out of the meeting in which he claims such ideas were rejected by the others, it constituted an oral termination of the joint venture insofar as he was concerned. In support of these contentions he cites such cases as Ford & McNamara, Inc., v. Wilson, 119 Cal.App. 475, 6 P.2d 996; Irer v. Gawn, 99 Cal.App. 17, 277 P. 1053; Gudebrod v. Ward's Administrator, 165 Va. 444, 182 S.E. 118; Black v. Hunter, 169 Cal. 632, 147 P. 463; Dennis v. Gordon, 163 Cal. 427, 125 P. 1063; Neilsen v. Holmes, 82 Cal.App.2d 315, 186 P.2d 197; and Gillan v. Stansbury, 97 Cal.App.2d 502, 217 P.2d 1016. The general holding of the cases examined is to the effect that the relationship of joint adventurers may be terminated by mutual consent. It does not appear in the instant action that defendant Carle in fact terminated his relationship in the joint venture or in the corporation. So far as the record shows, he still owns stock in the corporation and is still an officer thereof and participated in the demonstration of Form No. 5, with the possibility of a sale by the corporation of the rights accrued thereunder.

[6] In San Francisco Iron, etc. Co. v. American Milling etc. Co., supra, it was held that where no time is fixed for the termination of a joint venture, the agreement remains in full force until its purpose is accomplished or until it is definitely ascertained that its purpose cannot be accomplished, and while the agreement is in force neither party has a right to withdraw on the ground that it is no longer advantageous to him, or for the purpose of acting independently to the exclusion of his coadventurers.

[7] The evidence clearly supports the claimed objectionable finding that defendant Carle wrongfully undertook to conceive, in his own behalf, certain improvements and refinements and, from the facts related, the court might well find that the defendant surreptitiously undertook to do so.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

99 Cal.App.2d 219

GARFIELD v. BOARD OF MEDICAL EXAMINERS et al.

Civ. 14118.

District Court of Appeal, First District, Division 1, California.

Aug. 28, 1950.

Sydney Roy Garfield brought a proceeding against the State Board of Medical Examiners and the members thereof for a writ of mandate to set aside the board's orders suspending petitioner's license to practice as a physician and surgeon. From a judgment of the Superior Court in and for the City and County of San Francisco, Edward P. Murphy, J., for petitioner, respondents appealed. The District Court of Appeal, Bray, J., held upon stipulation of the parties that, in the interest of justice and those of the respective parties, the second count of the accusation should be remanded for further proceeding and for the overruling of the board's objections to certain evidence offered in defense and received only for the purpose of mitigation.

Judgment reversed with directions.

Prior opinion, 219 P.2d 829.

1. Mandamus ⇐174

In mandamus proceeding to set aside decision of State Board of Medical Examiners suspending physician's license, trial court was authorized to exercise its independent judgment on evidence.

2. Mandamus ⇐187(9)

On appeal by State Board of Medical Examiners from judgment annuling board's decision suspending physician's license, evidence was to be viewed in light most favorable to physician.

3. Physicians and surgeons ⇐6(1)

Under statutory provision that any graduate medical student registered with State Board of Medical Examiners may treat sick as intern, registration of unlicensed physician as intern is mandatory. Business and Professions Code, § 2147.5.

4. Physicians and surgeons ⇐4

Under statute providing for treatment of sick by interns who are graduates of approved medical schools, requirement that medical school shall have been approved by Board of Medical Examiners is mandatory, and fact that number of graduates of medical school have been admitted to practice by board does not constitute approval of school. Business and Professions Code, § 2147.5.

5. Physicians and surgeons ⇐6(1)

Failure of State Board of Medical Examiners to adopt and file with Secretary of State regulation on registration with board of medical school graduates, not licensed as physicians to serve as interns in hospitals, did not excuse licensed physician and surgeon, operating hospital, from complying with self-executing statutory provision requiring registration of such graduates to enable them to treat sick as interns, since board needs no regulations other than registry forms adopted by it, and such interns owe duty to apply to board for registration. Business and Professions Code, § 2147.5; Government Code, §§ 11380, 11381.

6. Physicians and surgeons ⇐5(2)

Physicians' letters to State Board of Medical Examiners, enclosing completed forms of applications for licenses to practice in which they stated that they were residents in surgery at certain hospital, did not constitute compliance with statutory requirement that graduate medical students register with board in order to treat sick as interns in hospitals. Business and Professions Code, § 2147.5.

7. Evidence ⇐75

In mandamus proceeding to set aside decision of State Board of Medical Examiners suspending petitioner's license to practice medicine on ground of unprofessional conduct in employing nonregistered physicians as interns at petitioner's hospital, respondent's failure to offer evidence that such physicians were not registered with board as interns raised no presumption that they were registered, as required by law. Business and Professions Code, § 2147.5.

8. Physicians and surgeons ⇐6(1)

An "intern" is an indoor or resident physician, surgeon, or similar officer in

hospital and specifically one serving in hospital as preparation for independent practice after completing required course of study.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Intern".

9. Mandamus ⇐168(4)

In mandamus proceeding to set aside decision of State Board of Medical Examiners suspending petitioner's license to practice medicine on grounds of unprofessional conduct in employing unlicensed physicians not registered with board as interns at petitioner's hospital, evidence sustained trial court's finding that such physicians were interns. Business and Professions Code, §§ 2141, 2147.5, 2378, 2392.

10. Physicians and surgeons ⇐6(1)

University medical school graduates, holding doctor's degrees, licensed to practice and practicing medicine in other states, serving in Army Medical Department as hospital surgeons and surgical consultants, taking refresher courses at hospital in state, and examining, prescribing for, and assisting in surgery on, out-patients therein under other physician's direction and supervision, for salaries of $700 per month, were not "interns" within statute requiring registration of graduate medical students with State Board of Medical Examiners to enable them to treat sick as "interns" in hospitals without having license to practice medicine in state. Business and Professions Code, § 2147.5.

11. Mandamus ⇐187(10)
Stipulations ⇐14(12)

On appeal from order of Superior Court setting aside decision of State Board of Medical Examiners suspending physician's license to practice medicine, where it was stipulated by parties that board had determined issues of second count of accusation on assumption that certain evidence was admitted in mitigation only, and appellate court held that such evidence should have been admitted without limitation, appellate court would accept proposal of stipulation and remanded second count for overruling of board's objections to evidence and for further proceedings.

12. Mandamus ⇐151(2)

Incumbent members of Board of Medical Examiners are proper, but not necessary, parties to mandamus proceedings brought against said board.

13. Mandamus ⇐168(4)

In mandamus proceeding to set aside decision of the State Board of Medical Examiners, suspending petitioner's license to practice medicine on ground of unprofessional conduct in employing unlicensed physicians at petitioner's hospital and aiding and abetting one of them to practice medicine, where there was no evidence that some of such physicians who were interns were registered with board as required by statute, and evidence showed conclusively that other physicians involved were not interns, trial court erred in finding that petitioner was not guilty of unprofessional conduct. Business and Professions Code, §§ 2147.5, 2392.

14. Mandamus ⇐187(10)

On appeal from trial court's order granting writ of mandate to set aside decision of State Board of Medical Examiners, where appellate court held, upon stipulation of parties, that, in interest of justice and those of respective parties, one count of accusation should be remanded for overruling of board's objections to certain evidence offered in defense and received only for purpose of mitigation, trial court's judgment would be reversed and matter remitted to board for reconsideration of penalty, since appellate court had no way of knowing what penalty board would have imposed for violation of other count of accusation alone.

Fred N. Howser, Atty. Gen., J. Albert Hutchinson, Deputy Atty. Gen., for appellants.

William A. O'Brien, Thomas K. McCarthy, and Thelen, Marrin, Johnson & Bridges, all of San Francisco, for respondent.

BRAY, Justice.

Appellant medical board, after hearing an accusation filed with it against respond-

ent, found him guilty of unprofessional conduct as defined in section 2392 of the Business and Professions Code. It ordered his license to practice as a physician and surgeon suspended for one year, and then suspended its order for a five year period of probation, on condition that he comply with the laws of the United States and of the State of California and Rules and Regulations of the board, and that he personally report to the board at each of its regularly scheduled San Francisco meetings.

[1] Thereafter respondent petitioned the superior court for a writ of mandate to set aside the decision of the board. The hearing of the alternative writ was had on the pleadings, the stipulations of the parties and the transcript of the proceedings before the board. No additional evidence was offered. Exercising its independent judgment, as it was authorized to do, Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20, the trial court set aside the action of the board and entered judgment in favor of respondent. The board appealed.

Question Presented.

[2] The primary question for us to determine "is whether the evidence, viewed in the light most favorable to petitioner, sustains the findings of the trial court to the effect that the charges against petitioner were not supported by the weight of the evidence." Moran v. Board of Medical Examiners, supra, 32 Cal.2d page 309, 196 P.2d page 25. Involved in this question is that of whether there is substantial evidence to support the court's findings that the doctors employed by respondent were (1) registered with the board, and (2) interns.

As to the second count in the accusation, the main question is whether guilty knowledge is necessary in a charge of aiding and abetting an unlicensed person to practice medicine.

Facts.

Taking the evidence and the reasonable inferences therefrom most favorable to respondent, the facts follow. (Actually there is little, if any, conflict in the evidence. The bulk of the testimony is that of respondent himself and one of the unlicensed physicians, Keene. However, there is considerable conflict in the inferences which the parties draw from the testimony.) The first count of the accusation charged respondent with employing ten unlicensed physicians, including Dr. Flint (one was later withdrawn); the second count referred to Dr. Flint alone and charged respondent with aiding and abetting him to practice medicine. It is admitted that none of the physicians in question had ever been licensed to practice in California.[1] Each was a graduate of an approved medical school, and had served an internship in an approved hospital, had received an M. D. degree, and had been licensed to practice medicine in another state, and was eligible to licensure in California on a reciprocity basis. All were employed by respondent at his hospital from August 20, 1945, to May 17, 1946; all, except Keene and Murphy, were paid salaries ranging from $125 to $225 per month, and resided at the hospital. All except Keene and Murphy were assigned to the hospital during the war (prior to May, 1945) by the Procurement and Assignment Board (a medical adjunct to the War Manpower Board) for the performance of medical services under supervision.

Certain exhibits presented to the board also showed that Dr. Garfield maintained a "call-board" at the hospital which listed no interns, but listed some of these unlicensed persons as doctors; that a list of respondent's employees included categories of "staff physicians," "interns" and "residents," and none of the unlicensed persons in the accusation was listed as "intern." Also a schedule of duties refers to some of the unlicensed persons, but not as interns.

1. Except Dr. Flint, whose license was revoked. He will be omitted in the discussion of the first count except when specifically mentioned.

Findings.

The trial court found that Permanente Foundation Hospital was operated by petitioner and approved by the board for the training of interns (no question of approval was involved, and it is still approved); that all of the persons named in count I except Flint were graduate students registered with the board and engaged as interns for the purpose of study; that to the extent such persons treated the sick, etc., it was under supervision, and for the purpose of obtaining education and training; that at no time referred to in said accusation did the board issue any regulations for the registration of interns, nor did it file any regulation for the registration of interns with the Secretary of State, or otherwise comply with the provisions of the Government Code, particularly chapter 4, part 1, division 3, title 2 (which requires filing of regulations); that the findings of the board that petitioner employed unlicensed persons are not supported by the weight of the evidence; that the findings of the board that the employment of such persons was not during a course of study and that they were not employed as interns, and that petitioner knew such facts, were not supported by the weight of the evidence; that on the contrary, the weight of the evidence was that such persons, other than Flint, were graduate students pursuing a course of study in the practice of medicine and surgery, engaged as interns, and registered with the board.

Statutory Provisions.

Those applicable at the time involved here follow. Section 2141, Business and Professions Code, prohibits any person from practicing any mode of treating the sick or prescribing for any mental or physical condition without having the certificate to practice provided in the Code. Section 2142 makes it a misdemeanor for any one without such certificate to use the prefix "Dr." or the letters "M. D." implying that he is a physician and surgeon or either. Section 2392 provides: "The employing, directly or indirectly, of any suspended or unlicensed practitioner in the practice of any system or mode of treating the sick or afflicted or the aiding or abetting of an unlicensed person to practice any system or mode of treating the sick or afflicted constitutes unprofessional conduct within the meaning of this chapter." This is the section which the first count of the accusation charges respondent with violating. The second count charges him with violating section 2378: "The violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter constitutes unprofessional conduct within the meaning of this chapter."

Inasmuch as it is conceded that none of the physicians had the necessary certificate to practice, it is necessary that the evidence bring them within the exceptions provided by the statute.

Section 2147.5 provides:

"*Any graduate student registered with the board* and upon whom a degree of doctor of medicine, bachelor of medicine, or doctor of osteopathy has been conferred by a school, approved by the board, and any regularly matriculated student in a school approved by the board *may, during and as a part of his course of study,* but not for a period of more than two years, treat the sick and afflicted either as such student in a school approved by the board, teaching medicine, surgery or osteopathy in this State, *or as an interne* in a hospital approved for the training of internes, and may, for rendering such treatment, receive compensation therefor from the hospital or school.

"Except to the extent authorized by this section, *no graduate student may treat the sick or afflicted or receive compensation therefor, or otherwise engage in or offer to engage in the practice of medicine or surgery.*" (Emphasis added.)

All were graduate students of and held M. D. degrees from schools approved by the board. (It was stipulated that it would not be claimed that the two year limitation had been violated.) Permanente is a hospital approved for the training of interns by the American Medical Association, Ameri-

can College of Surgeons and by the board. The questions to be determined under the first count are, was there substantial evidence to show that (1) they were registered with the board, and (2) they were interns. (It is not contended that Permanente is a school approved by the board teaching medicine, etc.)

1. Registry.

With the exception of letters written to the board by Doctors Keene and Murphy asking to be admitted to practice and stating they were residents at Permanente, there is no claim of actual registration with the board of any of the other physicians, even though the court found that they had so registered. It is respondent's position (a) that the statutory requirement is merely directory and not mandatory, and (b) that the necessity for registration was obviated by the failure of the board to adopt regulations concerning registry,

a. *Is registration mandatory?*

[3, 4] The section provides, "Any graduate student registered with the board" may as an intern treat the sick. It is clear from reading the section that registry is an important element of the situation in which an unlicensed person may treat the sick, and is mandatory. Respondent's attempt to read a different legislative intent into the section is unfounded. He refers to the fact that the section, on the second reading of the bill, was amended to provide that the section would not apply to a graduate student who prior to undertaking graduate work had failed to register. This amendment was stricken out before final passage. If this fact has any bearing on the subject, it would indicate that the Legislature was unwilling to permit even graduate work without registry, and strengthens, rather then weakens, the position that the section is mandatory. In re Estate of Mitchell, 20 Cal.2d 48, 123 P.2d 503, cited by respondent, is not in point. It was held in Mann v. Board of Medical Examiners, 31 Cal.2d 30, 187 P.2d 1, that the fact that a number of graduates of a certain medical school had been admitted to practice by the board, did not constitute an approval of the school and, in effect, that the provision requiring approval of the school by the board was a mandatory one.

b. *Was nonregistry excused?*

[5] Admittedly the board had never adopted any rule or regulation upon the subject of registration. There had been, however, an "Interneship Registration Card, Required by Chapter 341, Statutes 1939" adopted by the board, which card stated that it was "To be filed by every graduate of a medical school not licensed in California who is serving an interneship or a resident service in a California Hospital." Section 11380 of the Government Code defined regulations of a state agency and section 11381 provided for the filing of such regulations with the Secretary of State and stated that a regulation becomes effective a certain time after filing. Respondent contends and the court found that the board's failure to adopt a regulation on registration and to file the same with the Secretary of State excused him from complying with section 2147.5 of the Business and Professions Code. He cites no authority to support this position. Section 2147.5 is self-executing. There is no provision in the Government Code requiring regulations to be adopted concerning self-regulating provisions of the Code. Before a person can treat the sick he must register with the board. The burden is on him. The board had registry forms. It needed no regulations other than the form which it had adopted. It is interesting to note that all of respondent's employees who were carried on the hospital records as "interns" had complied with the section by registering with the board on these cards. The fact that the card contains a statement that it was used for both interns and residents does not affect the requirement that interns must register. In view of the statute, it was the duty of the physicians to apply to the board for registration.

[6] There is no evidence that the other physicians applied to the board in any way for registry; therefore the charges of unprofessional conduct are proved against respondent in employing nonregistered persons, even if it be assumed that Doctors Keene and Murphy had applied for registra-

tion. The letter written by Dr. Keene (presumably that of Dr. Murphy was similar) enclosed a completed application form for California licensure. It in no wise asked for registry as an intern. It stated that he was a resident in surgery at Permanente. In no sense could this letter be a compliance with the statutory requirement.

[7] Respondent contends that inasmuch as appellants offered no evidence that the physicians were not registered it must be presumed that the interns obeyed the law and that that presumption is sufficient to support the court's finding. He cites Head v. Wilson, 36 Cal.App.2d 244, 97 P.2d 509, which was an action for damages resulting from a collision between defendant's automobile and a county ambulance causing the ambulance to careen into plaintiff's store and service station, setting the store on fire and otherwise damaging his property. In holding that the trial court erred in giving an instruction to the effect that if the county permitted the ambulance driver to drive without a license the county was prima facie negligent, the higher court said, 36 Cal.App.2d page 253, 97 P.2d page 514: "While there is no evidence that Biggs did not have a driver's license, it is a misdemeanor to drive a motor vehicle without one. There is a presumption that he obeyed the law in this respect, which is the only material evidence in the record on this subject. There is no evidence, therefore, to justify the giving of this instruction." It is obvious that such case is not in point here. Nor is Robbins v. Hercules Gasoline Co., 80 Cal.App. 271, 251 P. 697, where, in an action for damages for injuries received by falling into an excavation in a sidewalk, it was held, where there was no evidence on the subject, that it would be presumed defendant had obtained the necessary permit to make the excavation. Nor is National City v. Dunlop, 86 Cal.App.2d 380, 194 P.2d 788, in point either. That was an action brought by the city to eject defendants from certain real property. On appeal, it was held that in considering whether or not to accept the testimony of the superintendent of streets and the city engineer as proof that notices of street vacation had not been posted the trial court had the right to consider the presumption that official duty had been legally performed and the law obeyed.

The case applicable to the situation here is Anderson v. Board of Dental Examiners, 27 Cal.App. 336, 149 P. 1006. There the petitioner, a licensed dentist, had been accused in a proceeding before the Board of Dental Examiners of unprofessional conduct in employing unlicensed persons to practice dentistry. After holding that it was Anderson's duty before employing the person in question as a dentist to find out if he were licensed, the court answered Anderson's contention that the evidence failed to disclose that the person was not licensed, by saying that the board could take judicial notice of the persons it had licensed. The court then put the burden of proof on Anderson, stating, 27 Cal.App. page 340, 149 P. page 1008: "It would have been an easy matter for petitioner to produce proof of the fact that Munn had been licensed, if such were the fact, for by the statute the board is charged with the duty of keeping a roll of licensed practitioners; and under these circumstances it would be idle to say that it could not judicially notice who were and who were not duly licensed."

2. Were The Physicians Interns?

[8, 9] Dr. Garfield testified that the unlicensed doctors (except Flint, Murphy and Keene) were carried on the hospital records as residents, and that this did not mean residents in the sense, as in some hospitals, of doctors acting without supervision; that at Permanente first year interns were called interns, but the second year men were called junior residents. The six doctors were paid in salary ranges from $125 to $225 per month plus maintenance, which was the salary paid interns, the first year men getting $125 and the second year men $225. Gould's Medical Dictionary (Fifth Revised Edition, 1941) defines an intern as "An in-door or resident physician in a hospital." Webster's International Dictionary (Second Edition, Unabridged, 1941) defines an intern as "A resident physician, surgeon, or similar officer in a hospital: specif., one who upon completion of

the required course of study serves in a hospital in preparation for independent practice." While there is considerable evidence upon which the court could have found that the six doctors were not interns, there is substantial evidence together with the reasonable inferences which could be drawn therefrom that they were.

[10] But a different situation arises in the cases of Doctors Keene, Murphy and Flint. (As far as Flint is concerned, he was considered by respondent to be a licensed physician and surgeon and not an intern.) Dr. Keene, a graduate of the University of Michigan Medical School with the degree of M. D. and of M. S. in surgery, was licensed to practice medicine in the State of Michigan in 1935 and practiced there until 1941. From 1942 until January, 1946, he was in the medical department of the United States Army, during which time he served in various capacities, such as chief surgeon for the Lovell General Hospital in Massachusetts, surgeon for the 311th General Hospital, surgical consultant for the 26th Hospital Center in Manila, surgical consultant for the 24th Corps Army Service. After a conversation with respondent, who was the medical consultant to the Kaiser Fraser Company, Keene contacted the company at Willow Run, Michigan, and apparently was offered the position of medical director and surgeon for them. In February, 1946, he arranged with respondent to come to Permanente to observe their methods and to take a refresher course in industrial medicine and surgery and to learn the administration aspects of an industrial hospital. He "worked in the Out Patient [department], under the direction of the doctors there, and discussed the industrial cases with them"; he "had no understanding concerning hours," and "was around there almost all the time." He received $700 per month from the hospital, "according to the dignity of his position." He prescribed "the usual physio therapy, or some times novocaine injections, * * * a form of aspirin—". He assisted in doing surgery, "The duties of a regular assistant, and occasionally * * * did minor procedures under the direction of another man." He saw outpatients in the absence of other physicians in the room but the latter were in the hospital. He examined outpatients, noted findings and prescribed a course of treatment for them.

"Q. And in what way did your conduct of these examinations and prescribing treatment differ from your practice as a physician if there is any? A. No difference.

"Q. In other words, the things you were doing there in this hospital were the same as you did in your private practice at home, is that right? A. No, (sic) except that when I was in private practice I had no one to supervise me.

"Q. But as far as your actual conduct of these operations of one kind or another, you proceeded as a trained physician, isn't that true? A. It is."

It was understood that he would be called a resident. His definition of resident was "any physician who lives or works exclusively in a hospital for the purpose to gain knowledge." In his experience the only distinction between an intern and a resident is in the degree of experience, a resident having more experience than an intern and is given much less supervision. He made no application to the board other than the one heretofore discussed. It was stipulated that if Dr. Murphy were called as a witness his testimony would be substantially the same as that of Dr. Keene except that his specialty was obstetrics while Keene's was surgery. Murphy also received $700 per month. Respondent classified Keene as an intern, as a man in training—"We called him a resident * * * he was there to learn under the refresher course * * *."

The directory at the entrance to the hospital commenced with Dr. Garfield "& Associates." Then followed the names of certain doctors. Under the heading of "Obstetrics and Gynecology" appears "Joseph Murphy, M. D." Murphy was not licensed to practice in California, and having in mind section 2142 of the Business and Professions Code had no right to use the letters "M. D." nor did respondent have the right to so list him.

Plaintiff's Exhibit 3, "Essentials of An Approved Internship, Prepared by the Council on Medical Education and Hospitals of the American Medical Association," upon which respondent testified Permanente's intern-training program was based, states: "The internship is a form of apprenticeship. The intern assists in the care of patients and receives in return instruction from the hospital staff in the clinical and laboratory aspects of his profession. 2. Length of Internship.—An internship should be of not less than twelve months' duration. * * *" Then follows a definition of the types of internship, all requiring "supervised experience" in the work to be undertaken. Other provisions applicable here are: "Assignments should be made so that the intern has opportunity each day to meet his attending physician for the conduct of systematic ward rounds or clinics and for the study of the patients under his care. * * * Each intern on duty in any clinical department should write or dictate the history, physical examination and his own diagnostic impression of all patients assigned to him. He should have laboratory work assigned to him of such nature as to give him familiarity with clinical laboratory methods and to develop in him competence in the use of all those which the average physician may be called on to perform. The non-operative treatment of each patient should, in the main, be his responsibility under critical guidance by the visiting physician. The intern's record should be checked within twenty-four hours by a competent supervising physician, calling attention to errors in observation and adding supplementary notes containing any relevant data which the intern may have omitted. * * * 1. Bedside Teaching.—The most important phase of intern instruction consists in well conducted teaching at the bedside. By this is meant systematic instruction of the intern by the attending physician with an ample discussion of the history, the clinical and laboratory findings, the diagnosis and the treatment of each patient. * * * 3. Internal Medicine.—This department should afford each intern an adequate amount of instruction and experience in general medicine and in such special medical technics as transfusion, intravenous and other parenteral therapy, and paracentesis. * * * 4. Surgery.—Surgical training should be planned to emphasize diagnosis and pre-operative and postoperative treatment of surgical cases rather than skill in operative technic. Thus the intern's work in surgery should be rather that of an assistant than of an operator. * * * 5. Obstetrics.—The intern should obtain training and experience by delivering under supervision at least 10 patients. At other deliveries he should act as an assistant, not merely as an anesthetist. 6. Pathology.—The intern should receive experience in clinical laboratory work to perfect his skill in routine laboratory procedures. He should also receive instruction from the pathologist in the procedures of pathologic diagnosis. * * * 7. Outpatient Department.—It is desirable that each intern should have supervised experience in outpatient work under circumstances comparable to the office practice of medicine. * * * 5. Relationship Between Hospital And Intern.—To avoid misunderstanding, it is desirable that each intern at the time of his appointment should enter into a formal agreement with the hospital defining mutual obligations. * * *"

While respondent now calls Doctors Keene and Murphy "interns" it is stretching one's imagination beyond all limits to so characterize them. Comparing these rules with the duties performed by Doctors Keene and Murphy, it is obvious that they were not interns. They were physicians and surgeons who undoubtedly had come to the hospital for a certain amount of refreshing but who were actually practicing medicine the same as any other practitioners except that they were under supervision. Boiled down, respondent's contention is that because interns act under supervision and the doctors here acted under supervision, ergo, they were interns. To hold that men with the medical experience of these men, doing the type of work they were doing at Permanente, and receiving the salaries they received, are interns, would make such a wide hole in the statute as to make it practically unenforceable. Courts have to

be realistic and not misled by attempts to attach a nomenclature which is completely unfounded.

Second Count.

[11] The parties have stipulated, upon their respective applications for a rehearing, that the issues of the second count of the accusation were determined by the board upon the assumption that certain evidence (of the circumstances surrounding the re-employment and continuation of the employment of Dr. Flint by respondent) were admitted in mitigation, only, and that, if this court is of the opinion that such evidence should have been admitted without limitation, the issues of the second count should be remanded to the board for further proceedings without directions, other than to overrule the objection to the admission of such evidence. The court is of the view that the disposition of the issues of the appeal relating to the second count proposed by the stipulation of the parties is a proper one and that the issues raised in connection with the second count should be first tried out before the board upon such evidence as the parties may there produce without a specific holding on this appeal as to the sufficiency of respondent's evidence in the present record, which was received for the limited purpose of mitigation.

Judgment Against Individual Members of Board.

[12] Moran v. Board of Medical Examiners, supra, 32 Cal.2d 301, 196 P.2d 20, holds that incumbent members are proper but not necessary parties to a mandamus proceeding. The record fails to show service of process on board members French, Fleming and Nelson, or on former members Otto and Scatena. Respondent concedes that the judgment against these unserved members is improper.

Conclusion.

[13] While there is substantial evidence to support the court's findings that the doctors, other than Keene, Flint and Murphy, were interns, there is no evidence that they were registered with the board. For that reason, and for the reason that the evidence shows conclusively that Doctors Keene, Flint and Murphy were not interns, the action of the trial court in finding (under count I) that respondent was not guilty of unprofessional conduct, was erroneous.

[14] The board made a single order of suspension based on its findings and conclusions that both counts had been violated. Inasmuch as we hold upon stipulation of the parties that in the interest of justice and those of the respective parties, the second count of the accusation should be remanded for the overruling of the board's objections to certain evidence offered in defense and received only for the purpose of mitigation, and since the suspension of one year is a drastic penalty, even though, by the probationary order, its effect has been considerably lessened, and moreover, as we have no way of knowing what penalty the board would have imposed for violation of count I alone, the judgment will have to be reversed and the matter sent back to the board for reconsideration of the penalty. See Cooper v. State Board of Medical Examiners, 35 Cal.2d 242, 217 P.2d 630.

The judgment is reversed and the trial court is directed to enter judgment commanding appellant board to set aside its order of suspension and further directing the board to reconsider the case and redetermine its order in the light of this court's opinion and judgment.

PETERS, P. J., and SCHOTTKY, J. pro tem., concur.

99 Cal.App.2d 302

In re WILLIAMS' ESTATE.

BLAND v. POTTER.
Civ. 14351.

District Court of Appeal, First District, Division 1, California.
Sept. 1, 1950.

Proceeding in the matter of the estate of Sarah Williams, deceased, wherein Marguerite Bland, executrix, sought probate of a will contested by John Potter. The Superior Court in and for the County of Santa Clara, M. G. Del Mutolo, J., denied probate of will and executrix appealed. The District Court of Appeal, Peters, P. J., held that the evidence was insufficient to sustain a finding that legatee under the will exerted undue influence upon testatrix in the execution of her will.

Reversed.

1. Wills ⇐166(1)

To sustain a finding of undue influence there must be some evidence, direct or circumstantial, that person charged with exerting such influence overcame volition of testator so that will was not in fact testator's testamentary act.

2. Wills ⇐155(1)

In determining undue influence, court will consider whether will cut off natural objects of testator's bounty, whether there was a variance between terms of will and expressed intentions of testator, whether there was an opportunity afforded by legatee's relationship to testator to influence testator, whether testator's mental and physical condition was such as to permit a subversion of his freedom of will, and whether beneficiary was active in procuring execution of will.

3. Wills ⇐166(5)

Where it appears that disposition of estate is inspired by reasons which were present in mind of decedent, no inference is to be derived from fact that provisions of writing are apparently unjust to natural objects of decedent's bounty, and whether decedent's reasons may appear to be just or adequate is not open to inquiry.

4. Wills ⇐166(6)

Changes of testamentary intention are frequently explicable, and if circumstances disclose an adequate reason for a departure from provisions of an earlier will, fact of conflicting intention must be deemed to be without probative force or effect.

5. Wills ⇐166(2)

Evidence was insufficient to support a finding that relationship between testatrix and legatee under will gave legatee opportunity to exert undue influence upon testatrix.

6. Wills ⇐166(8)

The fact that testator is in a weakened condition when will is executed must be considered on issue of undue influence, however such facts standing alone cannot support a finding of undue influence.

7. Wills ⇐166(1)

A will is to be sustained, generally, where the evidence shows that decedent personally instructed draftsman as to preparation of instrument, or that instructions emanated from decedent, and case of proponent is strengthened by circumstance that decedent was alone with draftsman at time of execution of will.

8. Wills ⇐166(1)

Evidence was insufficient to support a finding that legatee exerted undue influence upon testatrix in execution of her will.

K. R. McDougall, Palo Alto, for appellant.

Crist & Stafford and John M. Donegan, all of Palo Alto, for respondent.

PETERS, Presiding Justice.

Sarah Williams died June 24, 1948. Her sole surviving relative was John Potter, a nephew. She left an estate consisting of several hundred dollars in cash and a house and lot in Palo Alto valued at about $6,000. On May 11, 1948, she executed a will naming Marguerite Bland executrix, and leaving her entire estate to Rena Suddeth, thus disinheriting Potter, who had been sole legatee under a prior will. Potter contested

the probate of the will on the grounds that the testatrix was of unsound mind, acted under the undue influence of Rena Suddeth, and that the will was drawn as a result of the fraud of Rena. The cause was tried before a jury to whom three special verdicts were submitted. By a 9 to 3 vote the jury found that Sarah was of sound mind when the will was executed; by a 10 to 2 vote that Sarah was acting under the undue influence of Rena in executing the will; and by a unanimous vote that the execution of the will was not procured by fraud. Based on the verdict of undue influence, the trial court denied probate of the will. From that judgment Marguerite Bland, proponent of the will, appeals. Rena Suddeth is, of course, the real party in interest, she being the sole legatee under the will.

The sole argument of appellant is that the finding of undue influence, as a matter of law, is totally unsupported by the evidence. With this contention we agree.

Sarah was a laundress, household domestic, and cannery worker. She came to live in Palo Alto in 1932, and purchased the home there that constitutes the main asset of her estate. She made monthly payments on this house for many years. Her health started to fail about 1941, and grew progressively worse until her death on June 24, 1948. During this period she suffered from diabetes, arteriosclerosis and uremia. She became completely blind in 1944. After 1944 she was almost entirely dependent on friends to administer the required insulin and to care for her in other ways, although, on several occasions, either Sarah or Potter hired practical nurses. Her condition became so bad, and her care so arduous, that she was admitted to the Santa Clara County Hospital on February 13, 1948, where she remained, completely bedridden, until her death. She was in her sixties when she died.

John Potter, respondent, went to live with Sarah, his aunt, when he was three years old, at which time his father, Sarah's brother, died, leaving his wife with two children, John and Lillian. The daughter was brought up by her mother, but John came to live with his aunt Sarah, who was then residing in San Antonio, Texas. John lived with, and was brought up by, Sarah until he was 18 years of age, when he left her home to earn his own living. After leaving Sarah's home, John kept in touch with his aunt and frequently gave her financial assistance when she was out of work or ill. On some occasions John made the payments on the house and advanced money to pay the taxes. On a few occasions Sarah sent John money when he was in financial distress. John frequently visited his aunt, and she frequently telephoned to him. There can be no doubt at all that the relationship between these two was very close and friendly, at least up to 1944. In fact, in 1944, Sarah conveyed the house and lot to John, but a few months later requested him to reconvey the property to her so that she could sell it and acquire money for care in a private sanatorium. John, without protest, reconveyed the property to Sarah. She immediately had her lawyer draw a will, which she signed, leaving the property to John and to his sister. After the sister's death, John was the sole legatee under this 1944 will. This will was revoked by the 1948 will, if the latter will was valid.

Sarah frequently told many different people that she wanted all of her property, upon her death, to go to her nephew and niece, and, after the niece's death, she frequently stated that she wanted the property to go to John. Several witnesses testified that such declarations were made during 1947, and up to several days before Sarah went to the hospital. One witness testified that such a declaration was made to him about a month before Sarah died, which would make such declaration subsequent to the execution of the disputed will.

As opposed to this evidence, there is testimony to indicate that sometime in 1944, Sarah, rightfully or wrongfully, became displeased with her nephew. She apparently felt that John should pay for her care in a private sanitorium, and apparently deeded the property to him upon his promise to send her to a private sanitorium. She had a great fear that she would die penniless and be buried in a pauper's grave, and that her debts would not be paid.

She did not want to go to a county hospital. Marguerite Bland, a secretary and notary public and friend of Sarah's since 1935, and who had handled many business transactions for Sarah, testified that Sarah told her that she demanded the deed back from John because she discovered that John did not intend to put her into a private sanatorium but was going to let her go to the county hospital. She testified that after that episode Sarah was very displeased with John and never again mentioned his name to her. Rena Suddeth, the sole legatee under the 1948 will, testified that in May, 1948, Sarah told her that she was displeased with John because "He just put me in the [county] hospital * * * and he wouldn't even come to see me, and he wouldn't answer my letters. * * * I don't want John * * * to have nothing I got." Admittedly, the last time John saw Sarah was in November, 1947, although in prior years he had visited her several times a month. On the very day the disputed will was executed, May 11, 1948, Sarah told the subscribing witnesses that she did not believe John would take care of her body after her death, and would not "put her away decently," but that Rena would do so, and therefore she wanted all her property to go to Rena.

Rena Suddeth was a friend of Sarah. She first met Sarah in 1941 or 1942 when she became a roomer in Sarah's house. She was a member of the church attended by Sarah, and, pursuant to the custom in that church, called Sarah "mother," and Sarah called her "daughter." Since 1943, Rena has resided in Salinas, but thereafter frequently visited Sarah, usually upon Sarah's request. After Sarah became blind Rena frequently did errands for her, and visited her when she was lonesome. Undoubtedly, the two became very good friends. Rena testified, and there is no contrary evidence, that she never asked Sarah to deed or will any of her property to her. She admitted receiving, in January of 1948, as a present, deeds to two Oklahoma lots, but testified that she did not request this conveyance. Admittedly, these lots were of little value. She testified that the only time Sarah had ever discussed leaving her property to her was when Sarah was in the hospital in San Francisco (date not specified), at which time Sarah told her that her nephew "wasn't treating her right"; and then "she asked me if I would, if she would deed me, if she'd will me her property, if anything happened to her, would I see that she'd be put away and pay her bills, and I told her that I would." Under date of November 3, 1947, Rena wrote a letter to Sarah. The letter contains these sentences: "Now, if you do as you was speaking about doing, I will promise you you won't be sorry. I will treat you just like you was my real mother. I will pay your bills and clear up everything so you won't have nothing to worry about, and I will put it down in black and white, or if you have the papers made out, I will sign them. Mother, you let Jesus lead you, and whatever you want to do, it is okay with me. Your will is my pleasure."

There was considerable evidence from close friends of the deceased to the effect that before and after Sarah entered the Santa Clara hospital her conversation was so confused, incoherent and unintelligent, and her conduct so irrational, that these friends believed her of unsound mind. There was testimony from other friends and from a doctor and a nurse at the hospital to the effect that although, after Sarah entered the hospital, she was, on occasions, irrational, she also had periods when she was rational and of sound mind. This evidence would have supported a finding either way on the issue of mental competency, but that issue has been settled by the finding of the jury that on May 11, 1948, she was of sound mind. Since Potter has not appealed, that issue is no longer in the case. It must be assumed, on this appeal, that on May 11, 1948, Sarah was of sound mind. Such evidence is now pertinent only in so far as it may have any relevant bearing on the issue of undue influence.

The circumstances under which the will was drawn were described by Rena and the attorney draftsman. Rena testified that, after Sarah went to the county hospital, she visited her about four times. One of these visits occurred early in May, 1948,

at which time Sarah asked her to get her a lawyer. Rena's testimony about this visit is as follows: "* * * when I walked in, I spoke to her, I says, 'Oh, Mother, how are you?' She said, 'Rena, is that you?' I said, 'Yes.' She said, 'Oh, I'm glad, I'm so glad you come, Baby.' I said, 'What for, what's the trouble?' She said, 'I want you to get me a lawyer.' I say, 'A lawyer?' I said, 'What for?' She says, 'Mr. Moore and John isn't treating me right,' she said, 'He just put me in the hospital,' she said, 'I wrote John and he wouldn't even come to see me and he wouldn't answer my letters, and I see Mr. Moore every now and then.' She says, 'If I was to die, Baby, I wouldn't have money enough to be buried.' I says, 'Oh, yes,' and she say, 'Mr. Moore was here, I asked him to give me some money, a little money to buy me something extra, if I wanted it, and Mr. Moore told me I did not have no money, and I asked him what happened to my pension. He said they had cut my pensions off,' and I says, 'Oh, I don't think they have.' She asked me if I would go see if they had cut her pensions off, and I told her—she said, 'Baby, if I will my property to you, if I get well, can I come and live with you?' And I said, 'Mother, if you don't will me nothing, you can come and live with me.' She said, 'Yes, I want you to have it, because I don't want John and Mr. Moore to have nothing I got.'"

The Mr. Moore referred to in this testimony was Sarah's guardian, she having been declared incompetent in March, 1948, apparently because of her physical condition. It should also be noted that prior to May of 1948, Mr. Crist of Palo Alto had been Sarah's attorney for a period of about twenty years. This fact was apparently unknown to Rena. Why Sarah did not have Rena call Mr. Crist does not appear.

Rena testified that she did not know any attorneys in Santa Clara County, but that she did know that Marguerite Bland was a good friend of Sarah's and was in business in Palo Alto. The day after the above quoted conversation Rena went to Mrs. Bland and asked her to recommend an attorney for Sarah. Mrs. Bland recommended K. R. McDougall. Rena went to McDougall's office and there met McDougall and Robert Ensign, an attorney in the office, and told them that Sarah wanted an attorney to draw a will. There is no evidence that she told these attorneys that Sarah wanted to leave the property to her.

Ensign promised to call at the hospital, which he did. In all, he made three visits. He first called on Sarah on May 4, 1948, and introduced himself, whereupon Sarah told him she wanted to make a will and leave all of her property to Rena. On this occasion Ensign spent about twenty minutes with Sarah talking over the proposed will.

The second visit also lasted about twenty minutes and occurred on May 10th. On that visit Sarah confirmed her desire to leave all of her property to Rena, and referred to her nephew in such a manner as to indicate that she was displeased with him.

The third visit occurred on May 11th when the will was executed. Ensign knew that Sarah had been declared incompetent, and had examined the guardianship court records. On this visit of May 11th Ensign took with him a court reporter who took down in shorthand everything that occurred during this visit. The transcript of this meeting is in the record. The persons then present were Ensign, Sarah, the court reporter and a nurse. The transcript discloses that Sarah had some difficulty in sustaining her thoughts until the completion of her sentences, and that during the conversation she gave three different addresses for her home—381, 318 and 385 Chestnut Street. A reading of this transcript demonstrates that, while Sarah had some difficulty in talking, she was clearly aware of her property holdings and was most positive that she wanted her property to go to Rena. She stated, several times, that it was her own idea that the property should go to Rena. When Ensign reminded her that Potter was her nephew and asked her if she wanted to leave any of her property to him, she replied: "No, not a nickel, because he's tried to—he wants to see me down in the poor house." She also stated that she wanted her property to go to Rena because she felt that Rena "would look

after me and see that I would be put away decently; and my nephew, he wouldn't do that."

The entire conversation lasted over an hour, and then Sarah signed the will by mark in the presence of Ensign, the court reporter and the nurse. Ensign and the reporter, at Sarah's request, witnessed the mark and then witnessed the will. It should be pointed out that Rena did not accompany Ensign to the hospital on the first two visits and that, although on May 11th she accompanied the lawyer to the hospital in his automobile, she waited in the car while Ensign went in to see Sarah, and did not enter the hospital until after the proceedings were completed.

On the above evidence the jury found that Sarah was mentally competent on May 11, 1948, that Rena was not guilty of fraud, but that the will was executed as the result of undue influence exerted by Rena. The sole question presented is whether the finding of undue influence finds any support in the record.

[1] To sustain a finding of undue influence there must be some evidence, direct or circumstantial, that the person charged with exerting such influence overcame the volition of the testatrix so that the will was not in fact her testamentary act. The rule has been frequently stated and applied. In Re Estate of Trefren, 86 Cal.App.2d 139, 146, 194 P.2d 574, 578, the court quotes with approval the following statement of the rule from In re Estate of Easton, 140 Cal.App. 367, 370, 35 P.2d 614: " 'The legal principles to be used in determining whether a will is the product of undue influence are well settled by a continuous line of decisions. They are set forth in the In re Estate of Morcel, 162 Cal. 188, 121 P. 733, 735, In re Estate of Bryson, 191 Cal. 521, 217 P. 525, In re Estate of Perkins, 195 Cal. 699, 235 P. 45, and several later cases hereinafter cited. As pointed out therein, the kind of influence that may be held to be undue influence warranting a repudiation of a will "must be such as in effect destroyed the testator's free agency, and substituted for his own another person's will" (In re Estate of Motz, 136 Cal. 558, 563, 69 P. 294); and mere general influence, however strong or controlling, not brought to bear on the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount "to coercion destroying free agency on the part of the testator." In re Estate of Keegan, 139 Cal. 123, 127, 72 P. 828, 829; In re Estate of Fleming, 199 Cal. 750, 251 P. 637; In re Estate of Holloway, 195 Cal. 711, 235 P. 1012. So, also, proof of mere opportunity to influence the mind of the testatrix, even though coupled with an interest or with a motive so to do, is insufficient. In order to warrant setting aside a will on this ground there must be substantial proof, direct or circumstantial, of a pressure which overpowers the volition of the testator and operates directly on the testamentary act.' "

The case of In re Estate of Gleason, 164 Cal. 756, 130 P. 872, has frequently been cited with approval on this point. There, 164 Cal. at page 765, 130 P. at page 876, the court stated: "The unbroken rule in this state is that the courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of 'a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made.' "

It is apparent that in very few cases will there ever be direct evidence of undue influence, and that, in most cases reliance must be had upon circumstantial evidence. Many of the cases have referred to various "indicia of undue influence" in discussing the type of circumstantial evidence that may be entitled to consideration. In re Estate of Yale, 214 Cal. 115, 122, 4 P.2d 153; In re Estate of Brown, 89 Cal. App.2d 496, 200 P.2d 888; In re Estate of Graves, 202 Cal. 258, 262, 259 P. 935; In re Estate of Dopkins, 34 Cal.2d 568, 574, 212 P.2d 886.

[2] Although not always stated in the same way, there are apparently five questions to which the courts have given consideration in discussing this problem:

1. Does the will cut off the natural objects of the decedent's bounty, and unduly benefit the proponent?

2. Is there a variance between the terms of the will and the expressed intentions of the testatrix?

3. Was there an opportunity afforded by the legatee's relationship to the decedent to influence the testatrix?

4. Was the decedent's mental and physical condition such as to permit a subversion of her freedom of will?

5. Was the beneficiary active in procuring the execution of the will?

If these so-called "indicia" of undue influence be considered in relation to the facts of the present case, singly or together, there is no substantial evidence to support a finding of undue influence.

Were the provisions of the will unnatural?

[3] By her will Sarah cut off her nephew and left all of her property to one not a blood relative, but a close friend. Under the facts here, Potter, although only a nephew, may be considered the natural object of his aunt's bounty. But this fact alone is of very little legal significance. The evidence shows that rightly or wrongly Sarah had come to distrust her nephew, and had come to have great confidence in Rena. The rule that is applied in such cases is stated as follows in 26 Cal.Jur. p. 704, § 60: "Where it appears that the disposition of the estate was inspired by reasons which were present in the mind of the decedent, no inference is to be derived from the fact that the provisions of the writing are apparently unjust to natural objects of the decedent's bounty. As to whether the decedent's reasons, in the estimation of the court, jury or third persons generally, may appear to be just or adequate, is not open to inquiry. Where the evidence shows that the relations between the decedent and the contestant were estranged, the apparent injustice to the contestant is deemed to be explained, regardless of proof in respect of the cause of estrangement. It is immaterial that the decedent may have been blamable, that he may have imputed wrong motives to the contestant, or that his dislike or antipathy had no substantial foundation. Indeed, no inference is derivable from the fact that the decedent detested his relatives for some reason that is not apparent." See, also, In re Estate of Carson, 74 Cal.App. 48, at page 58, 239 P. 364.

Potter argues that Rena profited unduly by the will, and that, therefore, the will was unnatural. In this connection three cases are cited in which a non-relative beneficiary was held to have benefited unduly at the expense of a contestant who was a collateral relative, and where the appellate courts ruled in favor of the contestant. These three cases—In re Estate of Bucher, 48 Cal.App.2d 465, 120 P.2d 44; In re Estate of Lances, 216 Cal. 397, 14 P.2d 768; In re Estate of Graves, 202 Cal. 258, 259 P. 935—instead of assisting respondent, in fact support appellant, because they emphasize the nature of the evidence that must exist before a finding of undue influence will be upheld. In the Bucher case the proponent was a doctor who had known the decedent less than two years. The decedent was in the hospital under the proponent's care. The doctor secured the will from decedent's apartment and secreted it. He refused to allow anyone except his attorney whom he had selected and who had drawn the will, to see the decedent, and no copy of the will was left with the decedent. All of the evidence indicated undue influence. The facts are entirely different from those in the instant case where there is no evidence sufficient to sustain even a reasonable suspicion, far less a reasonable inference, that undue influence was exerted. The same can be said of the Lances case. There, the proponent was an attorney and friend of the decedent. It was he who drew the will. It was prepared in his handwriting. His testimony that no undue influence was exerted was substantially impeached. In the Graves' case the proponent advised the aged decedent to make a will in which he was named as sole legatee, and he introduced his attorney to the decedent and this attorney drew the will. Prior to the drafting of the will the decedent was very sick and in the hospital. The proponent had her removed from the hospital and taken to a room over the garage of his home where decedent was cared for by doctors and nurses selected by the proponent. After discussing the making of a will with decedent, the proponent had his

attorney prepare it and supervise its execution. All of the circumstances supported the inference of undue influence.

Was the will at variance with Sarah's previously expressed intentions?

Respondent answers this question in the affirmative, and supports his position by a reference to the evidence to the effect that Sarah frequently had stated that she intended to leave her property to Potter, by the testimony of one witness that such a statement had been made after the challenged will had been executed, and by a reference to the provisions of the prior will. There was uncontradicted evidence of several witnesses that after 1944 Sarah had expressed displeasure with her nephew, and on the very day of the execution of the will, as shown by the transcript of proceedings then taken, Sarah explained why she did not want to leave her property to her nephew and why she wanted to leave it to appellant.

[4] The rule to be applied under such circumstances, supported by the citation of many cases, is thus expressed in 26 Cal. Jur. p. 659, § 28: "However, changes of testamentary intention are frequently explicable; and if the circumstances disclose an adequate reason for a departure from the provisions of an earlier will, the fact of conflicting intention must be deemed to be without probative force or effect." See, In re Estate of Llewellyn, 83 Cal.App.2d 534, 567, 189 P.2d 822, 191 P.2d 419.

Did the relations between Sarah and appellant allow the latter an opportunity to exert undue influence?

Respondent points to the evidence that Rena and Sarah were close friends, and contends that this evidence compels an affirmative answer to this question. In this connection he cites In re Estate of Graves, 202 Cal. 258, 259 P. 935; In re Estate of Payne, 94 Cal.App.2d 504, 210 P.2d 916; In re Estate of Anderson, 29 Cal.App.2d 537, 85 P.2d 212; In re Estate of Nelson, 134 Cal.App. 561, 25 P.2d 871, and In re Estate of Gallo, 61 Cal.App. 163, 214 P. 496, and argues, at length, that the rules announced in these cases compels an affirmance in the instant case.

The relationships existing between the proponents and the decedents in the cited cases were far more intimate, and gave far greater opportunity to exert undue influence, than did the relationship in the instant case. In each of them a true confidential relationship existed. The facts of the Graves' case have already been set forth. There, the decedent was completely under the control of the proponent. The facts of the Payne case are very similar to those in the Graves' case. There, the proponent took complete charge of decedent and her affairs. It was he who secured the lawyer who drafted the will. It was he who had the decedent removed to a house close to his, and it was he who arranged to have his doctor substituted for the hospital doctor. In the Anderson case the decedent was staying with the proponent when the will was executed, and at that time decedent was ill and under the care of the proponent. The will was executed in the presence of the proponent and she was the one who propped decedent up in bed so that he could sign the will. In the Nelson case the proponent met decedent about two years before the challenged will was executed. On the very day she met decedent, she and her husband moved in with decedent. There was ample evidence that proponent and her husband exerted great efforts to have decedent execute a will in favor of proponent, and that the proponent acted in a competely unscrupulous fashion. In the Gallo case the proponent lived in decedent's home, was in business with her, and frequently acted as her agent. Proponent secured his attorney to draft the will, although decedent had her own attorney. An adopted daughter, who was very close to decedent, was practically disinherited.

[5] In the present case the evidence shows but a close friendship between Sarah and Rena, not a confidential or fiduciary relationship such as existed in the above cases. See, In re Estate of Muller, 14 Cal. App.2d 129, 132, 57 P.2d 994. It must be held that there is no evidentiary support for a finding that the relationship between Sarah and Rena gave Rena the opportunity to exert undue influence upon Sarah.

Was Sarah's mental condition such as to permit a subversion of her will?

[6] There can be no doubt that Sarah was in a weakened physical and mental condition when the will was executed, but the finding that she was then of sound mind cannot be disregarded. While it is undoubtedly the law that the fact that the decedent was in a weakened condition when the will was executed must be considered on the issue of undue influence, In re Estate of Teel, 25 Cal.2d 520, 527, 154 P.2d 384; In re Estate of Payne, 94 Cal.App.2d 504, 506, 210 P.2d 916; see, 26 Cal.Jur. p. 645, § 17; 26 Cal.Jur. p. 669, § 34, such fact, standing alone, cannot support a finding of undue influence. As already pointed out, in such cases, it must be shown that influence was in fact exerted, and that such influence was a pressure which overpowered the volition of the testatrix. See, particularly, In re Estate of Trefren, 86 Cal.App.2d 139, 146, 194 P.2d 574.

Did Rena's activities in procuring the will produce an effect upon the will?

This is the basic question involved. The connection of appellant with the drafting of the will has already been described. According to the uncontradicted evidence it was Sarah who suggested making the will leaving her property to Rena. It was Sarah who asked for an attorney. While Rena secured the attorney, she did so only after consulting with Sarah's business adviser, and took the adviser's recommendation. She had no prior acquaintanceship with the attorney. She gave no instructions or suggestions to the attorney, other than to tell him that Sarah wanted to see him. She was not present when the will was executed. There is not one bit of direct or circumstantial evidence that indicates or tends to indicate that Rena exerted any influence on Sarah, or that Sarah's own will was subverted.

[7] The proper rules to be applied to such a situation are stated as follows in 26 Cal.Jur. p. 727, § 77:

"The instrument is to be sustained as a general rule where the evidence shows that the decedent personally instructed the draftsman as to the preparation of the instrument, or that the instructions emanated from him; and the case of the proponent is strengthened by the circumstance that the decedent was alone with the draftsman. * * *

"* * * Nor does any adverse inference arise from the circumstance that the draftsman was not the attorney whom the decedent customarily employed." And at p. 730, § 78: "Nor does any significance necessarily attach to the circumstance that the proponent summoned the draftsman, accompanied the decedent to the draftsman's office, paid the fee, or acquired custody or possession of the instrument. But, within the rule that a prima facie case is established by proof of activity on the part of the proponent, accompanied by other indicia of imposition, the proponent is shown to have taken an active part where it appears that he employed the draftsman, assisted at the ceremony of signing, or conducted the decedent to the draftsman's office and was present when the writing was executed."

This analysis of the various indicia of undue influence indicates that no case has been cited where the court has upheld a finding of undue influence on the type of evidence here presented. On the other hand, there are many cases where the appellate courts have refused to find undue influence where the evidence in favor of the contestant was much stronger than that presented in the instant case. Two recent cases are representative of the prevailing view on this subject.

In Re Estate of Llewellyn, 83 Cal.App. 2d 534, 189 P.2d 822, 191 P.2d 419, hearing by Supreme Court denied, the jury had found the decedent to be of unsound mind and acting under undue influence. The appellate court reversed with instructions to admit the will to probate. The proponent was a brother of the decedent; the contestants were nephews and nieces. The evidence of contestants showed that decedent was very ill and confined in a hospital when the will was executed; that decedent asked the proponent to get him a specified attorney so that a will could be

drawn; that the proponent brought the attorney to the hospital but remained downstairs while the attorney visited decedent; that a will was then executed; that decedent asked the attorney to draft another will because he was not satisfied with his signature and might want to make changes; that the attorney drafted another will making proponent sole beneficiary, and when the attorney returned, proponent was present in the hospital and brought a subscribing witness into decedent's room. Two prior wills had been executed several years before, in one of which the proponent was omitted and in the other in which he was given but a share of the estate. There was ample evidence that while in the hospital the decedent's mind was confused and irrational, although the hospital records show that his mind was clear on the date the challenged will was executed. There was substantial evidence that decedent was childish, senile, and could not attend to his affairs. There was evidence that proponent kept pestering decedent to make a will; that on two occasions proponent had taken decedent to insurance companies and instructed the insurance representatives to change the beneficiaries from the contestant's to proponent's daughter; that proponent had tried previously to get decedent to sign a will prepared by proponent, but that decedent had refused; that proponent visited the decedent two or three times a day while decedent was confined in the hospital; that proponent tried to get decedent's keys to a locked box to investigate its contents; that when the will was executed the decedent was under the influence of phenobarbital; that while in the hospital decedent was very friendly to his nieces and nephews and referred to proponent as "grasping," "tight" and "stingy."

The court in discussing this evidence stated, 83 Cal.App.2d at page 561, 189 P. 2d at page 838: "The authorities in this state are numerous and harmonious to the effect that however unnatural a will may appear to be, or however much at variance with expressions by the testator as to his intentions with regard to relatives or the natural objects of his bounty, it may not be held invalid on the ground of undue influence unless there be an actual showing of some sort of pressure which overpowered the mind and mastered the volition of the testator at the very moment of execution of the will. [Cases cited.]"

At page 563 of 83 Cal.App.2d, at page 839 of 189 P.2d appears this comment: "The right of courts and juries to draw inferences is not arbitrary and unrestrained. An inference must not only be founded on a fact legally proven, but on such a deduction from that fact as is warranted by a consideration, among other things, of the propensities of people and the course of nature (Code Civ.Proc. Sec. 1960). The foregoing proven facts do not warrant a natural inference of perfidy but on the contrary, under the circumstances here present, reflect the natural propensities of one brother toward another." The court then went on to discuss some of the so-called indicia of undue influence in the following language, 83 Cal.App.2d at page 563, 189 P.2d at page 839:

"Furthermore, in the absence of evidence, it cannot be assumed that a person is guilty of wrongdoing. On the other hand, it must be presumed in the absence of evidence to the contrary, that one is innocent of crime or wrongdoing (Sec. 1963, Sub-div. 1, Code Civ.Proc).

"Considering the foregoing factors, none of which standing alone has the effect of creating a presumption against the validity of the testamentary document, but the probative force of which in combination will make the question as to undue influence one for determination by the triers of fact, we find as to the first consideration, that it is well settled that mere opportunity, even if coupled with a motive to influence a testamentary act, is not sufficient to invalidate such an act. In re Estate of Kilborn, 162 Cal. 4, 11, 120 P. 762. And the evidence must indicate more than general influence.

"The influence necessary to invalidate a testamentary document must be a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made [Citations

omitted]. From the evidence hereinbefore set forth we find no such showing. The testimony herein amounted to no more than a showing that appellant was so situated as to have an opportunity to unduly influence the mind of the testator and at the most, that the actions of appellant might be described as suspicious. Obviously, under the rulings of appellate tribunals in prior cases, such evidence is entirely insufficient to support the finding of the jury."

At page 565 of 83 Cal.App.2d at page 840 of 189 P.2d this significant language appears: "Coming now to the third factor, viz., activity on the part of the person charged with exercising undue influence, the evidence is clear and uncontradicted that appellant was not in the room when the contents of the will were discussed, nor when the testamentary document was executed. Appellant did contact the attorney who prepared the will, but that was at the request of the testator. * * * Securing of an attorney to draw a will for another has been held not to constitute participation. [Citing a case.] In the instant case the evidence conclusively shows that the will was prepared from directions given by the testator to his attorney and there is very strong evidence that it was the testator's voluntary act. * * * In the case now engaging our attention, nothing more was shown than the presence of an opportunity for appellant to influence the testator's mind with a possible interest or motive so to do. This is totally insufficient. Before a testamentary document will be overthrown because of the exercise of undue influence, the proven circumstances must be inconsistent with voluntary action on the part of the testator."

In reference to the fact that the contested will was at variance with prior wills the court stated (as in the instant case) that there was evidence to explain the variance and concluded on this phase of the case as follows, 83 Cal.App.2d at page 567, 189 P.2d at page 841: "Explanatory matters are to be found ordinarily in the events transpiring in the life of the decedent, changes in his affections, and even the peculiarities of his temperament."

The court concluded that the finding of undue influence, as a matter of law, was unsupported.

In Re Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25, the trial court granted a nonsuit on the issue of undue influence, granted a judgment notwithstanding the verdict after the jury found decedent incompetent, and admitted the will to probate. The orders of the trial court were affirmed. The contestant was a nephew, the closest living relative of the decedent. The proponents, and principal beneficiaries under the will, were friends. The decedent lived with one of the proponents and she nursed him when he was ill. Decedent was a chronic alcoholic. The evidence showed that a confidential relationship existed between decedent and one of the proponents. There was no evidence that either proponent participated in the drafting of the will. The court stated the proper rule in such cases as follows, 16 Cal.2d page 577, 107 P.2d page 27: "In an action to set aside a will of a deceased person on the ground of undue influence, it is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. [Citing a case.] Evidence must be produced that pressure was brought to bear directly upon the testamentary act. [Citing a case.] Mere general influence, however strong and controlling, not brought to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to *coercion* destroying free agency on the part of the testator. [Citing a case—emphasis is that of the court.] It is further held that mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. [Citing a case.]" To the same effect see In re Estate of McGivern, 74 Cal.App.2d 150, 157, 168 P.2d 232; In re Estate of Trefren, 86 Cal.App.2d 139, 146, 194 P.2d 574; In re Estate of Dopkins, 34 Cal.2d 568, 575, 212 P.2d 886; In re Estate of Spaulding, 83 Cal.App.2d

15, 20, 187 P.2d 889; In re Estate of Graves, 202 Cal. 258, 262, 259 P. 935; In re Estate of Stump, 202 Cal. 308, 312, 260 P. 543.

[8] Under the rules announced by these authorities, and many more that could be cited, it must be held that, as a matter of law, there is not sufficient evidence in the record on the issue of undue influence to sustain the challenged finding. There is not sufficient evidence to sustain a finding of suspicion that Rena exerted undue influence, far less to sustain a reasonable inference that such influence was exerted.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.



99 Cal.App.2d 191

KOLD KIST, Inc., et al. v. AMALGAMATED MEAT CUTTERS AND BUTCHERS WORKMEN OF NORTH AMERICA, LOCAL NO. 421, et al.

Civ. 17364.

District Court of Appeal, Second District, Division 3, California.

Aug. 25, 1950.

Rehearing Denied Sept. 20, 1950.

Hearing Denied Oct. 23, 1950.

Kold Kist, Inc., and others sued the Amalgamated Meat Cutters and Butchers Workmen of North America, Locals Nos. 421 and 587, and others, to enjoin defendants from entering into an agreement in restraint of trade. From orders of the Superior Court of Los Angeles County, Clarence M. Hanson, J., overruling defendants' demurrer to the complaint and granting a preliminary injunction, named defendants appealed. The District Court of Appeal, Shinn, P. J., held that the evidence justified the trial court's conclusion that the primary purpose of the agreement was to restrain and diminish trade in plaintiff's frozen meat, poultry and fish products by preventing retail sales thereof at times when union butchers were not selling competing fresh foods, not merely to accomplish legitimate labor objectives of limiting the number of days and hours of butchers' work, and that plaintiffs were not limited to recovery of two-fold damages under statute, but were entitled to injunctive relief.

Appeal from order overruling demurrer dismissed and order granting preliminary injunction affirmed.

1. Appeal and error ⇐920(3)
Injunction ⇐152

On application for temporary injunction, undenied allegations of complaint must be taken as true by trial court, and same rule applies on appeal from order granting writ.

2. Appeal and error ⇐920(3)

All intendments are in favor of correctness of order granting temporary injunction on appeal therefrom.

3. Monopolies ⇐24(13)

In suit to enjoin butchers' unions and retail merchants from entering into agreement in alleged restraint of trade, evidence justified trial court's conclusion that defendants' primary purpose was to restrain and diminish trade in plaintiff's frozen meat, poultry and fish products by preventing retail sales thereof at times when butchers were not selling competing fresh foods, not merely to accomplish legitimate labor objectives of limiting number of days and hours of butchers' work to insure work for union members and safeguard their health. Business and Professions Code, §§ 16720–16758.

4. Injunction ⇐101(1)

Illegality of purpose of conduct which would otherwise be permissible exercise of fundamental rights provides complete basis for injunctive relief, and where illegality consists of violation of settled public policy, as well as in other cases of illegal conduct, injured party has right to protection by injunction from imminent harmful consequence of such action.

5. Monopolies ⇐12(2)

The purpose of contract between labor unions and employers need not be directly, intentionally and specifically to restrain trade, unreasonably and illegally in a way unconcerned with accomplishment of le-

gitimate labor objective, for contract to be deemed an illegal restraint of trade. Business and Professions Code, §§ 16720–16758.

6. Monopolies ⇐12(1)

The fact that particular combination of business competitors was induced by good intentions cannot be asserted against statutes forbidding such combinations. Business and Professions Code, §§ 16720–16758.

7. Monopolies ⇐12(1)

The letter and paramount object of anti-trust act is satisfied, if tendency of action or proposed action is to restrain trade. Business and Professions Code, §§ 16720–16758.

8. Monopolies ⇐12(1)

Illegal combinations in restraint of trade are not limited by statute to those involving price fixing or monopolies, in view of statutory provisions prohibiting combinations to create or carry out restrictions in trade or commerce, limit or reduce production of commodities, or prevent competition in sale or purchase of merchandise, produce or commodities. Business and Professions Code, §§ 16720–16758, 16720 (a–c).

9. Monopolies ⇐24(7)

Parties in business of selling frozen meats, poultry and fish were entitled to injunction restraining butchers' unions and retail merchants from entering into contract restraining trade by preventing retail sales of such products at times when butchers were not selling competing fresh foods as against contention that such parties were strangers to contract. Business and Professions Code, §§ 16720–16758.

10. Monopolies ⇐24(7)

Parties in business of selling frozen meats, poultry and fish have right to injunctive relief, under general equitable principles against execution of contract between butchers' unions and retail merchants, restraining trade in such products by preventing retail sales thereof at times when butchers were not selling, competing fresh foods, in view of statutory provisions authorizing injunction when pecuniary compensation would not afford adequate relief or restraint is necessary to prevent multiplicity of judicial proceedings. Business and Professions Code, §§ 16720–16758; Code Civ.Proc. § 526.

11. Monopolies ⇐24(7)

An equity court will enjoin members of illegal combination from enforcing their agreement to injury of one engaged in competitive business or whenever necessary to protect lawful business from destructive tendencies of conduct inspired by such combination. Business and Professions Code, §§ 16720–16758.

12. Monopolies ⇐24(7)

Parties in business of selling frozen meats, poultry and fish are not required to accept inadequate relief of money damages as substitute for cessation of wrongful acts destructive of their businesses by members of meat cutters' unions and retail merchants under contract restraining trade in such products by prohibiting retail sales thereof when such members are not selling competing fresh foods, but are entitled to injunction against execution of such contract. Business and Professions Code, § 16720; Code Civ.Proc. § 526.

13. Monopolies ⇐24(7)

The provision of anti-trust act that person injured in his business or property because of anything forbidden by such act may sue for and recover two-fold damages does not exclude right to injunctive relief, where statutory remedy is inadequate. Business and Professions Code, § 16750; Code Civ.Proc. § 526.

14. Monopolies ⇐24(7)

The provision of anti-trust act that person injured in his business because of anything forbidden by such act may sue and recover two-fold damages does not deprive parties in business of selling frozen meat, poultry and fish of right to injunction against execution of contract between meat cutters' unions and retail merchants to restrain trade in such products by preventing retail sales thereof at times when meat cutters are not selling competing fresh foods, as statutory remedy is inadequate

and situation justifies intervention of equity court. Business and Professions Code, § 16750; Code Civ.Proc. § 526.

Charles P. Scully, San Francisco, for appellants.

Ben Gould, Latham & Watkins, all of Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiffs, Kold Kist, Inc., Arbo Frozen Meat Products, Inc., Frank Watson and Edward Kendall, partners doing business under the name of Arbo Food Distributors, Vernon Meat & Provision Co., and Jacob Feiler, are in the business of selling frozen meats, poultry and fish. Their customers include a large number of stores and markets named as defendants in the action. Amalgamated Meat Cutters and Butchers Workmen of North America Local No. 421, and Amalgamated Meat Cutters and Butchers Workmen of North America Local No. 587, are unincorporated voluntary associations functioning as labor organizations and members and affiliates of American Federation of Labor. Defendant George Swan is a representative of the unions.

Upon application of plaintiffs the superior court issued a temporary injunction which restrains the defendants from entering into an agreement between the unions on the one part and the several stores and markets on the other part. This proposed agreement contains provisions which had been negotiated and agreed upon by and among the defendants, and which the court held to be in restraint of trade, in violation of law, and contrary to public policy. The unions appeal. For convenience we shall refer to them as defendants.

The gravamen of the charge of illegality consists in the alleged violation of the Business and Professions Code, sections 16720 to 16758, the provisions of which are based upon the Cartwright Act, Statutes 1907, Chapter 530, page 984.

Section 16720 provides, in part, "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: (a) To create or carry out restrictions in trade or commerce. (b) To limit or reduce the production, or increase the price of merchandise or of any commodity. (c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity. (d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State." The remainder of the section deals with price fixing. Under subdivisions (a) and (c), combinations for restraining trade or commerce, or to prevent competition in the sale of a commodity, are trusts, even though reduction of production or increase of price is not intended or accomplished. Such combinations are trusts, against public policy, and void. Sec. 16726. Any violation of Chapter 2 is a conspiracy against trade that is punishable by fine or imprisonment or both. Sec. 16755. It provides, Sec. 16750, that anyone suffering injury to his business or property by reason of the prohibited acts may recover twofold the damages he has sustained.

It was alleged in the complaint "That the members of Defendant Unions are employees of Defendant Markets whose daily work consists of cutting, wrapping and selling fresh meat, poultry and fish kept for sale in the meat departments of the stores of Defendant Markets, said employees being hereafter for convenience referred to as 'meat clerks'."

It was also alleged that defendant merchants, to be referred to as "markets," sell at retail plaintiffs' frozen fruits, vegatables, ice cream, pies, etc., from freezers maintained at zero temperature which are equipped with sliding and transparent lids; that the customers desiring to purchase from said freezers have in view the articles contained therein, choose and remove such articles as they desire to purchase, take the same to the grocery clerks where they are checked and paid for. This "self-service" is uniform throughout defendant markets. Each of defendant markets maintains high temperature cases at approximately 35 de-

grees fahrenheit for the storing of fresh meat, poultry and fish, but approximately 80 per cent of the markets have no refrigeration facilities in which frozen meat, poultry and fish may be kept other than the aforementioned freezers which are maintained at zero temperature and from which all frozen products are sold. The grocery departments of the markets remain open after 6:00 o'clock p. m., and on Sundays and holidays, and substantial portions of the sales of plaintiffs' frozen meat, poultry and fish are made after 6:00 o'clock p. m., and on Sundays and holidays.

Defendants have negotiated and were prepared to execute an agreement which contained the following provisions:

"Article 15(b): Local 421 (587) shall have jurisdiction over all meats that are not cut and prepared for immediate human consumption, including packaged items of fresh, frozen and smoked meats, fresh or frozen fish, poultry and rabbits.

"Article 15 (c): Where low temperature and/or self service cases are used for any of such merchandise coming under the jurisdiction of Local 421 (587), such cases shall be serviced only by members of Local 421 (587). The opening and closing hours in Article 12 of this Agreement shall be applicable to the sale of such merchandise."

It was alleged:

"That under the terms of the proposed Articles referred to hereinabove as set forth in Paragraph VIII hereof, Defendant Markets will be unable to sell Plaintiffs' frozen meat, poultry and fish after 6:00 o'clock P. M. on week days and on Sundays and holidays, as there will be no meat clerks on duty having jurisdiction of the sale thereof, as provided in said Articles;

"That approximately 80% of Defendant Markets will be unable to store and maintain Plaintiffs' frozen meat, poultry and fish on their premises at all for the reason that if they keep the low temperature cases open after 6:00 o'clock P. M., and on Sundays and holidays, customers of Defendant Markets will attempt to purchase Plaintiffs' frozen meat, poultry and fish, by taking the same to grocery clerks who are not permitted to handle such products or will have to close said low temperature cases and stop the sale of other frozen foods kept therein; that approximately 80% of said Defendant Markets will be unable to take said frozen meat, poultry and fish out of said cases on account of the fact that they do not have storage elsewhere for frozen foods; That the confusion resulting therefrom will substantially deter many of Defendant Markets from purchasing Plaintiffs' frozen meat, poultry and fish at all, to Plaintiff's damage; that the cost of providing separate frozen food storage for the storing of frozen meat, poultry and fish after hours and on Sundays and holidays would be so prohibitive as to many of Defendant Markets as to deter them from handling Plaintiffs' frozen meat, poultry and fish;

"That it would be impractical to take out of the low temperature cases the frozen meat, poultry and fish at the end of each day and at the end of the week, as it is detrimental to the food value and fitness for consumption of such frozen foods to take them out and put them back into low temperature cases; that it has been the experience of Plaintiffs that to do so spoils and discolors frozen meat, poultry and fish."

It was alleged "that said provisions of the proposed contract are primarily designed and intended to prevent, restrict and diminish the manufacture and sale of plaintiffs' frozen meat, poultry and fish packed for sale by self service from low temperature cases contained in the stores of defendant markets," and also that the defendants "propose to enter into a contract or agreement to prevent, restrict and diminish the manufacture and sale of plaintiffs' frozen meat, poultry and fish, and unless defendants are restrained from so doing and restrained from entering into an agreement which contains the provisions set forth in paragraph VIII hereinabove, plaintiffs' businesses will be irreparably damaged as hereinabove alleged." An affidavit was filed by E. W. Jarvis, president of Kold Kist, Inc., in which he stated that a substantial portion of his company's sales of frozen meats was made after 6:00 o'clock

p. m., on week days and on Sundays and holidays; on information and belief that some time during the month of June, 1948, defendant unions informed defendant markets that said frozen meat was not to be sold after 6:00 o'clock p. m. on week days and on Sundays and holidays; that a number of defendant markets which and who are customers of said corporation have complied with the demands of said unions and have discontinued sale of said frozen meats after 6:00 o'clock p. m. on week days and on Sundays and holidays; "that as a result thereof the sales of said Corporation's frozen meats to said Defendant Markets have been substantially reduced and some of Defendant Markets have discontinued purchasing the Corporation's frozen meats altogether. That said Corporation has suffered a very substantial loss in income and business from the activities of said Defendant Unions, designed toward preventing, restricting and diminishing the output of the frozen meats of said Corporation." Two affidavits were filed on behalf of the unions. It was shown thereby that since 1942 agreements between the butcher shop industry and the unions have required the closing of meat departments at 6:00 o'clock p. m. daily and on Sundays and holidays. The affidavits denied that it was the purpose of the unions to prevent, restrict or diminish the output of frozen meats, but defendants did not deny by affidavits or answer any of the other allegations of the complaint or the affidavit filed on behalf of plaintiffs. Defendant's affidavits, however, stated: "The only purpose of the 6:00 p. m. closing is to insure work for the members of the Local and to safeguard the health of the members of the Local from excessive hours of employment."

Defendants contend: (1) That the proposed agreement would not operate to restrain trade; (2) that the sole purpose of the unions is to regulate hours of employment and that if restraint of trade should result it would be merely as an incident to the attainment of a proper labor objective by the unions and therefore the restraint of trade would not be illegal; (3) that the court is without power or jurisdiction to enjoin practices that are in restraint of trade unless such practices are engaged in for the purpose of fixing prices and creating monopoly; (4) that the recovery of double damages for injuries suffered from combinations for the restraint of trade is the exclusive remedy of an injured party.

[1, 2] The first question is whether the proposed practices of the defendants would operate as an unlawful restraint of trade. On the application for a temporary injunction the allegations of the complaint, which were undenied, were to be taken as true by the trial court and the same rule applies on appeal. Presumably the trial court concluded from these facts that the practices which would be put into effect if the agreements were entered into would interfere with, prevent, and diminish the sales of plaintiffs' products and would be in restraint of trade. Since all intendments are in favor of the correctness of the temporary injunction, we must assume that the trial court deemed it to be established, as stated in the affidavit of Mr. Jarvis (President, Kold Kist, Inc.), that a number of defendant markets have, because of the demands of the unions, discontinued the sale of plaintiffs' products after 6:00 o'clock p. m., on week days, and on Sundays and holidays, that some of defendant markets have discontinued purchasing Kold Kist's frozen meats, and that as a result thereof the sales of said plaintiffs' meats have been substantially reduced and said plaintiff has suffered a very substantial loss of income and business as a result thereof. (Other facts which must be taken as true have been mentioned above.) Another important fact which must be taken as true is that much confusion would follow if plaintiffs' customers found frozen meat, fish and poultry in the freezing cases after 6:00 o'clock p. m. on week days, and on Sundays and holidays, and although desiring to purchase them were unable to do so since the markets would be unable to sell them because of their contractual obligations with the unions. The markets, it was alleged, rather than invite and suffer the displeasure and disapproval of their customers, would discontinue the self-service sale of plaintiffs' products. This situation could not be

avoided by approximately 80% of the markets, for the reason that they do not have, and would not be justified in installing, separate low temperature cases in which to store frozen meats, poultry and fish if these products should be removed from the low temperature cases now in use, from which many other frozen products and articles are sold.

That accomplishment of the plan of defendants would materially diminish the sales of plaintiffs' products must, upon the record before us, be deemed established. It will appear from our further discussion that the result would be to illegally restrain trade.

While combined action which is in restraint of trade, as the term is commonly used, is illegal, regardless of the objective of the parties, it is also illegal if it is entered into for the purpose of restraining trade. Even though it appeared to be the purpose of the unions to improve the status of their members by limiting hours of work it was a proper inquiry whether it was intended to accomplish this purpose by placing restrictions upon the trade in plaintiffs' products through the prevention of the sale thereof except through union members.

[3] Defendant unions maintain that any interference with plaintiffs' business will be merely incidental to the limitation as to days and hours when such products may be sold, and that it is entirely lawful and proper to accomplish this purpose through an agreement that the members of the union shall not be required to work on Sundays or holidays or after 6:00 o'clock p. m. on week days and the further agreement that none but members of the union may handle sales of plaintiffs' products. We think that the trial court had reason to disagree with this contention. The work of the union members consists of "cutting, wrapping and selling fresh meat, poultry and fish kept for sale in the meat department of the stores of Defendant Markets." It was not shown, in contravention of this allegation, that they have anything to do with the sale of frozen meat, poultry and fish sold from the markets' self-service cases. We infer from the briefs that it will be, and perhaps has been, the practice of the butchers to place plaintiffs' products in the low temperature cases, but it would appear that this work may be done during the agreed working hours without interfering with the sales of the products at other times. However this may be, it appears without dispute that the self-service customers make their purchases of the articles, not through the butchers, but through the grocery clerks. The provision in the proposed agreement that the unions are to have "jurisdiction" over frozen meats, fish and poultry is conceded to mean that such articles may not be sold through employees other than butchers. Thus the transfer of the sale of plaintiffs' products from the grocery clerks to the butchers would create duties for the latter which they have not heretofore performed. These duties would, of course, be assumed by them only upon condition that they would not be performed on Sundays or holidays or after 6:00 o'clock p. m. on week days.

We feel that it is significant that the agreement does not change the work hours of the union members nor does it change the conditions of their employment. The purpose of the unions in fixing 6:00 o'clock p. m. as the closing time is said to be to insure work for the members of the Local and to safeguard their health from excessive hours of employment. This is, of course, a legitimate labor objective. There is, however, no relation between the cessation of work by the union members at 6:00 o'clock p. m. and the prevention of the sale of the frozen articles after 6:00 o'clock p. m. and on Sundays and holidays, since the union members do not propose to work at all during those times. In other words, there is no true relation between the stated objective and the means proposed to be used to accomplish it. The work hours of the butchers are not the subject of dispute. The controversy does, however, affect the work of other employees who have equal rights, although this is an incidental result. To prevent others from carrying on their usual duties at times when the union members are not working would tend to curtail the volume of sales during those periods. We think the trial court would have been justi-

fied in concluding from the evidence that it is the desire of the unions, and their purpose, to gain for themselves the exclusive right to handle sales of the frozen articles solely in order to prevent them from being sold at times when the butchers are not selling the fresh articles in competition with the frozen ones. The unions have not brought to light facts indicating that they have any other purpose. It is quite reasonable to suppose that the elimination of any degree of competition of the frozen articles with traffic in the fresh ones would be of some advantage to the latter. It is more a question of the purpose and tendency of the action than of degree, but inasmuch as it is alleged that plaintiffs have suffered substantial loss it may be inferred that substantial advantage was expected to accrue to the butchers under the proposed agreement. In the absence of any other reasonable explanation of the purposes of the unions it is logical to infer that their motive was to accomplish the results which have already been accomplished to a measurable extent, and would be accomplished to a greater extent under the operation of the proposed agreement. Defendants have not furnished a satisfactory answer to the claims of plaintiffs that they have a right to have their products sold in the usual and natural course of trade to customers who find it inconvenient or impossible to make their purchases during the days and the hours to which the unions have voluntarily limited the services of their members. This is a class of trade to which the unions do not propose to cater. The fact that it is considered by them to be undesirable is not a good reason for allowing it to be destroyed. Upon the facts in evidence, the trial court was justified in concluding that the primary purpose of the defendants was and is to restrain and diminish trade in plaintiffs' products by preventing the sale thereof at times when the butchers are not selling the competing fresh foods, and by this means to secure benefits for the union members through increased sales of fresh products.

[4] In City of L. A. v. Los Angeles, etc., Council, 94 Cal.App.2d 36, 42, 210 P. 2d 305, 309, we held on the authority of the following cases: Hughes v. Superior Court, 70 S.Ct. 718, 94 L.Ed. 985; Northwestern Pac. R. R. Co. v. Lumber & S. W. Union, 31 Cal.2d 441, 189 P.2d 277; Park & Tilford I. Corp. v. International etc. of Teamsters, 27 Cal.2d 599, 165 P.2d 891, 162 A.L.R. 1426; James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900; Riviello v. Journeymen Barbers etc. Union, 88 Cal.App.2d 499, 199 P.2d 400; Bautista v. Jones, 25 Cal.2d 746, 155 P.2d 343; Fashioncraft, Inc. v. Halpern, 313 Mass. 385, 48 N.E.2d 1; Schwab v. Moving Picture Mach. Operators Local, 165 Or. 602, 109 P.2d 600; Markham & Callow, Inc. v. International Woodworkers, 170 Or. 517, 135 P.2d 727, that: "* * * illegality of purpose provides a complete basis for injunctive relief against conduct which would otherwise be deemed a permissible exercise of fundamental rights. Where such illegality consists of violation of settled public policy, as well as in other cases of illegal conduct, the injured party has a right to be protected from the imminent harmful consequence of such action."

[5] As we have heretofore pointed out, defendants have not denied that detriment has resulted and will continue to result to plaintiffs' business in the manner and to the extent alleged in the complaint and supporting affidavit. Nevertheless they argue that even though there has been and will be restraint there is no remedy available to plaintiffs for the reason that they, the unions, are seeking only to obtain uniform working hours for all employees. They say that it must be demonstrated from the face of the contract or from the pleadings of plaintiffs that the purpose of the provisions of the contract is to "directly, intentionally and specifically" unreasonably and illegally restrain trade in a way which is unconcerned with the accomplishment of a legitimate labor objective or the contract cannot be deemed an illegal restraint of trade. This is to claim, in effect, that whenever their efforts are calculated to advance the interests of their members the effect upon others is not to be considered. This contention has frequently been advanced and rejected. If we were to agree with it, the result would be that the assertion of any law-

ful labor objective, regardless of the means proposed for the accomplishment thereof, would preclude the courts from making inquiry to determine whether the objective was indeed lawful.

[6, 7] In Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684, 687, 93 L.Ed. 834, the union argued that the primary objective of their combination and picketing was to improve age and working conditions, admittedly a lawful purpose, and that "their violation of the state anti-trade restraint laws must be dismissed as merely incidental to this lawful purpose." The Court said, quoting from International Harvester Co. v. Missouri, 234 U.S. 199, 209, 34 S.Ct. 859, 58 L.Ed. 1276, 52 L.R.A., N.S., 525, "'It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions. * * *'" It was also said that "To exalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy and might conceivably make it impossible for them to enforce their antitrade restraint laws." The courts of this state have held that the letter and paramount object of the law, Cartwright Act, is satisfied if the tendency of the action or proposed action is to restrain trade. People v. Sacramento Butchers' Ass'n, 12 Cal.App. 471, 107 P. 712; Overland Pub. Co. v. H. S. Crocker Co., 193 Cal. 109, 222 P. 812.

[8] Defendants also argue that only those combinations are in unlawful restraint of trade which seek to control prices and create a monopoly. A complete answer to this contention is found in the statute itself. Under subdivisions a, b and c of section 16720, Business and Professions Code, it is unlawful for two or more persons to combine to create or carry out restrictions in trade or commerce; to limit or reduce the production of any commodity; or to prevent competition in the sale or purchase of merchandise, produce or any commodity. These enactments are distinct from the remainder of the section which has to do with price fixing, Although price fixing and monopolistic practices tend to affect competition, production and restrictions in trade, the legislature has not limited illegal combinations in restraint of trade to those which involve price fixing or monopoly. People v. Sacramento Butchers' Protective Ass'n, supra.

[9-11] Defendants' final contention is that plaintiffs may not have an injunction against the parties to the contract. Their argument is threefold: (1) That plaintiffs are strangers to the contract and are not entitled to injunctive relief; (2) that there is no right to injunctive relief under general equitable principles; and (3) that the legislature in giving to an injured person the right to recover twofold damages has impliedly withdrawn the right to equitable relief.

We find no merit in the first point. As to the second, section 526, Code of Civil Procedure, provides in part as follows: "An injunction may be granted in the following cases: 1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually; * * * 4. When pecuniary compensation would not afford adequate relief; 5. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; 6. Where the restraint is necessary to prevent a multiplicity of judicial proceedings; * * *". These provisions summarize long established principles of equity. They encompass the rule stated by the Supreme Court of Georgia that "A court of equity will interpose by injunction to prevent the several members of an illegal combination from enforcing an agreement to the hurt and injury of one engaged in a competitive business." Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509, 50 S.E. 353, 357, 69 L.R.A. 90, 106 Am.St.Rep. 137, 2 Ann.Cas. 694. The courts have applied the rule whenever necessary to protect lawful business from the destructive tendencies of conduct inspired by illegal combinations. Schwartz v. Laundry &

Linen Supply Drivers' U., etc., 339 Pa. 353, 14 A.2d 438; Dothan Oil Mill Co. v. Espy, 220 Ala. 605, 127 So. 178; Tallassee Oil & Fertilizer Co. v. S. J. & J. L. Holloway, 200 Ala. 492, 76 So. 434, L.R.A.1918A, 280; Reeves v. Decorah Farmers' Cooperative Society, 160 Iowa 194, 140 N.W. 844, 44 L.R.A.,N.S., 1104; Burke Transit Co. v. Queen City Coach Co., 228 N.C. 768, 47 S.E.2d 297; Northern Wisconsin Co-operative Tobacco Pool v. Bekkedal, 182 Wis. 571, 197 N.W. 936; Jackson v. Stanfield, 137 Ind. 592, 36 N.E. 345, 37 N.E. 14, 23 L.R.A. 588; Brown v. Jacobs' Pharmacy Co., 115 Ga. 429, 41 S.E. 553, 57 L.R.A. 547, 90 Am. St.Rep. 126; see also Walsh on Equity, p. 259.

[12] One need only consider the facts to realize that if the proposed contract is executed by the parties thereto, plaintiffs' businesses will be adversely affected, in such a way that damages would be extremely difficult, if not impossible, to ascertain. The public interest would also be adversely affected. Plaintiffs' business that of preparing and freezing meats, poultry and fish for the market, is one of very recent origin and anything tending to restrain the sale thereof will also impede progress and advancement in that field. The relief which plaintiffs seek here is protection against the threatened destruction of their businesses. If defendants' conduct in executing the proposed contract is wrongful by reason of the statute, Business and Professions Code, sec. 16720, as we have decided it is, the plaintiffs should not be required to accept the inadequate relief of money as a substitute for cessation of the wrongful acts which are destructive of their businesses. Code Civ.Proc. sec. 526. The injunction cases cited all recognize that in such situations equity will intervene because damages would furnish an inadequate remedy and also to prevent a multiplicity of suits.

[13, 14] The final contention is that the right to equitable relief has been withdrawn by the Code, Business & Professions Code, sec. 16750. It provides specifically that "Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter" may sue and recover twofold any damages sustained by him. Inasmuch as we have decided that plaintiffs are injured persons within the meaning of the section, it becomes necessary to decide whether the legislature intended to exclude the right to injunctive relief because it expressly gave such an injured person the right to sue for and obtain twofold the damages suffered by him. In this connection it is unnecessary to discuss the cases cited by defendants in which injunctive relief to an injured party was denied upon the ground that the statutes under consideration limited the right to such relief to the State in actions bought on its behalf. We are of the opinion that no such result was intended in the enactment of our statutory law. The case of Orloff v. Los Angeles Turf Club, 30 Cal.2d 110, 113, 114, 180 P.2d 321, 323, 171 A.L.R. 913, directly supports this view. In that case plaintiff's action was based upon the civil rights statutes, Civ.Code, secs. 51, 52, 54, in which it is provided that anyone denied certain privileges, except for reasons applicable alike to every race and color, may sue for and recover damages of not less than $100. One of the questions presented for determination was whether the statute, Civ.Code, sec. 54, because it provided for damages, impliedly excluded the right to injunctive relief. The Court held that it did not and, in answer to the contention that the remedy of damages provided by the State was exclusive, quoted section 4 of the Civil Code: " 'The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.' " The Court also stated that a factor of importance in interpreting the statute and in applying the above mentioned common law rule of statutory construction is the adequacy of the remedy provided in the statute and that it should not apply when the remedy given by the statute is inadequate. It is clearly apparent that the remedy given by the statute is inadequate in

the instant case and just as apparent that the situation is one which justifies the intervention of a court of equity.

No other points are urged which require further discussion.

The attempted appeal from the order overruling defendants' demurrer is dismissed; the order granting a preliminary injunction is affirmed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.



99 Cal.App.2d 232

BISHOP v. BABCOCK et al.
Civ. 14242.

District Court of Appeal, First District, Division 1, California.
Aug. 28, 1950.

Action by Robert S. Bishop against Alfred Babcock and others for an accounting and dissolution of a partnership. Judgment was entered by stipulation against two defendants, and by default against a third. Respondents moved to vacate. From an order of the Superior Court of Alameda County, Ralph E. Hoyt, J., vacating the judgment and permitting defendants to file their cross-complaints, plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that the evidence was ample to support the action of the trial court.

Order affirmed.

1. Judgment ⇐145(4), 379(2)

On motion to set aside judgment by stipulation against two defendants and by default against a third, in action for accounting and dissolution of partnership, where defendants' affidavits and verified answer denied material allegations of complaint, and cross-complaint alleged receipt by plaintiff of partnership property in excess of his partnership interest and sought an accounting and dissolution, conclusion of trial court that defendants had meritorious defense was sufficiently supported. Code Civ.Proc. § 473.

2. Appeal and error ⇐957(1)
Judgment ⇐139

Motion to set aside default judgment is addressed to sound discretion of trial court, and in absence of clear showing of abuse of discretion, will not be reviewed on appeal.

3. Appeal and error ⇐957(1)

Court on appeal will affirm order setting aside default more readily than where result would be to allow judgment by default to stand, especially when the trial court grants prompt relief and appellant has not sustained any prejudice thereby.

4. Appeal and error ⇐1008(3)

Function of court on appeal when evidence is by affidavit is same as when all or some evidence is oral, and action of trial court in resolving conflicts will not be disturbed.

5. Appeal and error ⇐837(9)

Where on hearing to vacate judgment by stipulation against two defendants and default judgment against a third, supplemental affidavit was introduced by defendants with counsel for all parties present and plaintiff did not apply to court for opportunity to reply, affidavit could be considered on appeal.

Robert L. Ward, Oakland, Frank C. S. Pederson, San Francisco, of counsel, for appellant.

Thomas B. Richardson, Oakland, for respondents.

FRED B. WOOD, Justice.

This is an appeal by plaintiff from an order vacating a judgment against defendants and permitting them to file their answer and cross-complaint in the action.

On February 17, 1949, appellant commenced an action for an accounting and dissolution of a partnership and for $9,592.17 as advances made by him in excess of his partnership interest.

The complaint was served upon respondents Alfred Babcock and Ernest N. Milam on February 18 and upon Mary Babcock (wife of Alfred Babcock and mother of Milam) on March 5. On February 28, Alfred Babcock and Milam executed a stipulation for judgment in the amount prayed for in the complaint plus $30 as costs. On March 17, judgment was entered against all three respondents upon this stipulation and upon the default of respondent Mary Babcock.

On March 19, respondents filed notice of motion, under section 473 of the Code of Civil Procedure, to set aside the judgment upon the ground that it was taken through their mistake, inadvertence, surprise and excusable neglect, accompanied by their verified answer and cross-complaint and the affidavit of each. Counter affidavits by appellant and by his attorney were filed March 25. Supplemental affidavits by Milam and by Mary Babcock were filed March 25 and 29. The motion was heard on March 25 and 29 and thereupon granted.

[1] Sufficient support for the conclusion of the trial court that respondents have a meritorious defense is furnished by respondents' affidavits and their verified answer, which denies material allegations of the complaint, and by the cross-complaint, which alleges receipt by appellant of partnership property in excess of his partnership interest and seeks an accounting thereof by him and dissolution of the partnership. Beard v. Beard, 16 Cal.2d 645, 649, 107 P.2d 385; Shively v. Kochman, 23 Cal. App.2d 420, 422, 73 P.2d 637.

It appears that the stipulation for judgment was prepared by appellant's attorney and explained by him to Alfred Babcock who, according to his affidavit, had little experience in business and legal matters, was not represented by independent legal counsel and was not properly advised of his rights upon entering into the stipulation.

From Milam's affidavits it appears that when he signed the stipulation he was in a bewildered and confused state of mind and not in full possession of his faculties, as the result of several weeks' steady consumption of large quantities of intoxicating liquor; that he had not consulted nor was he represented by independent counsel and did not understand the stipulation at the time of signing.

From Mary Babcock's affidavits it appears that she was in Los Angeles County at the time the suit was filed; that on March 3 her husband called on her, advised her of the filing of the suit and of the stipulation he had signed, presenting a similar stipulation for her to sign. She refused to sign, returned to Oakland, and on March 4 consulted an attorney who referred her to another attorney, found the latter out of town but left with his secretary the copy of complaint served on Alfred and copy of the stipulation. On March 7, she and Alfred called on this attorney; told him they knew nothing regarding the matters referred to in the complaint; that only Milam could tell whether the complaint was justified; and that she had been served but did not recall the exact date thereof. She states that on March 7 and for a time prior thereto Milam was at the home of appellant and in an intoxicated state; that, after a lapse of several days and repeated requests by her, appellant brought Milam to her home, and she entered upon the process of nursing Milam and attempting to get him back on his feet; that after several days of treatment Milam partially recovered from the effects of his prolonged drinking and then advised her there were numerous good defenses to the complaint and numerous offsets against the demands of the appellant, and that he would secure the records concerning such offsets so that the same might be presented to an attorney. She and Milam then went to the office of the partnership and discovered that during the period of Milam's drinking all of the records pertaining to appellant's participation in the partnership had been removed. Thereupon she called on her attorney, told him that she had ascertained that each of the respondents had meritorious defenses to the action and made an appointment with him for that evening, on which evening her first affidavit was prepared and signed, and filed the following day. She further states that during the 10-day period following service of process upon her, her mind was in a confused, distraught

and upset condition resulting from the condition of her son, which she states was brought about to a large degree by the efforts and actions of appellant; and that during said 10-day period she was primarily concerned with the well-being of her son and all of her efforts were directed toward restoring his health.

This evidence furnishes ample support for the action of the trial court in vacating the judgment and permitting the answer and cross-complaint to be filed. It is not a case of a mere change of mind by a defaulting party, whether he wishes to contest an action, coupled with a failure to present facts to indicate that a different result might be reached if the motion to vacate were granted, as was the case in Elms v. Elms, 72 Cal.App.2d 508, 164 P.2d 936, upon which appellant relies.

[2, 3] A motion to set aside such a judgment as this is addressed to the sound discretion of the trial court and in the absence of a clear showing of abuse in the exercise thereof an appellate court will not disturb the order of the court below. It is the policy of the law to favor, where possible, a hearing on the merits, and appellate courts are more disposed to affirm an order when the result, as in the instant case, is to compel a trial upon the merits than when a judgment by default is allowed to stand, and it appears that a substantial defense could be made. Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148. Especially is this true when the trial court, as in the instant case, grants relief after it has been promptly sought and it does not appear that appellant has sustained any prejudice thereby. Hadges v. Kouris, 71 Cal.App.2d 213, 214, 162 P.2d 476; Weck v. Sucher, 96 Cal. App. 422, 424-426, 274 P. 579.

[4] Upon such an appeal it is not the function of an appellate court to weigh the evidence, as appellant would have us do. He urges that the evidence, being in the form of affidavits, consists merely of written documents that are susceptible to interpretation by any court, trial or appellate. It is well established that the function of an appellate court in this regard is the same as when some or all of the evidence is in the form of oral testimony. Bradley v. Davis, 156 Cal. 267, 104 P. 302. Accordingly, upon such an appeal, the action of the trial judge in resolving any conflicts between the affidavits of the opposing parties will not be disturbed. Waybright v. Anderson, supra, 200 Cal. 374, 378, 253 P. 148; Fickeisen v. Peebler, 77 Cal.App.2d 148, 152, 174 P.2d 883; Hadges v. Kouris, supra, 71 Cal.App. 2d 213, 217, 162 P.2d 476.

[5] Appellant in his brief suggests that the supplemental affidavit of Mary Babcock should not be considered upon this appeal because it was sworn to and filed on "the same day that the matter was submitted and the Order setting aside the judgments rendered," adding that "the plaintiff had no notice of said supplemental affidavit, nor an opportunity to answer it." This point is not well taken, for the record shows that this affidavit was introduced at the adjourned hearing on March 29, with counsel for all parties present, and prior to submission and decision of the motion. This record has been stipulated by the parties and certified by the clerk of the trial court as correct. It is unlike the case of Forrest v. Knox, 21 Cal.App. 363, 131 P. 894, cited by appellant, in which the court held that an affidavit filed after submission but without notice to the opposite party until after the granting of the motion, could not be considered in support of a motion to set aside a default judgment. If appellant herein desired to respond to the supplemental affidavit of Mary Babcock, he should have made application to the trial court therefor.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

99 Cal.App.2d 337

Ex parte BROWNING.
Cr. 4555.

District Court of Appeal, Second District, Division 1, California.
Sept. 5, 1950.

Frank M. Browning filed a petition in the District Court of Appeal for a writ of habeas corpus to obtain custody of Jean Woodward Herring Browning, a minor child, and to stay proceedings in a proceeding instituted by child's mother in Superior Court to determine custody of child. The District Court of Appeal, Per Curiam, held that the Superior Court had jurisdiction to determine the issues as to custody, and that discharge of previous petition to Superior Court for a writ of habeas corpus was res judicata of questions raised in petition to appellate court.

Petition denied.

1. Parent and child ⇐2(4)

Superior Court had jurisdiction to determine the issues as to custody of minor child who was in the state as between mother, residing in the state, and father who was a resident of New York and claimed custody under New Jersey divorce decree.

2. Habeas corpus ⇐44

Appellate court had no jurisdiction to entertain petition for habeas corpus while a similar petition filed by same party was pending in superior court.

3. Habeas corpus ⇐120

Where petition to District Court of Appeal for writ of habeas corpus to obtain custody of minor child alleged no facts in addition to those presented to superior court by previous petition for such writ, discharge by superior court of the writ of habeas corpus rendered the matter res judicata so far as subsequent petition to appellate court was concerned.

4. Habeas corpus ⇐46

Habeas corpus proceedings involving a factual situation should be tried in the superior court rather than appellate court, except where questions of law only are involved.

5. Appeal and error ⇐858

Appellate courts in exercise of appellate jurisdiction are restricted to the consideration of questions of law alone, except where a question of law necessarily arises from the evidence or is presented thereby, from its very nature.

Hill, Jones & Attias, Los Angeles, for petitioner.

PER CURIAM.

Petition for writ of habeas corpus and for stay of proceedings.

Petitioner is the father of a minor child. In October, 1948, petitioner and his wife were divorced in New Jersey. The child was awarded to petitioner by the court in New Jersey April 5, 1950.

Petitioner is a resident of New York, and his former wife is a resident of California. She has the child here, and refuses to deliver the child to petitioner. While testifying in the New Jersey court she stated she would not comply with the order of custody there as to the child. Prior to the entry of the judgment in New Jersey the child was in California.

August 16, 1950, petitioner applied for a writ of habeas corpus in the Superior Court of this state in Los Angeles County. August 18, 1950, the matter was referred to Judge Doyle for hearing. After the petition for habeas corpus was filed in the Superior Court, the mother filed another proceeding in that court, praying that the custody of the child be determined, and given to her.

[1] Judge Doyle discharged the writ of habeas corpus, and gave the mother temporary custody of the child. That the Superior Court had jurisdiction to determine the issues, there can be no question.

[2] Now the father petitions this court for a writ of habeas corpus. This is the second petition in this court for the writ. The first writ was quashed because of the pendency in the Superior Court of the writ above mentioned. In re Owen, 82

Cal.App. 280, 255 P. 541; In re Shaw, 84 Cal.App. 24, 257 P. 585.

[3] The petition now presented to this court alleges no new or additional facts than those presented to the Superior Court. Therefore, the matter is res judicata so far as the present petition is concerned. In re Martin, 79 Cal.App.2d 584, 180 P.2d 383.

[4, 5] Inasmuch as a proceeding in re custody of the child is pending in the Superior Court in which the parties may have their day in court, it would seem that all would be better served by attending to that case. Except where questions of law only are involved, such cases as this, where a factual situation is involved, should be tried in the Superior Court. In the exercise of appellate jurisdiction the appellate courts are restricted to the consideration of questions of law alone, except where there necessarily arises from the evidence or is presented thereby, from its very nature, a question of law.

The petition for a writ of habeas corpus is denied.



99 Cal.App.2d 254

LIERA v. LOS ANGELES FINANCE CO. et al.

Civ. 3986.

District Court of Appeal, Fourth District, California.

Aug. 29, 1950.

Rehearing Denied Sept. 15, 1950.

Hearing Denied Oct. 26, 1950.

Ramon Liera sued the Los Angeles Finance Company, a corporation, and others to recover damages for wrongful attachment of plaintiff's wages and abuse of process. From an order of the Superior Court of Imperial County, L. J. Mouser, J., denying defendants' motion for change of venue, defendants appealed. The District Court of Appeal, Griffin, J., held that individuals, appearing by denominating themselves in their demurrer to the complaint as defendants fictitiously named therein, had no right to seek a change of venue based on their residence in another county and that the corporations named as defendants in the complaint could be sued in Imperial County, wherein the obligation or liability arose or the breach occurred.

Order affirmed.

1. Associations ⇐20(1)
Corporations ⇐503(1)

The venue of action against corporations and associations is governed by constitutional provision authorizing action in county where contract is made or to be performed, where obligation or liability arises or breach occurs, or where corporation's principal place of business is situated, unless waived by plaintiff, as by designation and service of nonresident individual as party defendant. Const. art. 12, § 16.

2. Parties ⇐73

Where complaint designates some defendants by fictitious names, plaintiff, not defendants, may designate whom plaintiff intended to sue, and persons not named as parties, nor served with process as persons sued by fictitious names or otherwise made known by plaintiff as desired defendants, have no right to appear by demurrer to complaint as persons sued in such names.

3. Venue ⇐59

Where only defendants named in complaint and served with process were three corporations, individuals voluntarily appearing by denominating themselves in their demurrer to complaint as defendants designated by fictitious names therein had no right to seek change of venue on ground of their residence in county other than that in which action was brought, and no proper judgment could be obtained against them as individuals without proper amendment of complaint. Code Civ.Proc. § 474.

4. Corporations ⇐503(2)

Corporations could be sued for wrongful attachment of wages and abuse of process in county wherein obligation or liability arose or breach occurred, as provided in constitution, though their only places of business were in another county. Const. art. 12, § 16.

5. Constitutional law ⇐36

The legislature may not designate forum or county for commencement and trial of actions when such subject is covered by constitution. Code Civ.Proc. § 395; Const. art. 12, § 16.

6. Associations ⇐20(1)
Corporations ⇐503(1)

The constitutional provision that corporation or association may be sued in county where contract is made or to be performed, where obligation or liability arises or breach occurs, or where corporation's principal place of business is situated, controls suits in either contract or tort against corporations or associations. Const. art. 12, § 16.

7. Appeal and error ⇐912

On appeal from order denying motion for change of place of trial, allegations of complaint must be taken as true for purpose of motion.

A. Joseph Shapiro, Los Angeles, for appellants.

D. M. McGahey, El Centro, for respondent.

GRIFFIN, Justice.

Plaintiff brought an action in Imperial County for damages against defendant Los Angeles Finance Company, a corporation, Los Angeles Finance Counselors, a corporation, LeRoy's Jewelers, a corporation, and Does I to X inclusive.

The four causes of action stated against the corporations are for damages for claimed "distress in mind and body and mental anguish" due to the malicious and wrongful attachment of wages and earnings in the amount of $70 for personal service rendered within 30 days previous to the date of the attachment, and for abuse of process thereafter.

In the complaint is the usual allegation that the names of the fictitiously named defendants were not known to plaintiff and that he would ask leave to amend the complaint to show their true names and the capacity in which they acted upon ascertaining these facts. It does not appear, from the record before us, that any of the defendant corporations named or any defendant denominated Does I to X inclusive were served with summons and complaint. However, plaintiff recites in his brief that summons was only issued against the corporations named and not against any individual and that an attorney accepted service by acknowledgment on the original summons, reciting: "Received this —— day of ——, Attorney for defendants for all defendants". No attempt was made in the complaint to allege anything done by, or to state a cause of action against, any individual.

Plaintiff alleges that defendant, LeRoy's Jewelers, in doing and causing to be done the various things complained of, acted through defendant Los Angeles Finance Company and Los Angeles Finance Counselors, the corporations named. Thereafter, a demurrer was filed reciting: "Come now defendants, Los Angeles Finance Company, a corporation, Benjamin B. Shapiro, Frank P. Shapiro, and Harry Sherwood (sued herein as Doe I, Doe II and Doe III respectively), individually and as copartners doing business under the firm name LeRoy's Jewelers, and LeRoy's Jewelers, a copartnership, and demur to the complaint". In addition, each filed a notice of motion for change of venue to Los Angeles County. This was accompanied by an affidavit of merit which also recites that Harry Sherwood was president of the Los Angeles Finance Company, a corporation; that Frank P. Shapiro was vice president; that the affidavit is made on behalf of the corporation and themselves, individually, and as copartners of LeRoy's Jewelers, and that the Los Angeles Finance Company, formerly Los Angeles Finance Counselors, a corporation, and defendant LeRoy's Jewelers' principal and only place of business is in the city of Los Angeles and that the individual defendants resided there during all the times mentioned. Upon this showing the court denied the motion to change the venue.

Defendants appeal and contend (1) that all the defendants were residents of Los Angeles County and as such were entitled to have the action transferred to the county of their residence; (2) that the venue of

the action is governed by section 395 of the Code of Civil Procedure and does not fall within any of the exceptions therein provided; (3) that the fact that one of the defendants was a corporation did not cause the venue of the action to be governed by Article XII, section 16 of the Constitution rather than by the provisions of section 395 of the Code of Civil Procedure or the fact that the individual defendants were sued under fictitious names did not deprive them of the right to have the action tried in the county of their residence.

It is plaintiff's contention that the venue of the action against corporations and associations is governed by Article XII, section 16 of the Constitution unless waived by the plaintiff; that there was no such waiver; that it was plaintiff's privilege to designate the parties defendant he intended to sue; that the parties made defendants solely for venue purposes have no venue privileges under section 395 of the Code of Civil Procedure; and finally, that volunteers who choose to inject themselves into law suits waive venue privileges granted involuntary defendants.

[1] It is true that the venue of an action against corporations and associations is governed by Article XII, sec. 16 of the Constitution unless waived by the plaintiff. A waiver may be affected by the designation and service of a nonresident individual as a party defendant. Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209. In the instant action the individuals appearing by demurrer were not parties defendant named in the complaint. There was no allegation that any individual committed any wrongful act but, on the contrary, it is alleged that the wrongful and malicious act was committed by the corporations named. No judgment is sought against any individual but only against the named corporations.

[2] When a plaintiff sues with fictitious defendant allegations, it is plaintiff's rather than the defendant's privilege to designate whom he intended to sue. A person not named as a party to the suit and not served as one of those sued by fictitious names or otherwise made known by the plaintiff as one of the real persons whom he desired as defendants, and whom he sued under fictitious names, has no right to appear therein by demurrer, and it is not for any or every person in the county to decide for himself whether he is the person intended. Mercantile Trust Co. of San Francisco v. Stockton Terminal etc. Co., 44 Cal.App. 558, 186 P. 1049; McKinlay v. Tuttle, 42 Cal. 570; Bachman v. Cathry, 113 Cal. 498, 45 P. 814.

[3] It would therefore appear, so far as the complaint before us is concerned, that the only defendants mentioned in the complaint and served, were the three corporations thus designated, and any individuals appearing by denominating themselves Does I, II and III would have no right, in the face of the complaint, to seek a change of venue based upon their residence. Their appearance in the action was voluntary, and without a proper amendment to the complaint, no proper judgment could be obtained against them as such individuals. Sec. 474, Code Civ. Proc.; Flores v. Smith, 47 Cal.App.2d 253, 117 P.2d 712; Union Tank & Pipe Co. v. Mammoth Oil Co., 134 Cal.App. 229, 25 P.2d 262; Roseborough v. Campbell, 46 Cal.App. 2d 257, 115 P.2d 839.

[4-6] The only remaining question is whether or not the corporations named in the complaint could be sued in Imperial County by reason of the fact that the "obligation or liability arises, or the breach occurs" in that county. Sec. 16, Art. XII Constitution. The legislature may not designate the forum or county for commencement and trial of actions when that subject is covered by the Constitution. Miller & Lux v. Kern County Land Co., 134 Cal. 586, 66 P. 856; Buck v. James McClatchy Publishing Company, Inc., 105 Cal.App. 248, 287 P. 364. The above-mentioned section of the Constitution has consistently been held to control suits either in contract or tort, brought against corporations or associations. Brady v. Times-Mirror Company, 106 Cal. 56, 39 P. 209; Griffin & Skelly Co. v. Magnolia & Healdsburg F. C. Co., 107 Cal. 378, 40 P. 495; Tingley v. Times-Mirror Co., 144 Cal. 205, 77 P. 918. The

complaint only alleges that the corporations committed the acts charged.

[7] In considering an appeal from an order denying a motion for change of place of trial, for the purpose of the motion, the allegations of the complaint must be taken as true. Coley v. Hecker, 206 Cal. 22, 272 P. 1045; Yolo County Consolidated Water Co. v. Adamson, 22 Cal.App. 493, 135 P. 48.

In view of this determination it will be unnecessary to further consider the other points suggested by plaintiff justifying the order.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; SCHAUER, J., dissenting.



99 Cal.App.2d 319

In re MESNER'S ESTATE.

SINGER v. CRADICK.

CRADICK v. SINGER.

Civ. 17766.

District Court of Appeal, Second District, Division 1, California.

Sept. 1, 1950.

As Modified Sept. 7, 1950.

Rehearing Denied Sept. 20, 1950.

Proceeding in the matter of the estate of Jennie Mesner, also known as Jennie Grawoig. Charles W. Cradick, executor of the estate, filed a petition for confirmation of his sale of apartment courts belonging to the estate, and J. F. Singer filed a petition to set aside a subsequent sale of such property to him. From orders of the Superior Court of Los Angeles County vacating an order confirming the second sale and forfeiting the amount of petitioner Singer's deposit, he appealed. On motion to dismiss the appeals. The District Court of Appeal, Drapeau, J., held that the order forfeiting the deposit was appealable.

Motion denied.

1. Courts ⇐202(5)
Executors and administrators ⇐358(2)

While appealable orders in probate matters generally are only those enumerated in statute and order denying petition to set aside probate court's order for sale of decedent's realty is not appealable, orders in which a party to probate proceedings has an interest are appealable. Probate Code, § 1240.

2. Courts ⇐202(5)

Probate court orders involving construction of proper exercise of administrator's duties or subjecting him to liability, if obeyed, are appealable. Probate Code, § 1240.

3. Executors and administrators ⇐358(2)

A probate court order merely vacating order for sale of decedent's realty would have been nonappealable, but became appealable when it adjudged that amount of purchaser's deposit with executor was forfeited, thereby making purchaser an interested party. Probate Code, § 1240.

4. Appeal and error ⇐76(1)

The appealability of an order is determined, not from its form, but from its legal effect.

Clarence Hansen and Vernon S. Gray, Los Angeles, for appellant.

Dailey S. Stafford, Los Angeles, for respondent.

DRAPEAU, Justice.

The executor of this estate received a bid of $79,500 for the property from Mr. and Mrs. Harry Gershan. He presented this bid to the probate court for confirmation. On the hearing which followed, Joseph P. Singer bid in open court $83,975 for the property, and it was sold and confirmed to him.

While in court, Mr. Singer signed a formal written bid, and deposited with the executor $8,500 to bind the bargain. Executor's deed was to follow upon payment of the balance of the purchase price. For the purpose of completing the transaction,

Mr. Singer caused an escrow to be set up in a bank.

But he failed to pay the money due. And he petitioned the probate court to set aside the sale on the ground of fraud; also on the ground that the Gershans, without his knowledge had withdrawn their offer before the sale to him; and, therefore, the court was without jurisdiction to proceed.

The probate court vacated the order confirming the sale, and in the same order, directed that Mr. Singer was not entitled to return of the $8,500. The court made another and additional order, based upon Mr. Singer's petition, that he was not entitled to repayment of the $8,500.

Mr. Singer appeals from both of these orders.

In the same estate an order by the probate court directing the return of the deposit of Mr. and Mrs. Gershan was affirmed by this court. Estate of Mesner, 95 Cal. App.2d 265, 212 P.2d 267.

Clerk's and reporter's transcripts and appellant's opening brief are on file. Respondent moves to dismiss both appeals upon the ground that the orders are not appealable. In support of his proposition he cites: Probate Code, § 1240; Estate of O'Dea, 15 Cal.2d 637, 104 P.2d 368; Estate of Grussing, 15 Cal.App.2d 11; 59 P.2d 152; Estate of Ryker, 92 Cal.App.2d 162, 206 P.2d 406; Estate of Brady, 32 Cal.2d 478, 196 P.2d 881.

[1] While appealable orders in probate matters in general are only those enumerated in the statute, Estate of Hathaway,111 Cal. 270, 43 P. 754, Estate of O'Dea, supra, and an order refusing to set aside an order of sale is not appealable, Estate of McCarty, 169 Cal. 708, 147 P. 941, the rule has definite limitations. Orders in which a party litigant in probate proceedings has an interest are appealable. Estate of Bradley, 168 Cal. 655, 144 P. 136.

[2] And orders involving the construction of the proper exercise of the duties of an administrator are likewise appealable. Whenever an order involves such a construction, or whenever obedience thereto might subject the administrator to liability an appeal will lie. Estate of Welch, 106 Cal. 427, 39 P. 805; Estate of Exterstein, 2 Cal.2d 13, 38 P.2d 151.

[3, 4] If the order vacating the order of sale had stopped there, it would have been non-appealable. Estate of McCarty, supra; Estate of Verwoert, 177 Cal. 488, 171 P. 105. But when the order continued, and adjudged that $8,500 was forfeited it became appealable. The appealability of an order is determined not from its form, but from its legal effect. Estate of West, 162 Cal. 352, 122 P. 953. To the extent that the order directs disposition of the $8,500 in controversy it made Mr. Singer an interested party, with the right of appeal.

The motion to dismiss both appeals is denied.

WHITE, P. J., and DORAN, JJ., concur.



99 Cal.App.2d 343

GIRARD v. VEACH.
Civ. 17538.

District Court of Appeal, Second District, Division 1, California.
Sept. 7, 1950.

Fred Girard sued Harry Ore Veach for attorney's fees. From a judgment of the Superior Court of Los Angeles County, Leroy Dawson, J., for plaintiff, defendant appealed. The District Court of Appeal, Drapeau, J., held that allowance of interest before the date of the judgment was erroneous, as interest should be only from such date.

Judgment modified and affirmed as modified.

1. Appeal and error ⇐1011(1)

The District Court of Appeal is not called on to weigh or evaluate conflicting evidence on appeal from judgment on trial court's findings, but that is trial judge's province.

2. Appeal and error ⇐1010(1)

A judgment on trial court's fact findings, substantially supported by evidence, must be affirmed on appeal.

3. Interest ⇐39(3)

In action for attorney's fees, allowance of interest before date of judgment for plaintiff was erroneous, as interest should be only from date of judgment.

George R. Maury, Alden F. Houck, and Steiner A. Larsen, all of Los Angeles, for appellant.

Hindin, Weiss & Girard, Los Angeles, for respondent.

DRAPEAU, Justice.

Defendant is a medical doctor. He treated a fifteen-year-old girl. A man who gave his name as Gordon called at the doctor's office, and accused him of criminal and unprofessional conduct toward the girl. The doctor hotly denied the charge, and ran the man out of the office.

That evening the doctor called his insurance agent, who had sold him his malpractice insurance policy, and notified him what had happened. The agent advised him to keep quiet and do nothing for the time being.

Then an attorney at law telephoned the doctor, said that he represented the girl and her mother, and asked for a conference. The doctor advised the agent of this development. The agent advised the insurance adjusters. They suggested that in view of the possibility of criminal prosecution the doctor should secure the services of a lawyer skilled in criminal practice.

Upon this suggestion, plaintiff was called into the case. He was introduced to the doctor by the insurance agent. He moved in rapidly; secured the assurance of the District Attorney's office that if anyone asked for a criminal complaint, the doctor would be given a hearing before it issued. He participated in taking statements from the doctor's nurse, and other possible witnesses. He went over the case with defendant, and members of defendant's family; also with defendant's personal lawyer, and with the insurance agent. And he talked with the lawyer who had telephoned the doctor.

At the first interview between plaintiff and defendant, something was said about plaintiff's fee, but no figure was named. Later, and after a great deal of work had been done, plaintiff advised defendant that his fee would be $2,500. Defendant refused to pay any part of the fee; said he didn't have that much money; that it was too much; and that, anyway, plaintiff was working for the insurance company, and under his policy he was not required to pay attorneys' fees.

The policy provided that the insurance carrier was not liable for any criminal act on the part of the insured, and was not required to defend in any proceeding growing out of such act. No criminal complaint was issued; and none was asked for. After plaintiff retired from the case, a settlement between the doctor and the minor was approved by the Superior Court.

After seven days' trial, the court found for plaintiff. From the judgment which followed, defendant appeals.

[1, 2] The old, familiar rule in appellate practice must again be followed in this case. While the doctor's case may have entitled him to judgment, the trial court found against him on conflicting evidence. This court is not called upon to weigh or evaluate evidence. That is the province of the trial judge. The evidence substantially supports the findings of the trial court and the judgment. Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 163 P. 2d 756.

It is charged on appeal that the trial court "so erred * * * in leading the witnesses, and in suggesting lines of testimony for the plaintiff, as to have demonstrated prejudicial bias." No mention of these charges was made until the opening brief on appeal was filed. The record has been carefully read, with each charge in mind. No bias of the trial judge appears. And no errors in admission of evidence, or

in the conduct of the trial by the judge, are to be found.

[3] Defendant complains of the allowance of interest prior to the date of the judgment. On the authority of Johnson v. Marr, 8 Cal.App.2d 312, 47 P.2d 489, interest should be only from the date of the judgment.

The judgment is modified to provide that it shall bear interest from the date of its entry. As so modified the judgment is affirmed. Each party to bear his costs on appeal.

WHITE, P. J., and DORAN, J., concur.



99 Cal.App.2d 353

POWELL et al. v. BERG et ux.

POWELL v. BERG.
Civ. 7741, 7742.
Sac. 6057, 6058.

District Court of Appeal, Third District, California.

Sept. 8, 1950.

Action by William James Powell, Oscar Nelson and another against Lars C. Berg and his wife, to recover the reasonable value of services rendered in the construction of a house and a garage upon land owned by defendant. In a separate action, William James Powell sought to recover moneys advanced by him to Lars C. Berg in the construction of house and garage. The actions were consolidated for trial and appeal. The Superior Court, Butte County, Henry Deirup, J., entered judgment in favor of plaintiffs Powell and Nelson, in first action and plaintiff in second action and defendants appealed from both judgments. The District Court of Appeal, Peek, J., held that the evidence supported finding of trial court that one of plaintiffs did not represent himself to be a licensed contractor, and that plaintiffs rendered services performed as an employee of another with wages as sole compensation.

Affirmed.

Licenses ⇐39.44

In action to recover reasonable value of services rendered in construction of a house and a garage upon land owned by defendants, evidence sustained finding that one of plaintiffs did not represent himself to be a licensed contractor and sustained finding that such plaintiff rendered services performed as an employee of another with wages as sole compensation. Business and Professions Code, §§ 7026, 7031.

Morris Oppenheim, San Francisco, for appellants.

Matthew E. Marsh, Chico, for respondents.

PEEK, Justice.

By their action plaintiffs Powell, Nelson and Tansey sought to recover the reasonable value of their services in the construction of a house and garage upon land owned by defendants Berg and to have the amounts thereof adjudged to be liens against said property. From the judgment which was entered in behalf of plaintiffs Powell and Nelson defendants have appealed. 3 Civil 7741. No appeal was taken by plaintiff Tansey from the judgment entered against him. Plaintiff Powell by a second and separate action successfully sought to recover moneys advanced by him in the construction of said dwelling and for the value of the use in such construction work of a truck owned by him. From this judgment defendant likewise has appealed. 3 Civil 7742. The foregoing actions were consolidated for trial and appeal and are now before this court upon a single reporter's transcript.

Following the overruling of defendants' demurrer in the first action, 3 Civil 7741, an answer was filed denying the material allegations of plaintiffs' complaint and affirmatively alleging that Powell had represented himself to be a licensed contractor but that he was not so licensed; that he

had orally agreed to construct the house at cost and that Berg would sell the same and divide the profits with Powell. In regard to plaintiff Nelson, the answer alleged that he had been fully compensated for his work, and in regard to plaintiff Tansey it was alleged that for a valuable consideration he had released defendants from all claims or demands. Although the answer of defendant in the second action, 3 Civil 7742, does not appear in the record before us, defendants state in their opening brief that an answer was filed denying generally the allegations of the complaint and realleging all of the special defenses set forth in the first action. The consolidated cases proceeded to trial upon the issues so raised. At the conclusion thereof the trial court adopted findings of fact favorable to plaintiffs Powell and Nelson, but found in favor of defendants in regard to plaintiff Tansey.

Appellants' primary contention is that the judgment as to Powell must be reversed for insufficiency of the evidence to sustain the findings of fact. In particular, it is argued that the evidence establishes as a matter of law that Powell was "a contractor" within the meaning of Section 7026 of the Business and Professions Code, and since he admittedly was not licensed as such he could not recover. Sec. 7031, Bus. & Prof. Code. Appellants' argument in support of such contention is merely an attack upon the weight of the evidence. However, since the record discloses substantial evidence in support of the findings, their contention is utterly without merit. Suffice it to say that there is more than ample evidence that Powell did not represent himself to be a licensed contractor and that he rendered the services performed as an "employee of another with wages as the sole compensation." Sec. 7026. Additionally, there is more than ample evidence establishing defendants' control of the building operations and of the persons employed therein and the actual exercise of such control by defendants.

Appellants' second contention is as equally devoid of merit as their first. It appears to be merely that as to plaintiff Nelson the evidence is insufficient to sustain the judgment solely for the reason that, in their words, Nelson "literally reeks with alcohol" and "admits he was addicted to the use of intoxicants". From such statements defendants then draw the conclusion that Nelson performed no services. We know of no such rule. Again, suffice it to say that there is more than ample evidence to support the findings and judgment so attacked.

The judgments are affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.



99 Cal.App.2d 285

PUCHTA v. ROTHMAN et al.

Civ. 14338.

District Court of Appeal, First District, Division 2, California.

Aug. 31, 1950.

Rehearing Denied Sept. 30, 1950.

Margaret Jane Puchta, a minor, by Stanley J. Puchta, her guardian ad litem, sued N. Rothman and Rough Rider, Inc., for injuries the minor plaintiff sustained in a building under construction when plaintiff fell through an opening in second floor of building onto a concrete floor beneath. The Superior Court in and for the County of San Mateo, A. R. Cotton, J., held that defendants were not liable under the attractive nuisance doctrine, or as having wilfully injured minor.

Judgment affirmed.

Dooling, J., dissented.

1. Negligence ⇐39

Defendants engaged in construction of a building were not liable under attractive nuisance doctrine for injuries received by minor who trespassed upon building by going up stairway to second floor of building, and who stepped upon tar paper above a concealed hole in floor and fell through to first floor.

2. Negligence ⇐119(1)

In action for injuries resulting when minor trespassed upon building by going up stairway onto second floor, and stepped upon tar paper above a concealed hole in floor and fell through to first floor, minor had burden to obviate what otherwise would be legal consequences of trespass by alleging and proving all facts necessary to remove effect of trespass as an objection to recovery.

3. Negligence ⇐39

The attractive nuisance doctrine does not require an owner to destroy or impair usefulness of his property in order to safeguard trespassing children.

4. Negligence ⇐33(1, 3)

Landowner need not keep his premises safe for either adult or minor trespassers.

5. Negligence ⇐11

Where retention of barricade, erected at foot of stairway leading to second floor of building under construction to protect children from danger would have destroyed purpose for which stairs were built, and would retard completion of building, and minor trespassed in building by climbing stairs in order to play on second floor, and minor fell through tar paper covering hole in second floor, defendants who were constructing building and who removed barricade were not liable for injuries as having wilfully injured minor.

6. Pleading ⇐252(2)

An amended complaint superseded original complaint and original complaint after amendment performed no function as a pleading and could not be looked to for issues to be tried.

Dolwig & Gaudio, South San Francisco, for appellants.

F. E. Hoffmann, San Mateo, for respondents.

GOODELL, Justice.

Appellant sued for $50,000, for injuries sustained in a building which was under construction, when she fell through an opening in the second floor thereof onto a concrete floor 12 or 13 feet beneath. A general demurrer was sustained (with leave to amend) to each of the two counts of the amended complaint. Appellant declined to amend and judgment was entered for respondents for costs. This appeal followed.

Appellant's statement of facts as alleged in the complaint is as follows: "On or about the 6th day of February, 1947, the defendants were engaged in the construction of a building in South San Francisco * * * The building was partially completed on that date and the second floor was overlaid with a sheet of tar paper. Under this tar paper and totally concealed by it was a hole for a proposed ventilator or skylight. The stairway had already been completed so that access to the second floor was easy and convenient. Children had, to defendants' knowledge, played upon this structure and knowing this, defendants had in fact erected a barricade to protect them from this known danger. On or about the 6th day of February, 1947, defendants removed this protective barricade and plaintiff Margaret Jane Puchta, ten years of age, went to the second floor of the building to play and while so engaged, stepped upon the tar paper above the concealed hole, plunging through to the first floor, suffering severe personal injury."

Appellant concedes that it is "the general rule that a land owner owes no duty of care to trespassers" and states that the first count is based on the attractive nuisance doctrine, which is an exception to that rule.

The attractive nuisance doctrine was first applied in California in Barrett v. Southern Pacific Co., 91 Cal. 296, 27 P. 666, 25 Am. St.Rep. 186, where the Supreme Court, with two rules on the subject from which to choose, selected the rule followed by the United States Supreme Court, and by Pennsylvania, Michigan, Missouri, Kansas and Minnesota, and rejected that of New Hampshire. It is a typical attractive nuisance case since it involved a turntable.

Cahill v. E. B. & A. L. Stone & Co., 153 Cal. 571, 96 P. 84, 19 L.R.A.,N.S., 1094, in-

volved a push-car used in laying a railroad track in a city street which car, without any brake, was left unguarded, unenclosed and unlocked, and a 12-year old boy was injured while playing thereon while it was in motion. A demurrer to his complaint was sustained but the judgment was reversed on the authority of the Barrett case. The court in 153 Cal. at page 574, 96 P. at page 86, said: "The rule of course is not to be confined to turntables, but applies to any attractive and dangerous machinery * * * It is true that in this state the rule has been strictly limited to the particular character of cases mentioned in the Barrett Case. In Peters v. Bowman, 115 Cal. [345] (349, 47 P. 113, 598, 56 Am.St. Rep. 106), wherein it was held that the owner of a lot was not liable for the death of a boy drowned in a pond on his premises, Mr. Justice McFarland, speaking of the so-called 'turntable cases,' says: 'The rule as thus applied rested on the ground that the immature judgment of a young child could not well determine or provide against the danger of meddling with such machinery, and that therefore the railroad company was liable for legal negligence in erecting it and leaving it exposed as an attraction to children, and a temptation to them to intermeddle with it.' It is further stated that the principle of these 'turntable cases,' while well established in this state, is an exception to the general rule that the owner of land is under no legal duty to keep it in safe condition for others than those whom he invites there."

"Originally, the attractive nuisance doctrine was applied only to machinery under certain circumstances, but in this state its application has been extended to various appliances and contrivances." Hernandez v. Santiago etc. Ass'n, 110 Cal.App. 229, 233, 293 P. 875, 877. Thus it was applied in Pierce v. United G. & E. Co., 161 Cal. 176, 118 P. 700, where a loose guy wire came in contact with a live wire; in Skinner v. Knickrehm, 10 Cal.App. 596, 102 P. 947, where a wagon was attached to the rear of a house being moved through city streets; in Faylor v. Great Eastern Q. M. Co., 45 Cal.App. 194, 187 P. 101, where unlocked ore cars were left in an unguarded, unused, mining tunnel; in Sandberg v. McGilvray-Raymond Granite Co., 66 Cal.App. 261, 226 P. 28, where a railroad train was slowly backing; in Morse v. Douglas, 107 Cal.App. 196, 290 P. 465, where a trailer and vat of boiling tar were left unguarded in a city street, and in Lambert v. Western Pacific R. R. Co., 135 Cal.App. 81, 26 P.2d 824, where an abandoned box of dynamite caps was left on a railroad right of way under construction.

The courts have refused to extend the rule to such things as ponds and reservoirs, Peters v. Bowman, supra; Polk v. Laurel Hill Cemetery Ass'n, 37 Cal.App. 624, 174 P. 414; Reardon v. Spring Valley Water Co., 68 Cal.App. 13, 228 P. 406, storm drains; Melendez v. Los Angeles, 8 Cal. 2d 741, 68 P.2d 971; Beeson v. Los Angeles, 115 Cal.App. 122, 300 P. 993, a stable; Giannini v. Campodonico, 176 Cal. 548, 169 P. 80, a dance hall; Doyle v. Pacific Electric Ry. Co., 6 Cal.2d 550, 59 P.2d 93, an icing platform; Hernandez v. Santiago etc. Ass'n, 110 Cal.App. 229, 293 P. 875 supra.

An unfinished building has none of the characteristics of turn-tables, moving cars or wagons, live wires, or "dangerous and attractive machinery." Respondents' assertion in their brief that they have found no case holding such a structure to be an attractive nuisance virtually challenged their adversary to produce one, but since no reply brief was filed none was forthcoming.

In Peters v. Bowman, supra, 115 Cal. 345, 349–350, 47 P. 113, 114, the court said: "the rule of the Turntable cases is an exception to the general principle that the owner of land is under no legal duty to keep it in a safe condition for others than those whom he invites there, and that trespassers take the risk of injuries from ordinary visible causes; and it should not be carried beyond the class of cases to which it has been applied", and added in 115 Cal. at page 356, 47 P. at page 599, in denying a rehearing: "The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the charac-

ter of the thing, whether natural and common, or artificial and uncommon: to the comparative ease or *difficulty of preventing the danger without destroying or impairing the usefulness of the thing;* and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions." (Emphasis added.)

In Loftus v. Dehail, 133 Cal. 214, 218, 65 P. 379, 380, the court said: "But it by no means follows, * * * that anything or everything which a jury may find, or a court may determine, to be attractive as a playground or plaything for children casts a responsibility of guard and care upon the owner of that thing. * * * *Venturesome boys and even girls make playgrounds of unfinished buildings,* climb perilous heights, and scamper over insecure boards and rafters. If an owner became responsible, merely because children were attracted, it would burden the ownership of property with a most preposterous and unbearable weight." (Emphasis added.) The last quotation, which used *unfinished buildings* as an example, while merely a dictum, was repeated 35 years later in Doyle v. Pacific Electic Ry. Co., 6 Cal.2d 550, 552, 59 P.2d 93, supra. In the latter case a 13 year old boy trespasser ventured onto a canvas-covered sky-light opening and fell through it, *in much the same way as appellant fell through this paper-covered opening.*

When the cases speak of guarding the dangerous contrivance, they are not speaking of a warning of "danger" or a notice to "keep out", but of something that will physically prevent children and others from going upon the premises. This is indicated by the case of Faylor v. Great Eastern Q. M. Co., 45 Cal.App. 194, 187 P. 101, supra, where the mining property was enclosed with a barbed wire fence, and where there was posted in a conspicuous place on the gate "a sign 6 feet long and 18 inches wide, and with the word 'Danger' painted thereon in letters 1 foot high, and the words 'No Admittance' about 8 inches high." Notwithstanding these precautions the court held that the mining company should have sealed up the mouth of the unused tunnel. It is indicated also in the Barrett case, 91 Cal. 296, 27 P. 667, supra, where the turntable was equipped "with a latch and slot, such as is in common use on such tables, to keep it from revolving" which was fastened at the time, but since it "was not protected by any inclosure" or guarded, the defendant was held liable.

It is self-evident that any barricade at the foot of the stairway of this building, of sufficient size and strength to keep children from going up the stairs, would destroy the very purpose for which the stairs were built and retard the completion of the building.

Appellant quotes the Restatement of the Law of Torts, § 339, and argues that the California rule on attractive nuisances is substantially in accord with it. Generally speaking it is, but the cases which we have cited show the lines of distinction which the California courts have drawn. A building under construction, being immobile for one thing, is readily distinguishable from an attractive, moving vehicle or piece of machinery. In applying the rule our courts draw the line at a situation where the protective measure would destroy or impair the usefulness of the property itself. The Faylor case, 45 Cal.App. 194, 187 P. 101, supra, relied on by appellant, involved (a) an idle, non-operating mine, and (b) it is one of the cases where moving things —push-cars in an unused mining tunnel— were the attraction; a building under construction is in nowise comparable, for both reasons.

[1] Under the California cases the first count states no cause of action within the doctrine of attractive nuisances, and the demurrer thereto was properly sustained.

The second count is grounded, appellant's counsel say, "upon the entirely different doctrine that a landowner owes a duty to refrain from *wilfully* inflicting injury upon a *known* trespasser."

[2] In Bradley v. Thompson, 65 Cal. App. 226, 229, 223 P. 572, 573, the court said: "Inasmuch as the injury caused by the offending instrumentality in this class of cases is the result of a trespass committed by the child, it is incumbent upon

the plaintiff to obviate what otherwise would be the legal consequences of the trespass by alleging and proving all the facts which are necessary to remove the effect of the trespass as an objection to a recovery." This applies with equal force here.

The charging part of plaintiff's allegations is that defendants "wilfully removed a stair-way barricade, theretofore erected by said defendants as a safety measure, and wilfully failed to guard, enclose, or block said stairway and roof."

Instead of stating facts from which the court could conclude for itself whether or not these acts were wilful, the pleader simply adds "wilfully" as a descriptive epithet. An allegation, for instance, that, in order to teach trespassers a lesson, the owner had planted some contrivance or trap on the premises, would state *facts* showing a wilful act. See Peters v. Bowman, supra, 115 Cal. 345, 348, 47 P. 113, 598, 56 Am.St.Rep. 106, which instances a spring gun and Bourie v. Spring Valley Water Co., 8 Cal.App. 588, 592, 97 P. 530, which instances a ditch.

[3-5] Obviously, the removal of a barricade which had "enclosed" and "blocked" the stairway, would restore the stairway to usefulness as a means of access to the unfinished second floor—a perfectly normal and legal act of ownership which could hardly be called wilful. Even under the attractive nuisance rule an owner is not expected to destroy or impair the usefulness of his property in order to safe-guard trespassing children. Peters v. Bowman, supra, 115 Cal. 345, 350, 355, 47 P. 113, 598; Polk v. Laurel Hill Cemetery Ass'n, supra, 37 Cal.App. 624, 637, 174 P. 414. That being so, then surely he cannot be held to such an onerous duty where the property is not an attractive nuisance, the rule being "that the owner of land is under no duty to keep his premises safe for trespassers." Peters v. Bowman, supra, 115 Cal. 345, 348, 47 P. 114.

Moreover, the allegation that defendants knew that children played in and about the building (squinting, as it does, at the attractive nuisance rule) adds nothing at all to the claim of wilfulness. The rule now under discussion applies to children as well as to adults. To again quote Peters v. Bowman, 115 Cal., at page 349, 47 P. at page 114: "'The rule is that, ordinarily, the owner of premises owes no duty of immunities to trespassers, though the latter be infants.' (Whittaker's Smith on Negligence, 2d ed., 67, note, and cases there cited.)"

The demurrer to the second count was properly sustained.

[6] Appellant presents an argument respecting the third count. There were three counts in the original complaint, the last of which pleaded special damages arising from medical and hospital expenses, in the sum of $1613.25. This third count was apparently abandoned, as it does not appear in the amended complaint. The amended complaint of course superseded the original complaint and the latter performs no function as a pleading and cannot be looked to for the issues to be tried. 21 Cal.Jur. p. 214.

The judgment is affirmed.

NOURSE, P. J., concurs.

DOOLING, Justice.

I dissent. Our Supreme Court reiterated only the other day the well settled rule that under the liberal provisions of our code "(i)t is not necessary in this state to plead with the exactitude required at common law." Steiner v. Rowley, 35 Cal. 2d 713, 221 P.2d 9. Certainly judged by this standard, and in my opinion by any reasonable standard, the first count of the complaint states a cause of action under the attractive nuisance doctrine. It alleges that the minor plaintiff is ten years of age; that the defendants on or about February 6, 1947 were engaged in constructing a building; that prior to the injury herein complained of children had been attracted to the unfinished building for the purpose of playing therein "and had played in and about said stairway and uncompleted roof, *all of which,* at all times herein mentioned, *was well known to the defendants;* * * that the second story of said structure was incomplete * * * and at that time was

covered by a sheet of tar paper covering, which tar paper covering also was laid over a proposed ventilation opening or skylight, *totally concealing the same"*; that the minor plaintiff was attracted, with other children, to the building as a place to play and *"without knowledge or notice of the existence of said covered ventilator shaft* * * * fell into the concealed ventilation opening * * * through the temporary tar paper covering * * *." (Emphasis mine.)

These allegations fit the concealed peril or "trap" phase of the attractive nuisance doctrine expounded by the courts in Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 271 P. 1060, and Faylor v. Great Eastern Q. Min. Co., 45 Cal.App. 194, 187 P. 101, like a glove tailored to the hand.

It is a too mechanical application of the rules of law to say that because the cases have held that to bring the *ordinary* perils of an unfinished building within the attractive nuisance doctrine "would burden the ownership of property with a most preposterous and unbearable weight", *ergo* no sort of trap or concealed peril in an unfinished building can come within that doctrine. The removal of a piece of tar paper from a ventilator opening would not burden the ownership of property with a "preposterous and unbearable weight" or any appreciable weight at all, particularly when measured against the lives and safety of little children known to have played in the building.

With the knowledge that little children were in the habit of playing about the building, according to the pleaded facts, the defendants covered the entire second story floor, including the ventilator opening, with tar paper thus giving the deceptive appearance of a safe flooring to the ventilator opening and the minor plaintiff deceived by the appearance fell through the opening and was injured, thus springing the "trap".

The courts of this state have held over and over again that an open body of water on a defendant's land is not within the attractive nuisance doctrine and yet the court in Sanchez v. East Contra Costa Irr. Co., supra, had no difficulty in finding that a concealed trap in an open canal came within the doctrine. The court made the distinction between the obvious dangers and the trap or concealed peril in the following words, 205 Cal. at page 517–518, 271 P. at page 1061: "In the instant case, the canal with its shallow water was the bait of the trap. The defendant knew that children lived close by and the opening of the syphon might have been easily guarded. It is a matter of common knowledge that children playing on the edge of a shallow body of water will be tempted to play in the water and to reach into it, and, while the defendant need not have guarded against this open and obvious stream of water, under numerous California decisions, we think a different rule applies where an apparently harmless, shallow stream of water contains a large opening into which anyone might slip, which opening is wholly unguarded and completely concealed from view. * * * The children assumed the risk of the open, obvious, notorious danger incident to the canal, containing about three feet of water; but they did not assume the risk of an unknown, concealed, and unguarded danger."

Substitute "unfinished building" for "canal" and you have the pleaded case. Nor can I agree that Doyle v. Pacific Elec. Ry. Co., 6 Cal.2d 550, 59 P.2d 93 is a comparable case. There a canvas did conceal a skylight, but it was in the attic of a finished building used as a public ballroom which could only be reached by a ladder from the spectators' gallery and a catwalk of planks, a situation very different from an unfinished building open to playing children and in which, according to the allegations of the complaint the fact that children "had played * * * was well known to the defendants." The facts of the two cases readily distinguish them.

I would reverse the judgment.

99 Cal.App.2d 322

KAUFFMAN et ux. v. BOBO & WOOD et al.
Civ. 7790.

District Court of Appeal, Third District, California.

Sept. 1, 1950.

Action by John W. Kauffman and wife against Bobo & Wood, copartnership composed of A. W. Bobo, sometimes also known as Alexander W. Bobo, and W. M. Wood; A. W. Bobo, individually, and W. M. Wood, individually, for fraud. The Supreme Court, San Joaquin County, George F. Buck, J., sustained a demurrer on both general and special grounds, without leave to amend, and plaintiffs appealed. The District Court of Appeal, Adams, P. J., held that complaint stated cause of action.

Reversed with directions.

1. Pleading ⇐204(2)

General demurrer must be overruled if, on any theory, complaint states cause of action.

2. Pleading ⇐225(1)

General demurrer shall not be sustained without leave to amend if complaint is subject to amendment to state cause of action.

3. Pleading ⇐225(1)

It is error to sustain special demurrer without leave to amend if cause of action is stated or can be stated.

4. Pleading ⇐34(1), 235

Pleadings and amendments thereto should be allowed and construed liberally with object of affording every litigant his day in court and to render substantial justice between parties.

5. Pleading ⇐367(2)

If complaint is good as against general demurrer, trial court may in its discretion require clarification of uncertainties or ambiguities therein.

6. Appeal and error ⇐917(1)
Pleading ⇐214(2)

On appeal from judgment on demurrer it must be assumed that all facts are as alleged since filing of demurrer constitutes admission that all allegations well pleaded are true.

7. Fraud ⇐41

Complaint for fraud must show fraudulent representations, that they were known by defendant to be false or were made under circumstances not warranted by his knowledge, that they were actually false, that they were made with intent to deceive plaintiff, or with intent to induce him to enter into transaction, that plaintiff relied upon representations, believing them to be true, and that he was injured.

8. Partnership ⇐104

Action by one partner against the other partner is not permissible, during existence of partnership.

9. Partnership ⇐104

Where plaintiffs alleged promise of defendants to effect partnership and failure by defendants to perform their part of agreement to create such partnership, an existing partnership was not alleged, and, therefore, principle that one partner may not sue another member of existing partnership was inapplicable.

10. Fraud ⇐41
Pleading ⇐225(1)

Where complaint alleged that defendants entered into fraudulent conspiracy to acquire ownership of certain depot restaurant business, that plaintiffs relied upon representation by defendants that defendants would pay half of cost, that half of cost was never paid by defendants, that defendants then forced plaintiffs on threat of revocation of franchise to consent to agreement whereby defendants would purchase restaurant business making plaintiff manager and then partner, that defendants never intended to perform and that plaintiff was never made manager nor partner with intention of forcing him to forfeit franchise, complaint stated cause of action or could be amended to state cause of action, and therefore sustaining general demurrer, and special demurrer on ground of uncertainties and ambiguities, without leave to amend was error.

Chadeayne & Wilkinson, Tracy, for appellants.

Popper & Burnstein, Oakland, for respondents.

ADAMS, Presiding Justice.

On this appeal the sufficiency of the third cause of action contained in plaintiffs' second amended complaint is alone involved. To that count the trial court sustained a demurrer, on both general and special grounds, without leave to amend. The only question presented here is whether or not the said court erred.

[1-3] It is well established that a general demurrer must be overruled if, on any theory, it states a cause of action, Lord v. Garland, 27 Cal.2d 840, 853, 168 P.2d 5; Johnson v. Clark, 7 Cal.2d 529, 536, 61 P.2d 767; and that it shall not be sustained without leave to amend if it is subject to amendment to state a cause of action, People v. Turlock Home Tel. & Tel. Co., 200 Cal. 546, 550, 253 P. 1108; Finch v. McKee, 18 Cal.App.2d 90, 95, 62 P.2d 1380; Starr v. Slaney, 11 Cal.App.2d 311, 314, 53 P.2d 395; Tann v. Western P. Ry. Co., 39 Cal.App. 377, 381, 178 P. 971; and that it is error to sustain a special demurrer without leave to amend if a cause of action is stated or can be stated, Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 104, 114 P.2d 1; Columbia Pictures Corp. v. DeToth, 26 Cal. 2d 753, 762, 161 P.2d 217, 162 A.L.R. 747; Olivera v. Grace, 19 Cal.2d 570, 579, 122 P. 2d 564, 140 A.L.R. 1328; Wennerholm v. Stanford Univ. School of Medicine, 20 Cal. 2d 713, 719, 128 P.2d 522, 141 A.L.R. 1358; Jensen v. City of Modesto, 89 Cal.App.2d 835, 837, 202 P.2d 332; Kraft v. Smith, 24 Cal.2d 124, 132, 148 P.2d 23.

[4] Also pleadings and amendments thereto should be allowed and construed liberally with the object of affording every litigant his day in court and to render substantial justice between the parties. Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 42, 172 P.2d 867; Buxbom v. Smith, 23 Cal.2d 535, 542, 145 P.2d 305; Jackson v. P. Gas & Elec. Co., 95 Cal.App.2d 204, 208, 212 P.2d 591.

[5] If a complaint is good as against a general demurrer, a trial court may in its discretion require the clarification of uncertainties or ambiguities therein. Columbia Pictures Corp. v. DeToth, supra; Guilliams v. Hollywood Hospital, supra.

[6] Also it is elementary that on appeal from a judgment on demurrer it must be assumed that all the facts are as alleged since the filing of the demurrer constitutes an admission that all allegations well pleaded are true. Jensen v. City of Modesto, supra, 89 Cal.App.2d at page 837, 202 P.2d 332, and cases there cited.

Plaintiffs' prayer was for the sum of $80,000 and for general relief, it being alleged that plaintiffs suffered loss to that extent by reason of fraudulent promises and acts on the part of defendants. Defendants assert in their brief that the fraud alleged by plaintiffs consists only of promises made by defendants to perform acts in the future which, when not fulfilled, are not actionable unless made without any intent, at the time same were made, to perform same.

The third cause of action alleged: That defendants were copartners, operating certain food and novelty sales concessions in various Greyhound Bus depots in California and were administrative and supervisorial employees of Pacific Greyhound Lines, Inc.; that plaintiffs had been operating a hotel and restaurant in Colfax, California, where they also acted as ticket sales agent for Greyhound on a commission basis; that a new bus depot was to be built in Tracy, California, and that defendants entered into a fraudulent and corrupt conspiracy and agreement to acquire ownership and control of the restaurant business and ticket agency to be established in that depot, by persuading plaintiffs to give up their Colfax business and come to Tracy to operate the restaurant and ticket agency, whereupon defendants, by means of economic pressure and their position of authority with the Greyhound Lines would force plaintiffs out of the business and that defendants would then acquire said business for no or only nominal consideration;

that defendants' fraudulent conspiracy was effectuated by having defendant Wood approach plaintiffs and represent to them that he would help them get the Tracy station, and that he would also put up one-half of the money needed, but as a silent partner so that Greyhound Co. would not know of defendant Wood's connection with the business; that plaintiffs relied on defendant Wood's representations, sold their Colfax business, and went into the Tracy operation; that while plaintiffs were expending large sums of money (cash and debts) totaling about $60,000, they continually called on defendant Wood to put up his share and he finally contributed a total of only $8,500; that this put plaintiffs in a precarious financial position, so as to be subject to the aforementioned economic pressures; that plaintiffs were not aware of defendant Bobo's connection as defendant Wood's partner until about the time they opened the Tracy business in October, 1946; that in January, 1947, plaintiffs were informed that the $8,500 which Wood had provided was not money belonging to defendants, but came from a corporation—Swiss Maid—and had to be repaid to that corporation; that defendants then represented and promised plaintiffs that if plaintiffs would pay back the $8,500 to Swiss Maid, plus $1,500 more to pacify the stockholders of Swiss Maid, defendants would pay their full share into the business shortly and would help plaintiffs to borrow enough money to pay off the business debts; that defendants would also acquire certain real property to be rented to plaintiffs as parking space, and would also convey to plaintiffs an undivided one-third interest in food and novelty concessions in Greyhound depots at Merced, Madera and Fresno; that plaintiffs thereupon paid $6,000 in cash and made a note for $4,000; that defendants made only a very slight token compliance (detailed in the complaint) with these latest promises; that defendants did not even have any interest in the concessions at Madera, Merced and Fresno; that finally, in further pursuance of their fraudulent and corrupt conspiracy to cheat and defraud plaintiffs, defendants proposed an agreement which would settle and adjust the rights of all the parties in all the properties and businesses heretofore involved, which provisions were that the defendants would purchase the Tracy business from the plaintiffs for a sum equal to the cost thereof to plaintiffs; that plaintiff John W. Kauffman be retained as manager of the business at a salary of $400 per month until defendants had paid the entire amount of the purchase price, at which time the parties would enter into an agreement of partnership whereby defendants would own two-thirds of the business and plaintiffs would own one-third; that defendants asserted that if plaintiffs did not agree to the settlement proposed by defendants, said defendants would, by virtue of their position of authority with Greyhound Co., cause Greyhound to cancel plaintiffs' "franchise" for the Tracy depot; that plaintiffs were thereby forced to submit to defendants' fraudulent duress and signed the agreement proposed by defendants; but that defendants neglected and refused to perform their part of the agreement and prevented and thwarted plaintiff John W. Kauffman from acting as manager, but have had him doing very menial chores as laborer, janitor, etc., all directed towards forcing him to breach the sale agreement and suffer the forfeitures therein provided; that all of defendants' acts were done pursuant to a fraudulent conspiracy to cheat and defraud plaintiffs, and that the promises when made, were made with no intention of keeping them, but for the purpose of putting plaintiffs into a position where defendants could squeeze them out.

[7] The essential averments necessary to a cause of action for fraud are set forth in 12 California Jurisprudence 806 et seq., section 64, as follows: "The pleadings must, of course, show the fraudulent representations; that they were known by the defendant to be false or were made under circumstances not warranted by his knowledge; that they were actually false; that they were made with intent to deceive the plaintiff, or with intent to induce him to enter into the transaction; that the plain-

tiff relied upon the representations, believing them to be true; and that he was injured."

We think that these averments are all made in plaintiffs' complaint. It is definitely alleged that defendants made promises which were made without intention to perform them; and, under Sections 1710 and 1572 of the Civil Code, this constitutes actionable fraud. Also see Union Flower Market, Ltd. v. So. Cal. Flower Market, Inc., 10 Cal.2d 671, 676, 76 P.2d 503; Bedell Engineering Co. v. Rouse, 57 Cal.App. 2d 734, 135 P.2d 404; Scafidi v. Western Loan & Bldg. Co., 72 Cal.App.2d 550, 165 P.2d 260; Wilson v. Rigali & Veselich, 138 Cal.App. 760, 33 P.2d 455; Prosser on Torts, 764, sec. 89; Restatement of Torts, secs. 530, 544.

Respondents in their brief do not deny the existence of the foregoing rule of law, but ignore the allegations of the complaint that when defendants made the various alleged promises they had no intention of keeping them; they urge, only, that the promises as alleged were only for future action, and failure to keep them did not constitute actionable fraud; and they assert that the mere fact of failure or refusal to perform does not raise an inference of an intent at the time promises were made, not to perform them. They also assert that some of the promises were kept. We need not pass upon the principles of law there asserted, since we are satisfied that plaintiffs did allege the making of promises not kept, which defendants did not, *at the time they were made,* intend to keep; that they allege a good cause of action for damages based on the causing of plaintiffs to transfer their property in reliance upon such promises, and through duress and compulsion, and on defendants' purchasing the Tracy property with the preconceived intention not to pay for it; that defendants' acts, alleged as a series of acts committed in the execution of a scheme and conspiracy to defraud, which conspiracy plaintiffs alleged was entered into between Bobo and Wood, on or about December 1, 1945, and before or at the time they began their negotiations with plaintiffs, gave rise to a cause of action; and, as for the special demurrer, if same was in any respect well founded, the trial court, in its discretion, could and should have required a clarification of uncertainties or ambiguities appearing.

[8, 9] Respondents, in opposition to appellants' claim for relief, assert that the latter, in their petition alleged an existing partnership, but made no showing that same had been dissolved and an accounting had; and that, such partnership existing, their action could not be sustained since such an action by one partner against the other is not permissible.

The answer to this contention appears to be, not that the principle of law is wrong, but that the petition does not allege the actual coming into existence of a partnership, but the promise on the part of respondents that it would be effected and a failure on their part to perform their part of the agreement to create such a partnership. In short, we do not find in the petition any allegation that a partnership actually ever was established.

[10] Assuming the truth of the allegations of the complaint filed by appellants, we cannot say that it does not state a cause of action. Certainly it cannot be said that if it fails in any respect, it cannot be amended to state a cause of action. And as for the allegations of the demurrer as to uncertainties and ambiguities the trial court should, if the demurrer on that ground be meritorious, require the clarification of the complaint by appropriate amendments, to the end that petitioners have their day in court as to the merits of their complaint.

The judgment is reversed with directions to the trial court to reverse its order in so far as it denies plaintiffs leave to amend their third cause of action, and to grant leave to amend on such terms as it may direct in the exercise of its discretion.

VAN DYKE and PEEK, JJ., concur.

99 Cal.App.2d 281

OVERACKER v. KEY SYSTEM et al.

Civ. 14314.

District Court of Appeal, First District, Division 2, California.

Aug. 31, 1950.

Edwin Overacker sued Key System, a corporation, and others, for injuries received when plaintiff was struck while walking across the street in unmarked crosswalk at intersection. The Superior Court for the County of Alameda, James R. Agee, J., rendered a judgment for plaintiff, and defendants appealed. The District Court of Appeal, Dooling, J., held that negligence of plaintiff was for jury under the evidence, and that jury was properly instructed on the last clear chance doctrine.

Judgment affirmed.

1. Appeal and error ⇐930(1)

On defendants' appeal from judgment for plaintiff in action for injuries resulting when plaintiff was struck by a bus while plaintiff was walking across a street at intersection, evidence will be taken most favorable to plaintiff.

2. Automobiles ⇐245(72)

Where a pedestrian looks in direction of approaching traffic before stepping into street, and sees vehicle approaching, if he misjudges its distance or its speed and proceeds, without again looking, into street and is there struck by vehicle, question of whether pedestrian was guilty of negligence is for jury.

3. Automobiles ⇐160(4)

If a pedestrian is crossing at intersection in unmarked crosswalk driver of automobile approaching intersection must yield right of way to pedestrian. Vehicle Code, § 560(a).

4. Automobiles ⇐245(72)

In action for injuries resulting when plaintiff pedestrian was struck by bus while plaintiff was walking across a street at intersection in unmarked crosswalk, negligence of plaintiff was for jury under evidence that plaintiff looked to his left at curb and saw bus approaching about 125 feet away, took his eyes off bus and stepped into unmarked crosswalk and took about 6 steps without again looking toward bus, when plaintiff was struck by bus. Vehicle Code § 560(a).

5. Negligence ⇐83.7

Unawareness of peril may bring last clear chance doctrine into play.

6. Automobiles ⇐246(58)

In action for injuries resulting when plaintiff pedestrian was struck by bus while plaintiff was walking across street at intersection in unmarked crosswalk, jury was properly instructed on doctrine of last clear chance under evidence that plaintiff looked to his left at curb and saw bus approaching about 125 feet away, took his eyes off bus and stepped into unmarked crosswalk and took about 6 steps without again looking toward bus, when plaintiff was struck by bus, and that bus driver saw plaintiff from time plaintiff was 100 to 125 feet from crosswalk. Vehicle Code § 560(a).

7. Automobiles ⇐227(3)

In action for injuries resulting when plaintiff pedestrian was struck by a bus while plaintiff was walking across street at intersection in unmarked crosswalk, fact that plaintiff's negligence, if any, was continuous to time of injury, did not preclude application of last clear chance doctrine. Vehicle Code § 560(a).

Donahue, Richards, Rowell & Gallagher and George E. Thomas, all of Oakland, for appellants.

Elmer P. Delany, Martin J. Jarvis, San Francisco, for respondent.

DOOLING, Justice.

[1] Plaintiff had judgment for personal injuries after a jury trial and defendants appeal. Taking the evidence most favorable to plaintiff, as is our settled duty, plaintiff with his wife approached the intersection of Union Street and Santa Clara Avenue in the City of Alameda. They were walking on the sidewalk on Union

Street, plaintiff somewhat in advance of his wife, and when plaintiff arrived at the curb he looked to his left and saw the defendants' bus approaching on Santa Clara Avenue about 215 feet away. He took his eyes off the bus and stepped into the unmarked crosswalk leading across Santa Clara and had taken about six steps, without again looking toward the bus, when he was struck by it. The driver of the bus testified that he saw plaintiff from the time that the bus was from 100 to 125 feet from the crosswalk.

[2] Where a pedestrian looks in the direction of approaching traffic before stepping into the street and sees a vehicle approaching, if he misjudges its distance or its speed and proceeds, without again looking, into the street and is there struck by the vehicle the question whether or not he was guilty of negligence is one for the jury. White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086; Ladas v. Johnson's B. & W. Taxicab Co., 43 Cal.App.2d 223, 229, 110 P.2d 449; Sanker v. Humborg, 48 Cal.App.2d 203, 119 P.2d 431; Goodwin v. Foley, 75 Cal.App.2d 195, 170 P.2d 503; other cases are collected in Scott v. City & County of San Francisco, 91 Cal.App.2d 887, at page 890, 206 P.2d 45.

[3,4] Plaintiff and his wife testified that he was at all times in the unmarked crosswalk. If so the duty was cast on the driver of the bus to yield to the plaintiff. Vehicle Code, § 560(a). Whether in the failure to do so defendants were guilty of negligence was certainly a jury question. Plaintiff at one point testified that he last saw the bus after taking five or six steps into the street but on cross-examination he clearly testified that he observed the bus while on the sidewalk, then immediately stepped into the street and did not look toward the bus again after leaving the curb. The jury was entitled to accept this version.

[5-7] The jury was instructed on the doctrine of last clear chance. Defendants' witnesses testified that plaintiff ran diagonally into the intersection in front of the bus. They argue that these facts are the only ones to which the last clear chance instruction could apply and that the time involved under that testimony was too brief for a *clear* chance to avoid the injury. The last clear chance instruction was not limited to the facts shown by defendants' witnesses. On the evidence "most favorable to plaintiff's case", Bonebrake v. McCormick, 35 Cal.2d 16, 19, 215 P.2d 728, 729, he observed the bus 215 feet away and then without looking toward it again walked in the crosswalk to the point where he was struck. Under the cases above cited this left a jury question as to plaintiff's negligence. If the jury believed plaintiff's testimony, as we must assume, and found plaintiff guilty of negligence on that testimony then they might also find that the bus driver, observing a pedestrian proceeding across the path of the bus without looking toward it should have realized that he was unaware of his peril and taken steps to avoid striking him. Unawareness of peril may bring the last clear chance doctrine into play, and this rule has been applied to negligently inattentive pedestrians crossing the path of vehicles over and over again. Center v. Yellow Cab Co., 216 Cal. 205, 13 P.2d 918; Meincke v. Oakland Garage, Inc., 11 Cal.2d 255, 257-258, 79 P.2d 91; Cooper v. Smith, 209 Cal. 562, 565-566, 289 P. 614; Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 707 et seq., 242 P. 703; Lee v. Market Street Ry. Co., 135 Cal. 293, 67 P. 765; Ladas v. Johnson's B. & W. Taxicab Co., supra, 43 Cal.App.2d 223, 229, 110 P.2d 449; Bailey v. Wilson, 16 Cal.App.2d 645, 61 P.2d 68; Olson v. Combs, 1 Cal.App. 2d 260, 36 P.2d 708; Baldock v. Western Union Tel. Co., 127 Cal.App. 141, 15 P.2d 199; Moore v. Bishop, 113 Cal.App. 25, 295 P. 580; Bence v. Teddy's Taxi, 112 Cal. App. 636, 642, 297 P. 128; Atkins v. Bouchet, 86 Cal.App. 294, 260 P. 828; O'Farrell v. Andrus, 86 Cal.App. 474, 482, 260 P. 957.

The fact that plaintiff's negligence, if the jury found him negligent, was continuous to the time of the injury does not prevent the application of the last clear chance doctrine. It is pointed out in many of the cases above cited that in every case of negligent unawareness plaintiff's negligence continues to the very time of the injury, but if the elements of the last clear chance

doctrine are present that rule none the less applies. Girdner v. Union Oil Co., 216 Cal. 197, 203-204, 13 P.2d 915; Center v. Yellow Cab Co., supra, 216 Cal. 205, 207-208, 13 P.2d 918; Paolini v. City & County of S. F., 72 Cal.App.2d 579, 586-587, 164 P.2d 916; Gillette v. City of San Francisco, 58 Cal.App.2d 434, 439-441, 136 P.2d 611; Bailey v. Wilson, supra, 16 Cal.App.2d 645, 649-650, 61 P.2d 68; Baldock v. Western Union Tel. Co., supra, 127 Cal.App. 141, 144, 15 P.2d 199.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.



99 Cal.App.2d 328

Ex parte BREES.

Cr. 2214.

District Court of Appeal, Third District, California.

Sept. 1, 1950.

Proceedings in the matter of the application of Leonard E. Brees, for a writ of habeas corpus to have portion of judgment declaring petitioner to be a habitual criminal adjudged void and without effect. The District Court of Appeal, Adams, P. J., held that petitioner had not served separate prison terms after he had been twice convicted for separate robberies and was improperly adjudged to be a habitual criminal, but he was not entitled to be released where he had not served term imposed for latest robbery conviction.

Writ discharged.

1. Habeas corpus ⇐29

Habeas corpus could be resorted to for purpose of determining that portion of judgment declaring petitioner to be a habitual criminal was void.

2. Criminal law ⇐1202(1)

Where petitioner was convicted and sentenced for a second robbery offense in 1943 and his imprisonment term therefor was to begin after termination of sentence imposed in 1939, and in 1947, adult authority fixed his terms to effect discharge before sentence imposed in 1943 was commenced, he had not served a separate term of imprisonment for his second conviction, within habitual criminal statute, and that portion of judgment adjudicating him an habitual criminal after conviction for robbery in 1948 was void. Pen.Code, § 644.

Richard J. Lawrence, Sacramento, for petitioner.

Fred N. Howser, Attorney General, Gail A. Strader, Deputy Attorney General, for respondent.

ADAMS, Presiding Justice.

Petitioner is incarcerated in what is generally known as the Folsom prison, by reason of a conviction in the Superior Court of Los Angeles County of first-degree robbery, the judgment of that court providing for his imprisonment for the term prescribed by law and adjudging him to be an habitual criminal.

Petitioner in this proceeding does not claim that he is entitled to be released from prison, but does seek a decision that the portion of the judgment declaring him to be an habitual criminal is void and without effect, and that he should be dealt with, hereafter, as a prisoner who has not been so adjudged.

[1] That habeas corpus may be resorted to for the purpose of securing such relief was determined in Re McVickers, 29 Cal. 2d 264, 270, 176 P.2d 40. Here the facts conceded by respondent to be true are that on October 6, 1939, petitioner was convicted in the Superior Court of Los Angeles County of robbery of the first degree, and sentenced to San Quentin for the term prescribed by law. He was thereafter paroled and while on parole was, on February 24, 1943, again convicted of robbery

in Los Angeles County and sentenced for the term prescribed by law, it being decreed that sentence was "to run consecutively with any unexpired term defendant may be required to serve." Petitioner was thereupon remanded to the custody of the warden of San Quentin prison, the action granting conditional parole having been rescinded in January, 1943, prior to the conviction of February 24 of 1943. In August, 1944, Brees was granted a special service parole and after his honorable discharge from the service the Adult Authority, on August 1, 1947, fixed his "'terms" to effect discharge on August 8, 1947. On June 3, 1948, the sentence under which he is now serving was imposed.

[2] From the foregoing it becomes apparent that the term of imprisonment decreed on February 24, 1943, which was to be served after the termination of the term imposed on October 6, 1939, was never commenced, and that during the period when he was incarcerated after the conviction of February 24, 1943, he was, in fact, serving under the term imposed by the judgment of October 6, 1939.

Section 644 of the Penal Code provides, not only that to constitute one an habitual criminal he must be twice or more convicted of offenses there enumerated upon charges separately brought and tried, but that he shall have served separate prison terms therefor. It is conceded by respondent that petitioner did not serve a separate term of imprisonment for his second conviction, and that the adjudication that he is an habitual criminal does not find support in the record. See People v. Gump, 17 Cal. App.2d 221, 224, 61 P.2d 970.

For such benefit as may accrue to petitioner it is therefore adjudged that the portion of the judgment of June 3, 1948, which declared petitioner to be an habitual criminal is of no force and effect, and that in fixing petitioner's term of imprisonment and in determining his eligibility for parole the Adult Authority shall disregard the prior adjudication that he is an habitual criminal. In re Kingsbury, 74 Cal.App.2d 959, 963, 170 P.2d 82.

It appearing, however, that petitioner is not entitled to his release from the imprisonment imposed after his conviction on June 3, 1948, the writ of habeas corpus heretofore issued is discharged and petitioner is remanded to the custody of the warden of the California State Prison at Folsom.

VAN DYKE and PEEK, JJ., concur.



99 Cal.App.2d 348

SHOOK v. PEARSON et al.

Civ. 4069.

District Court of Appeal, Fourth District, California.

Sept. 7, 1950.

Action by Marvin Shook against Roland Pearson, doing business as Airplane Vapor Spray Company, and others, to recover unpaid commissions under exclusive agency contract and general and special damages for breach of contract to manufacture and sell airplanes to plaintiff. The Superior Court of Tulare County, Frank Lamberson, J., sustained a demurrer to the amended complaint without leave to amend and entered a judgment of dismissal, and plaintiff appealed. The District Court of Appeal, Griffin, Acting P. J., held that complaint stated causes of action for relief sought in both counts and that neither count was subject to general demurrer for failure to allege the items of special damages claimed, but that cause of action for breach of contract was subject to special demurrer for uncertainty in so far as it related to special damages.

Judgment reversed.

1. Principal and agent ⇐89(5)

Complaint stated a cause of action for unpaid commissions under oral exclusive agency contract.

2. Sales ⇐411

Complaint stated a cause of action for general damages for breach of oral

agreement to manufacture airplanes in accordance with plaintiff's specifications and sell them to plaintiff for specified prices.

3. Pleading ⇐204(1)

A demurrer which attacks entire pleading should be overruled if one of the counts therein is not vulnerable to the objection.

4. Pleading ⇐204(1)

If any count or cause of action in a complaint setting up several counts or causes of action is good as against demurrer, a judgment of dismissal for insufficiency of the complaint cannot be sustained.

5. Damages ⇐142

Failure to allege items of special damages in count seeking recovery of general and special damages for breach of contract to sell airplanes did not render another count of complaint for unpaid commissions under exclusive agency contract vulnerable to general demurrer for uncertainty.

6. Damages ⇐157(6)

Where plaintiff seeks recovery of general damages in one count, the fact that he also seeks special damages does not preclude recovery of general damages.

7. Damages ⇐142

Special damages must be specially set forth in complaint and allegation that by reason of breach of contract plaintiff has suffered special damages in a named sum is not sufficient.

8. Damages ⇐142

The facts as to special damages and the amount of such damages must be stated with particularity.

9. Damages ⇐142

Where special damages depend on proof of different circumstances from the general damages, the grounds of such claim should be alleged.

10. Damages ⇐142

Recovery may be had for damages not covered by the general liability for breach of contract only where the facts are specially pleaded showing that the injury was one reasonably within the contemplation of the parties and that the conditions likely to result in the special injury complained of were brought to the attention of defendant at time contract was made.

11. Pleading ⇐205(1)

Failure to allege items of special damages in count seeking recovery of general and special damages for breach of contract to manufacture airplanes according to plaintiff's specifications and sell them to plaintiff did not render that count of complaint vulnerable to general demurrer.

12. Pleading ⇐209

In action to recover general damages for breach of contract to manufacture and sell airplanes to plaintiff and special damages for expenditures made in obtaining contracts to sell and deliver such airplanes to others, complaint which did not state what items went to make up the sums allegedly expended or that they were necessarily expended with defendants' knowledge or within the reasonable contemplation of the parties was vulnerable to special demurrer for uncertainty in so far as it related to special damages.

David S. Folsom, Corcoran, for appellant.

Wild, Carlson & Reeve and Robert M. Barnard all of Fresno, for respondents.

GRIFFIN, Acting Presiding Justice.

The trial court made an order of dismissal after sustaining defendants' demurrer to plaintiff's fourth amended complaint without leave to amend. Plaintiff appealed.

The first cause of action alleges that defendants, in May, 1948, in consideration of plaintiff's agreement to act as sales agent for them, entered into an oral contract whereby defendants granted plaintiff the exclusive agency for the marketing of defendants' products; that plaintiff performed all of the terms and conditions of the agreement on his part; and that defendants agreed to pay plaintiff 10 per cent of the list price of such products sold during

the term of such exclusive agency (such list was attached to the complaint and referred to as Exhibit A). It was then alleged that the contract was terminated in October, 1948, and during such term of exclusive agency there accrued to plaintiff, for his unpaid commissions, the sum of $2015.

As a second cause of action plaintiff alleges that on October 1, 1948, plaintiff and defendants entered into an oral agreement whereby defendants agreed to manufacture for plaintiff, in accordance with plaintiff's specifications, certain airplanes known as "dusters" and "spray rigs" and to sell to plaintiff the entire production thereof for certain alleged specified prices; that plaintiff paid defendant $3,000 to apply on the purchase price, and in reliance on said agreement, plaintiff entered into binding contracts to sell and deliver seven dusters and spray rigs; that these contracts were approved and confirmed by defendants; and that plaintiff, in relying upon defendants' agreement, expended $1182 in obtaining said contracts and in anticipation of additional contracts to be obtained in the future for said airplanes. The complaint then avers that plaintiff was unable to specify the items of expenditure contained in said sum of $1182; that in January, 1949, defendants notified plaintiff that they would not deliver or sell to plaintiff any of the airplanes contracted for at the price agreed upon, and demanded of plaintiff a higher price; that plaintiff performed his part of the agreement and was able and willing to accept delivery at the contract price and pay the balance of the purchase price; that by reason of the premises plaintiff suffered damages in the sum of $15,000, plus $1182 special damages heretofore mentioned, in addition to the $2015 claimed as damages in the first count.

Defendants demurred to both causes of action only on the ground that the facts stated were not sufficient to constitute a cause of action, and on the ground of uncertainty. The trial court made a general order sustaining the demurrer to plaintiff's fourth amended complaint, without leave to amend.

Plaintiff does not complain that he was not granted further time to amend. He requested that if the demurrer be sustained, it be sustained without leave to amend so that the issue here involved could be squarely presented to the appellate court. He states in his brief that there is only one issue on this appeal, i. e., whether, under the second cause of action and in particular the portion alleging special damages in the sum of $1182, in the face of the demurrer for uncertainty, plaintiff was required to allege how or in what manner or for what purpose plaintiff expended that sum.

Defendants' position is that a demurrer for uncertainty as to this count was proper and that plaintiff, having failed to allege the items of damage, the demurrer was properly sustained and that where special damages are sought, it is necessary to plead the facts which would show that the pleader has sustained damages of the character alleged, citing Hamberger-Polhemus Co. v. Hind, Rolph & Co., 81 Cal.App. 624, 627, 254 P. 615; and Casaretto v. DeLucchi, 76 Cal.App.2d 800, 174 P.2d 328.

Plaintiff claims otherwise and argues that since the total amount claimed to have been expended was alleged, it was not necessary to allege the various items making up such total, but if defendants desired such information they could have demanded a bill of particulars if they were so advised, citing sec. 454, Code Civ. Proc.; that the failure to supply such detailed information in the complaint may not be subject to attack by demurrer for uncertainty and plaintiff's refusal to so amend would not support an order sustaining a demurrer without leave to amend, citing Gaddis v. Grant, 39 Cal.App. 437, 179 P. 410; Henning v. Clark, 46 Cal.App. 551, 189 P. 714; Jacobson v. Oakland Meat & Packing Company, 161 Cal. 425, 119 P. 653, Ann.Cas. 1913B, 1194; and Brea v. McGlashan, 3 Cal.App.2d 454, 459, 39 P.2d 877. Section 454 of the Code of Civil Procedure applies principally to the pleading of accounts. 1 Cal.Jur. p. 157, sec. 18; 21 Cal.Jur. p. 69, sec. 43.

[1, 2] From an examination of the amended complaint a cause of action is stated against defendants both as to the first and second counts, as applied to the general damages sought. This fact is not questioned in the briefs.

[3-10] It is the general rule, as adopted by this court in Bacon v. Wahrhaftig, 97 Cal.App.2d 599, 218 P.2d 144, (hearing in the Supreme Court denied), that a demurrer which attacks an entire pleading should be overruled if one of the counts therein is not vulnerable to the objection, citing Lord v. Garland, 27 Cal.2d 840, 853, 168 P.2d 5. If any count or cause of action in a complaint setting up several counts or causes of action is good as against demurrer, a judgment of dismissal for insufficiency of the complaint cannot be sustained. Armstrong v. Adams, 102 Cal.App. 677, 283 P. 871. The ruling on the general demurrer as to the first count should be reversed. The same is true as to the second count pertaining to the general demurrer, insofar as it relates to the general damages claimed, unless plaintiff's refusal to further amend as to that count in respect to the claimed special damages would preclude such a ruling. The general rule is that when a plaintiff seeks the recovery of general damages in one count, the fact that he also seeks special damages does not preclude the recovery of general damages. Hamer v. Ellis, 40 Cal. App. 57, 180 P. 30; 8 Cal.Jur. 749, sec. 19. A defendant cannot be presumed to be aware of the special damage resulting from his act, and therefore, in order to prevent a surprise on him, this sort of damage must be specially set forth in the complaint, or the plaintiff will not be permitted to give evidence of it. 8 Cal.Jur. p. 889, sec. 127. And an allegation that by reason of the breaches of contract the party has suffered special damages in a named sum, is not enough. Judson Manufacturing Co. v. Lutge, 174 Cal. 566, 163 P. 1017; 8 Cal. Jur. 891, sec. 128. The facts as to special damages must be stated with particularity. The amount of such damages must be stated with particularity. The amount of such damages must be given, and the means of occasioning them must be set forth. When such damages depend on proof of different circumstances from the general damages, the grounds of each claim should be alleged. 8 Cal.Jur. 890, sec. 127. It is a well recognized rule of law that recovery may be had for damages not covered by the general liability for breach of contract, only where the facts are specially pleaded showing that the injury was one reasonably within the contemplation of the parties. Cohn v. Bessemer G. E. Co., 44 Cal.App. 85, 89, 186 P. 200; Chitty on Pleading, 410, 411. To this general rule must be added the statement that: "to cover the requirements in such a case * * * there must also be pleaded facts which show that the conditions likely to result in the special injury complained of *were brought to the attention of the defendant at the time the contract was made.*" (Italics ours.) Cohn v. Bessemer G. E. Co., supra, 44 Cal.App. at page 90, 186 P. at page 203.

In Mitchell v. Clarke, 71 Cal. 163, 11 P. 882, 60 Am.Rep. 529, it was held that evidence of special damages is inadmissible, without an averment in the complaint of special circumstances entitling the plaintiff thereto, *of which the defendant had knowledge at the time of entering into the contract.* The purpose of such averment is that such special damages, if they have occurred, will give notice to the defendant thereof so that he may be prepared to contest them. While it is here alleged that in reliance upon defendants' agreement plaintiff made binding contracts with others to sell and deliver dusters and spray rigs and that these contracts were known to and approved by defendants, there is wholly lacking the allegation that defendants had knowledge of or in any way had notice of the fact that plaintiff was expending any sum in obtaining said contracts or in anticipation of additional contracts. It likewise is not specially averred what items went to make up the sum claimed to have been expended, or that they were necessarily expended with the knowledge of defendants or within the reasonable contemplation of the parties. In fact, the allegation is that plaintiff was "*unable* to specify the items of expenditure." Counsel

for plaintiff freely concedes, according to the record before us, "that there is nothing further that I can add to my complaint."

[11, 12] The conclusion must be then that the court erroneously sustained the general demurrer as to both counts pertaining to the allegations of general damage, and that the judgment of dismissal as to those counts must be reversed. The sustaining of the special demurrer for uncertainty was proper insofar as it related to the special damages.

Judgment reversed.

MUSSELL, J., concurs.

BARNARD, J., being disqualified, did not participate herein.



99 Cal.App.2d 330

HOBSON v. MUTUAL BENEFIT HEALTH & ACCIDENT ASS'N, Inc.

Civ. 14396.

District Court of Appeal, First District, Division 1, California.

Sept. 5, 1950.

Ivan B. Hobson sued the Mutual Benefit Health & Accident Association, Inc., on a health and accident insurance policy. From a judgment of the Superior Court in and for the County of Alameda, James R. Agee, J., on a jury's verdict for plaintiff in an unsatisfactory amount, plaintiff appealed. The District Court of Appeal, Bray, J., held that a provision in the policy that monthly total accident disability benefits, specified in a previous clause, should be reduced 10% when insured became 56 years old and further reduced in equal amount with each additional attained year of age to and including 60, did not modify such clause or, if it did, was repugnant thereto and must be disregarded.

Judgment reversed with instruction.

1. Evidence ⇐405(1)

An accident insurance policy, providing for payment of $100 monthly total disability benefits so long as insured lived and suffered total loss of time, and for 10% reduction of such benefits when insured became 56 years old, with further reduction of equal amount with each additional attained year of age to and including 60, was not ambiguous, so that parol evidence was unnecessary and inadmissible for interpretation thereof.

2. Insurance ⇐530

A provision in accident insurance policy that $100 monthly total disability benefits, provided for in previous clause during insured's lifetime, should be reduced 10% when he became 56 years old, with further reduction of equal amount with each additional attained year of age to and including 60, did not modify such previous clause and require such reductions when insured, who was injured before attaining age of 56, reached ages of 56 to 60, inclusive, but policy entitled him to $100 monthly so long as he lived and was wholly disabled, where he was under 56 years old at time of injury.

3. Insurance ⇐146(3)

Where two constructions of insurance policy are reasonable, that most favorable to insured should be adopted.

4. Insurance ⇐146(2)

An insurance policy should be read as a layman would read it, not as an attorney or insurance expert might read it.

5. Insurance ⇐530

A provision of accident insurance policy that monthly total disability benefits should be reduced 10% when insured became 56 years old and equal amount with each additional attained year of age to and including 60 was repugnant to previous clause, providing for payment of fixed monthly indemnity so long as insured lived and suffered total loss of time, and must be disregarded, if it modified such previous clause.

6. Insurance ⇐530

Use of words, "as herein limited and provided," in caption of accident insurance

policy, and words "subject however to all the provisions and limitations hereinafter contained" in insuring provision on first page thereof, did not connect additional provision for reduction of monthly total disability benefits by stated percentages when insured reached certain ages with preceding clause providing for payment of such benefits so long as insured lived and suffered total loss of time, but reduction clause could not stand.

7. Contracts ⇐162

The first of two repugnant clauses of agreement must be received and later clause rejected.

8. Insurance ⇐146(3)

Where two clauses of insurance policy are repugnant, clause affording most protection to insured will control and be given effect.

9. Contracts ⇐162

In construing contract, proviso utterly repugnant to and irreconcilable with body of contract will be rejected and clause irreconcilable with previous clause and repugnant to general purpose and intent of contract will be set aside.

Robert E. Nisbet, Oakland, for appellant.

Horace T. Beverly, Leonard S. Lurie, San Francisco, for respondent.

Fred N. Howser, Attorney General, T. A. Westphal, Jr., Deputy Attorney General, Harold B. Haas, Deputy Attorney General, for Wallace K. Downey, as Insurance Com. of California, amici curiæ.

BRAY, Justice.

In an action upon a health and accident insurance policy issued by defendant to plaintiff and tried before a jury, the jury found in favor of plaintiff in the sum of $3,730. Plaintiff appealed, on the ground that the amount awarded was less than he was entitled to under the terms of the policy.

Questions Presented.

Were the terms of the policy ambiguous and hence extrinsic evidence should have been admitted to interpret them, and if not, was the court's interpretation correct?

Facts.

The facts are not disputed. On December 2, 1941, defendant issued plaintiff, who was then 53 years of age, a "Lifetime Income Protection Policy" which provided "Benefits for Loss of Life, Limb, Sight or Time, by Accidental Means, or Loss of Time by Sickness as Herein Limited and Provided." Its terms as they affect this litigation will be set forth hereafter. In December, 1942, plaintiff was injured. The jury found that plaintiff "was wholly and continuously disabled by bodily injuries resulting directly and independently of all other causes and through purely accidental means from December 23, 1944, to and including May 22, 1949." This finding is not challenged. Plaintiff became 56 years of age on September 18, 1944. Defendant paid plaintiff $100 per month from the date of the accident until December, 1944, and then stopped payment. The record is not clear as to whether this was because defendant believed plaintiff had fully recovered, or because plaintiff would not accept payments at a reduced monthly sum. This action was then brought. At the trial defendant took the position, as it does now, that the policy provided that when the insured became 56 years of age the monthly payments were reduced 10% each year until the insured should become 60, and thereafter would be $50 per month. Plaintiff's position was and is (1) that the policy provides for payment of $100 per month without reduction; (2) that if the policy is construed as contended by defendant, then the policy is repugnant to the California Insurance Code; and (3) that at worst, the policy is ambiguous and therefore the court erred in refusing to permit plaintiff to introduce parol evidence to explain the ambiguity. The trial court took the position that the policy was not ambiguous, construed it in accordance with defendant's contention, and so instructed the jury. The amount awarded by the jury was in accordance with this construction.

Terms of Policy.

The terms relevant here follow: The association "Does Hereby Insure Ivan B. Hobson * * * against loss of life, limb,

sight or time, resulting directly and independently of all other causes, from bodily injuries sustained during any term of this Policy, through purely Accidental Means (Suicide, sane or insane, is not covered), and against loss of time beginning while this Policy is in force and resulting from disease contracted during any term of this Policy, respectively, subject, however, to all the provisions and limitations hereinafter contained." After the words "Does Hereby Insure," on either side of the policy appears in large type the following:

"Monthly Benefits $100.00	Death Benefit $2,500
"Maximum Monthly Benefits $200.00	Maximum Death Benefit $5,000"

On the top of page 2, is part D, a crucial clause in this case. The clause reads:

"Part D. Total Accident Disability Benefits For Life

"If such injuries, as described in the Insuring Clause, do not result in any of the above mentioned specific losses but shall wholly and continuously disable the Insured for one day or more, the Association will pay a monthly indemnity at the rate of One Hundred ($100.00) Dollars per month so long as the Insured lives and suffers said total loss of time."

On the third page, under the heading "Additional Provisions" appears the following: "(c) The term of this policy begins at 12 o'clock noon, Standard Time, on date of issue to the Insured against accident and on the thirty-first day thereafter against disease and ends at 12 o'clock noon on date any renewal is due. *No reduction in the benefits of this policy shall be made during the lifetime of the Insured on account of age except in Parts D and K which shall be reduced ten per cent when the Insured is or becomes fifty-six years of age, with further reduction of an equal amount effective with each additional attained year of age to and including age sixty.*" The italicized portion of this clause is in heavier type than the first sentence.

Interpretation.

[1, 2] The basic question is the effect of this last clause (which for convenience will be called "the reduction clause") on "Part D" which provides for indemnity at $100 per month *for life*. The trial court was correct in its finding that the policy did not require parol evidence for its interpretation, and therefore, that such evidence was inadmissible. However, the court was in error in its construction of the disputed clause. It held that additional provision (c) modified part D, so that when an insured who had been injured prior to his attaining age 56, reached that age, the $100 monthly payments would be reduced to $90; at age 57 they would be reduced to $80, and so on until from age 60 on they would be $50.

[3] In construing an insurance policy it must be borne in mind that where two constructions are reasonable, that which is most favorable to the insured should be adopted. Frenzer v. Mutual Ben. H. & A. Ass'n, 27 Cal.App.2d 406, 416, 81 P.2d 197; Island v. Fireman's Fund Indemnity Co., 30 Cal.2d 541, 548, 184 P.2d 153, 173 A.L.R. 896; 14 Cal.Jur. 443; Norton v. Farmers A. Inter-Ins. Exch., 40 Cal.App.2d 556, 566, 105 P.2d 136.

[4] The policy should be read as a layman would read it and not as an attorney or an insurance expert might read it. From an examination of the policy it is obvious that a layman would reasonably conclude that it provided that were he less than 56 years of age at the time of injury, he would receive $100 per month as long as he lived and was wholly and continuously disabled. Were he 56 years of age when injured, he would receive $90 per month as long as the disability continued; were he 57 years of age when injured he would receive $80 per month for such period, and were he 60 years of age or older at the time of injury, he would receive $50 per month for such period.

A layman reading the policy would first be struck with the statement on the first page of the policy, in bold type and large figures "Monthly Benefits $100.00 Maxi-

mum Monthly Benefits $200.00." Then in large letters at the top of page 2 he would see "Part D. Total Accident Disability Benefits For Life" followed by the paragraph stating that he would be paid "a monthly indemnity at the rate of One Hundred ($100.00) Dollars per month so long as the Insured lives and suffers said total loss of time." In view of these eye-catching positive statements, his interpretation of the reduction clause would undoubtedly be as we have above set forth.

Cases like Taff v. Atlas Assur. Co., 58 Cal.App.2d 696, 137 P.2d 483, and Kahn v. Royal Indemnity Co., 39 Cal.App. 180, 178 P. 331, cited by defendant, which hold that an assured is bound by the terms of the policy he accepts and cannot complain that he did not read the policy, are not in point. This is not a case of the policy not being read, but one of the interpretations a person reading the policy would reasonably give it.

[5] If the court's interpretation of the policy were correct, then additional provision (c) is repugnant to part D, and under well-established principles of insurance law must be disregarded. Part D clearly states that the indemnity to be paid is $100 per month as long as the insured lives, and the disability continues. There is nothing in part D or the insuring clause or clauses that modifies this statement in any way.

The language in Frenzer v. Mutual Ben. H. & A. Ass'n, supra, 27 Cal.App.2d 406, 81 P.2d 197, applies here. There the court was discussing the repugnancy of part K of that policy to part A. Of part A the court said in 27 Cal.App. at page 415, 81 P.2d, at page 202: "It purports to be a complete method of dealing with the specific losses there mentioned. It does not refer to Part K or to any portion of the policy for clarification." Substitute part D and additional provisions (c) of our policy for part A and part K and the quotation fits exactly.

[6] If additional provision (c) attempts to modify this positive statement it is repugnant to it. That the clauses are repugnant to each other is well shown by the case of Boillot v. Income Guaranty Co., 231 Mo.App. 531, 102 S.W.2d 132. In that case the contract in part B called for a monthly indemnity "at the rate of the monthly indemnity hereinbefore specified for the period of such continuous total disability." 102 S.W.2d, at page 144. Additional provision N. contained a reduction clause. The court said in 102 S.W.2d at page 145: "The latter clause of additional provision N whereby it undertakes to reduce the amount of such monthly indemnities from $100 to $66.-66⅔ per month is clearly repugnant to the provisions of part B of the policy, which precedes it and fixes the amount of the monthly indemnity at $100. By part B, the agreement to pay is unequivocal, as likewise is the amount agreed to be paid monthly. * * * The latter clause of additional provision N, under such circumstances, cannot stand. Under such circumstances, part B governs." The Boillot case is an answer to defendant's contention that the use of the words "as Herein Limited and Provided" in the caption of the policy in question here, as well as "subject, however, to all the provisions and limitations hereinafter contained" set forth in the insuring provision on the first page of our policy, ties in additional provision (c) to part D. In the Boillot case the policy used the language that it provided indemnity for loss of time by accidental means "to the extent herein provided", 102 S.W.2d at page 144, and insured plaintiff "subject to all of the provisions and limitations thereinafter contained in the policy", 102 S.W.2d at page 144. Nevertheless, the court there held that the reduction clause could not stand.

[7-9] There are three legal principles which apply to this situation: (1) Where two clauses of an agreement are repugnant, "the first shall be received and the latter rejected." 12 Am.Jur. 778, § 243; Burns v. Peters, 5 Cal.2d 619, 55 P.2d 1182. (2) That clause "which affords the most protection to the insured will control and be given effect." 1 Couch, Cyclopedia of Insurance Law, 369; Frenzer v. Mutual Ben. H. & A. Ass'n, supra, 27 Cal.App.2d 406, 81 P.2d 197. (3) "* * * a proviso which is utterly repugnant to the body of the contract and irreconcilable with it will be rejected; likewise, a subsequent clause irreconcilable with a former clause and re-

pugnant to the general purpose and intent of the contract will be set aside." Jones v. Pennsylvania Casualty Co., 140 N.C. 262, 52 S.E. 578, 579, 5 L.R.A.,N.S., 932, 111 Am. St.Rep. 843.

Defendant relies on language in Security T. & S. Bk. of San Diego v. New York Indem. Co., 220 Cal. 372, 31 P.2d 365, which supports his position that the additional provision should be given full effect. The essential facts in that case were that plaintiff bank brought an action on an indemnity bond against the indemnity company to recover on a loan which it had made on the basis of forged documents. Insuring clause B of the policy covered any losses of property through theft. Section 2(a), a later provision in the policy, provided that the bond did not cover "Any loss effected directly or indirectly by means of forgery. * * *" The Supreme Court found that theft was present, but reversed a judgment in favor of plaintiff, basing its reversal on Section 2(a). The court said in 220 Cal. at page 377, 31 P.2d at page 368: "We are unable to ascribe to the reasoning which suggests that, because the general coverage clause B insures against all thefts, the exception or limitation clauses excluding losses resulting from forgery or growing out of a loan, must be so construed as to exclude such losses only when there is an absence of the elements of theft. To so interpret the bond would be novel, to say the least, and would serve to nullify the exception or limitation clauses in important particulars. The very purpose of exception or limitation clauses is to exclude risks otherwise covered by general coverage clauses." It does not appear whether the makeup of the policy there was such as here as to give an impression that the coverage was unlimited. However, life insurance policies are different than indemnity bonds. The latter are given generally to business men who are trained and accustomed to read and consider all their provisions, whereas insurance policies are sold to the general public who are not so trained, and who are more likely to consider only the obvious provisions. The rule applicable to insurance policies is well stated in State ex rel. Mills Lumber Co. v. Trimble, 327 Mo. 899, 908, 39 S.W.2d 355, 358 (quoting from Mathews v. Modern Woodmen, 236 Mo. 326, 343-344, 139 S.W. 151, Ann.Cas.1912D, 483): "'Policies are contracts, elaborately and shrewdly prepared in advance by calculating and astute experts. They are tendered, ready-made, to and accepted out of hand by plain people, the uninformed and unlearned, the unwary and confiding. Insurance policies swarm with intricate technical provisions, stipulations, exceptions, conditions, provisos, limitations, hedging liability about and looking to its avoidance. It is not singular, then that courts incline to pit judicial astuteness against the astuteness of the policy maker; the latter planting forfeitures in ambush or open, and the former striving to avoid them.'"

In view of our holding that the above is a reasonable interpretation of the provisions of the policy as they appear upon its face, it becomes unnecessary to consider the contentions of plaintiff and of the attorney general raised in the amicus curiæ brief, as to whether the form of the policy, that is, the sizes of the type and the physical relationship of the various paragraphs, complies with the Insurance Code and the rules of the Insurance Commissioner. If the insured had been 56 years of age or over when injured, these matters would become important on the question of whether the reduction clause would be illegal, but are not necessary to be determined here.

The judgment is reversed. Inasmuch as defendant has not appealed from the judgment based upon the verdict to the effect that plaintiff was wholly disabled through accidental means for the period from December 23, 1944, to May 22, 1949, the trial court is instructed to enter judgment in favor of plaintiff in the sum of $100 per month for the said period of disability, together with interest and costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

99 Cal.App.2d 346

DESERT CLUB et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 18039.

District Court of Appeal, Second District, Division 1, California.

Sept. 7, 1950.

Proceeding by the Desert Club, a corporation, and Edward Glick against the Superior Court of the State of California in and for the County of Los Angeles, for review of the action of the Superior Court appointing a provisional director of petitioning corporation pending outcome of litigation. The District Court of Appeal, Drapeau, J., held that action of Superior Court in failing to make findings and conclusions of law, and rendering decision upon affidavits only and not upon evidence, were errors in exercise of jurisdiction and could not be annulled on certiorari.

Writ denied.

1. Certiorari ⇐4, 28(1)

Writ of certiorari or review is available only if there is an excess of jurisdiction on part of an inferior tribunal, no right of appeal and no other plain, speedy and adequate remedy. Code Civ.Proc. § 1067.

2. Appeal and error ⇐101(1)

Order by Superior Court appointing a provisional director of a corporation pending litigation so as to meet immediate needs of corporation was an appealable order. Code Civ.Proc. § 963.

3. Certiorari ⇐29

Action of Superior Court in failing to make findings and conclusions of law and rendering decision on affidavits only and not upon evidence, were errors in exercise of jurisdiction and could not be annulled on certiorari. Code Civ.Proc. § 1067.

Harold D. Geffen, Beverly Hills, for petitioners.

H. W. Kennedy, County Counsel, William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Julius Mackson, Los Angeles, for Frank Stone, real party in interest.

DRAPEAU, Justice.

The Desert Club is a California corporation, with but two directors. The company is authorized to have three directors, but has no third director qualified to act as such. Petitioner Edward Glick and Frank Stone are the directors, and each holds an equal amount of stock.

These two parties have been unable to agree as to the management of the affairs of the corporation, or the appointment of a third director. So one of them brought this proceeding in the Superior Court, under Section 819 of the Corporations Code, and prayed the court to appoint an impartial person to act as a director.

The matter was heard by the court on order to show cause and affidavits. No evidence was taken, and no findings were made. The court ordered the appointment of a provisional director.

The other party, owner of stock and director, petitions for a writ of review, upon the ground that no trial was had, the issues being decided upon affidavits only, and there being no findings of fact or conclusions of law.

No trial procedure is prescribed to carry out the provisions of Section 819 of the Corporations Code. The section was enacted in 1947, and was based upon former Civil Code, sec. 404, subd. C, enacted in 1931. No cases have been called to the attention of the court relative to the procedure to be followed by the Superior Court in matters arising under this statute.

Counsel for Frank Stone now concedes that a trial in the usual manner provided by our law was necessary. It is suggested, however, that the court has the power to appoint a provisional director—a director *pendente lite*—to meet the immediate needs of the corporation.

[1] These matters are not to be reviewed in this proceeding. The Writ of Certiorari, or Review, Code Civ.Proc. sec. 1067, is available in this state only if the following conditions are present: (1) an

excess of jurisdiction on the part of an inferior tribunal; (2) no right of appeal; and (3) no other plain, speedy, and adequate remedy. Redlands High School Dist. v. Superior Court, 20 Cal.2d 348, 125 P.2d 490; Shrimpton v. Superior Court, 22 Cal.2d 562, 139 P.2d 889.

[2] The order complained of was an appealable order. Code Civ.Proc. sec. 963.

[3] Decision of the case in the Superior Court upon affidavits only, and not upon evidence, and the failure to make findings and conclusions of law, are errors in the exercise of jurisdiction, and cannot be annulled on certiorari. 4 Cal.Jur. 1036 and cases cited.

The writ is denied.

WHITE, P. J., and DORAN, J., concur.



99 Cal.App.2d 277

DUHART et al. v. O'ROURKE et al.
Civ. 17427.

District Court of Appeal, Second District, Division 3, California.

Aug. 30, 1950.

As Modified Sept. 5, 1950.

Rehearing Denied Sept. 20, 1950.

Hearing Denied Oct. 26, 1950.

John Duhart and Lottie Duhart sued Harold John O'Rourke, sometimes known as Major John O. Rourke, Lizzie O'Rourke, Abbot C. Bernay, Maurice T. Leader, Richard H. Sampson, A. W. Appel, and Northwest Casualty Company, a corporation, and others, for a declaration of rights with respect to a parcel of realty standing of record in the name of Lizzie O'Rourke, a married woman, as her sole and separate property. The Superior Court of Los Angeles County, Le Roy Dawson, J., rendered a judgment for the plaintiffs and the named defendants other than the O'Rourkes appealed. The District Court of Appeal, Vallée, J., held that finding that money fraudulently obtained by one defendant found its way into realty on which wife of such defendant executed a declaration of homestead, after such defendant and his wife, as joint tenants, executed deed granting the realty to wife as her sole and separate property, so as to make homestead subject to execution and sale, was not shown to be not supported by the evidence.

Affirmed.

1. Fraudulent conveyances ⇐52(1)

The principles of fraudulent conveyances do not apply to declarations of homestead.

2. Homestead ⇐97

A homestead may be successfully attacked by creditor where money fraudulently obtained from creditor is invested in and constitutes part of homestead, and under such circumstances right of defrauded creditor is paramount to that of owner of homestead, depending upon facts, and property homesteaded is not exempt from execution or sale.

3. Homestead ⇐107

Evidence sustained finding that money fraudulently obtained by one defendant found its way into realty on which wife of such defendant executed declaration of homestead after such defendant and his wife, as joint tenants, executed deed to realty granting realty to wife as her sole and separate property, so as to make homestead subject to execution and sale.

4. Homestead ⇐129(1)

Where suit was brought to recover value of property allegedly obtained from plaintiffs by fraud, and attachment was levied against realty acquired partly with proceeds of alleged fraud, and on which declaration of homestead had subsequently been executed, and attachment lien ripened into judgment and plaintiffs bought realty at execution sale, rights of plaintiffs in realty were prior to rights acquired by holders of trust deeds which had been executed after attachment by person who homesteaded realty, although holders had no notice of attachment proceedings.

Guerin, MacKay & Tendler and Max Tendler, all of Los Angeles, for appellants.

Rupert B. Turnbull, Los Angeles, M. C. Yearing, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendants Abbot Bernay, Maurice T. Leader, Richard H. Sampson, A. W. Appel, and Northwest Casualty Company, a corporation, from a judgment for plaintiffs in an action in which plaintiffs sought a declaration of rights with respect to a parcel of realty standing of record in the name of Lizzie O'Rourke, a married woman, as her sole and separate property.

Prior to October 21, 1946, the property stood of record in the names of John O'Rourke and Lizzie O'Rourke, husband and wife, as joint tenants. On October 19, 1946, a deed was executed by them granting the property to Lizzie O'Rourke as her sole and separate property. On the same day she executed a declaration of homestead on the property. The deed and the declaration of homestead were recorded October 21, 1946.

Appellants claim a superior interest in the property as lien holders under trust deeds executed by Lizzie O'Rourke. Respondents, judgment creditors of John O'Rourke, assert a superior interest by reason of their purchase of the property at execution sale.

The litigation stems from the following: Between August 28 and September 6, 1946, John O'Rourke and Albert Daener, by false representations, defrauded plaintiffs of 2000 sacks of wheat, valued at $10,000. They sold the wheat for $9,600 and retained the proceeds.

On November 21, 1946, plaintiffs commenced an action in the superior court of Los Angeles County (No. 521905) against John O'Rourke and Albert Daener for the value of the wheat fraudulently obtained by them and caused a writ of attachment to be levied on the real property involved here. The attachment was levied against the property standing in the name of Lizzie O'Rourke and against the interest of John O'Rourke therein. Lizzie O'Rourke filed a complaint in intervention alleging the property was her sole and separate property and praying that the writ of attachment be released. Plaintiffs answered, alleging that the deed of October 19, 1946, was executed to hinder, delay and defraud the creditors of John O'Rourke, including plaintiffs, and to prevent them from reaching the property. Plaintiffs recovered judgment against O'Rourke and Daener. Lizzie O'Rourke was denied any relief. The court found that the attached property was conveyed in fraud of the creditors of John O'Rourke, including plaintiffs, and that the property, irrespective of its record title, was the community property of the O'Rourkes, and concluded that the attachment was in force as an attachment against their community property. Judgment was accordingly rendered November 25, 1947. No appeal was taken from the judgment and it has since become, and was at the time of the filing of the present action, final.

On October 26, 1947, Lizzie O'Rourke executed a trust deed, duly recorded, in favor of appellants Sampson, as trustee, and Appel, as beneficiary, as security for the repayment of an obligation set forth therein, i. e., to secure Appel upon the payment by him of any losses sustained by Northwest Casualty Company upon a forfeiture of its bail bond securing the appearance of John O'Rourke in criminal proceedings instituted against O'Rourke and Daener as a result of their fraud against plaintiffs. See People v. Daener, 96 Cal.App.2d 827, 216 P.2d 511.

On October 29, 1947, Lizzie O'Rourke executed another trust deed, duly recorded, in favor of appellants Bernay and Leader, beneficiaries, as security for the payment of $1,000 attorneys' fees for services rendered and to be rendered O'Rourke in the criminal proceedings.

On February 9, 1948, plaintiffs purchased the property at execution sale in action No. 521905. The proceeds thereof were applied on their judgment, and the writ of execution was returned wholly satisfied. The time for redemption expired February 9, 1949.

On March 19, 1948, the present action was filed by plaintiffs against appellants,

the O'Rourkes, and others, seeking a determination of their rights in the property. The complainant alleged facts concerning the fraud of O'Rourke and Daener, the recovery of judgment in action No. 521905, and the subsequent proceedings culminating in the sale of the attached property to plaintiffs. The complaint further alleged that the declaration of homestead executed individually by Lizzie O'Rourke was void because (1) the judgment in action No. 521905 determined that the deed under which she claimed title had been made in fraud of creditors and was therefore void, and (2) the consideration for the acquisition of the property sought to be impressed with the homestead was acquired partly with funds fraudulently obtained from plaintiffs which the O'Rourkes had used "in acquiring a clear title to real property, which they * * * in turn exchanged for the real property" involved here. The complaint further alleged that the trust deeds in favor of appellants were junior to the rights of plaintiffs because the attachment had been levied prior to the giving of the trust deeds, which attachment had ripened into a final judgment upon which execution sale had occurred. Appellants filed answers. The O'Rourkes defaulted.

The court, among other things, found and concluded that: the interest of the O'Rourkes in and to their equity in the property was acquired by funds which O'Rourke obtained from plaintiffs by fraud, to-wit, the proceeds of the 2000 sacks of grain; the homestead filed by Lizzie O'Rourke was a void homestead and did not at any time impress the property with any rights in favor of the O'Rourkes or any of the defendants; plaintiffs acquired a lien upon the property by virtue of the writ of attachment levied in November of 1946, which lien ripened into a judgment; the execution sale held on February 9, 1948, was valid; unless the property was redeemed by some party in interest within the period provided the sheriff was directed to issue a deed to plaintiffs on February 10, 1949; all of the trust deeds executed in favor of appellants are junior to plaintiffs' interest acquired by virtue of the execution sale. Judgment was entered accordingly.

Appellants contend the court erred in finding the homestead was void, the execution sale was valid, and their rights were junior to those of plaintiffs.

[1, 2] The question of the validity or invalidity of the homestead was not an issue in action No. 521905. That action merely adjudged that the conveyance to Lizzie O'Rourke was in fraud of O'Rourke's creditors and the property was the community property of the parties. This determination, however, in nowise affected the homestead, if otherwise valid, for the principles of fraudulent conveyances do not apply to declarations of homestead. Montgomery v. Bullock, 11 Cal.2d 58, 62, 77 P.2d 846; Parker v. Riddell, 41 Cal.App. 2d 908, 914, 108 P.2d 88. A homestead may, however, be successfully attacked by a creditor where money fraudulently obtained from him is invested in and constitutes part of the homestead. Under such circumstances, the right of the creditor so defrauded becomes paramount to that of the owner of the homestead, depending upon the facts of the case, and the property so homesteaded is not exempt from execution or sale. Kemp v. Enemark, 194 Cal. 748, 753, 230 P. 441; Ohio Electric Car Co. v. Duffett, 48 Cal.App. 674, 679, 192 P. 298; Shinn v. Macpherson, 58 Cal. 596; Parker v. Riddell, 41 Cal.App.2d 908, 914, 108 P.2d 88.

[3] In the present case the court found that funds fraudulently obtained by the O'Rourkes found their way into the homestead. Appellants contend there is no evidence to support this finding, relying on the oral testimony and documentary evidence received as exhibits. There was evidence that $7,600 of the money obtained from the sale of the wheat was received by O'Rourke and that part of it found its way into the homestead.

[4] Appellants' contention that the court erred in not finding their liens superior to the rights acquired by plaintiffs because they were bona fide encumbrancers without notice of the attachment proceed-

ings, is conclusively answered by Bank of South San Francisco v. Pike, 53 Cal.App. 524, 200 P. 752, in which the applicable principles are stated and discussed at length.

The foregoing renders unnecessary a discussion of other points raised by appellants.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



99 Cal.App.2d 246

CITY OF SAN DIEGO v. ALPHA SECURITIES CORPORATION et al.

Civ. 3976.

District Court of Appeal, Fourth District, California.

Aug. 29, 1950.

Action by the City of San Diego, a municipal corporation, against Alpha Securities Corporation, a corporation; C. C. Pease and others to quiet title. The Superior Court of San Diego, L. N. Turrentine, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Mussell, J., held that a judgment, entered over seventeen years previously for defendants' predecessor, the taxpayer, following tax sale, was not res judicata as to issues in instant action because it was not a final judgment but was only an interlocutory and conditional judgment dependent upon taxpayer's acceptance of its terms within a reasonable time, that curative statutes would apply upon showing of defects, and that one year statute of limitations for attacking validity of tax deeds applied.

Affirmed.

1. Judgment ⇐564(2)

Where land had been sold to state for delinquent taxes and taxpayer had recovered judgment which permitted redemption, but redemption never had been made notwithstanding expiration of approximately seventeen years, in action by purchaser of tax deed against taxpayer's successor to quiet title, the judgment was not res judicata since it was not final judgment but only interlocutory and conditional upon taxpayer's acceptance of its terms within reasonable time.

2. Taxation ⇐699

Where land had been sold to state for delinquent taxes and taxpayer recovered judgment authorizing redemption with no time limit fixed within which redemption might be effected, by implication there was a reasonable period of time within which provisions of judgment were to be complied with, which period of time had elapsed after expiration of seventeen years. Revenue and Taxation Code, §§ 3518, 3631.

3. Taxation ⇐788(1)

A deed from state, which had purchased at tax sale, duly acknowledged and proved is conclusive evidence, except against actual fraud, of the regularity of all other proceedings from assessment of assessor to execution of deed, both inclusive. Revenue and Taxation Code, §§ 3518, 3631.

4. Appeal and error ⇐1008(1)
Taxation ⇐789(4)

In action by purchaser of tax deed against taxpayer's successor, introduction in evidence of tax deed to state and deed from state to purchaser established prima facie title in purchaser and question whether taxpayer's successor satisfactorily rebutted such prima facie case and sustained burden of proving that such deeds were void was question of fact for trial court to determine, and trial court's finding would not be disturbed on appeal.

5. Taxation ⇐688, 770

Validating Acts of 1943, 1945, and 1947 which provided for confirmation and declaration of legal effectiveness of acts of taxing agencies in assessing, levying taxes and making tax sales and tax deeds, were applicable to tax sale of land to state in 1932, for delinquent taxes, tax deed to state in 1937, and sale and deed by state to plaintiff in 1941. Gen. Laws, Acts 8443–8443b.

6. Taxation ⇐805(1)

In action by city holding land through deed received nine years previously from

state which acquired tax deed over twelve years previously, against taxpayer's successor, attack against validity of deed to state and against proceedings leading thereto was barred by one year statute of limitations. Revenue and Taxation Code, § 3521.

C. C. Pease, San Diego, for appellants.

J. F. DuPaul, City Attorney, Thomas J. Fanning, Deputy City Attorney, San Diego, for respondent.

MUSSELL, Justice.

Action to quiet title.

Plaintiff, purchaser of a tax deed, commenced this action against the defendant to quiet title to Lot "A" in Crown Point in the City of San Diego. The complaint is in the usual form. In the answer and amendments thereto it is alleged that by reason of a prior suit entitled "C. C. Pease v. City of San Diego", No. 105388, pending between the same parties, the instant action was barred; that in an action filed in San Diego county entitled "S. L. Tripp et al. v. Board of Supervisors et al.," No. 73237, it was adjudicated that the amounts assessed and required to be paid for the taxes on the lot in question were illegal and void. It was further alleged that the city obtained no title to the property involved because of the invalidity of the tax assessments. By stipulation the prior action filed by Pease against the city, No. 105388, was consolidated for trial with the instant action. In this connection it appears that action No. 105388, pleaded as a bar to the instant action, was dismissed by the trial court and the judgment of dismissal affirmed on appeal by this court. Pease v. City of San Diego, 93 Cal.App.2d 706, 209 P.2d 843.

The trial court found on substantial evidence that the property here involved was duly assessed for taxation in the year 1931 and was thereafter, on June 29th, 1932, duly sold to the State of California by the tax collector of San Diego County for the nonpayment of delinquent taxes which had been legally levied; that in 1941, no redemption having been consummated, the property was conveyed by the tax collector to the plaintiff; that there was no defect in the proceedings leading up to and including the deed to the State of California and no subsequent defect in the proceedings leading up to the deed to the City of San Diego; that the judgment entered in the "Tripp" action is both interlocutory and conditional, has not become final, and there has never been a compliance with the conditions thereof; that more than a reasonable time within which to have made redemption under said judgment has passed. The court concluded that the city is the owner of the property and entitled to possession; that the defendant has no right, title or interest therein; that the curative acts and statute of limitations were applicable and constituted a bar to an attack on the tax proceedings; and that the Tripp judgment is invalid as to the real property involved. Judgment was entered quieting title in the plaintiff and defendant appeals, contending that the trial court erred in finding that the Tripp judgment was interlocutory; in finding that the curative statutes applied to the case; and in holding that the statute of limitations was applicable.

Plaintiff's title is based on a tax deed to the State of California and a deed from the state to the plaintiff. Defendant claims title as successor in interest of the former fee owner. The lot in controversy was sold to the State of California on June 29, 1932, for the delinquent city and county taxes of 1931. Pursuant to such sale it was deeded to the state July 23, 1937, and subsequently sold and deeded by the state to the plaintiff on October 2, 1941. It was stipulated at the trial that the defendant is the owner of the lot in question unless his title was divested by the tax deed to the state and the deed from the state to the plaintiff.

The judgment in the Tripp case, so far as material here, is as follows:

"It is ordered, adjudged and decreed that the valid legal charges against the property described in plaintiff's complaint are as follows: * * * making a total of $8,241.30. * * * That the plaintiffs be, and they are hereby granted authority to redeem said property, and the County Auditor be and he is hereby directed to issue a certificate of redemption to the plaintiffs in the sum of

* * * ($8,241.30), and the County Treasurer is hereby authorized to accept said sum of * * * ($8,241.30) in full payment of the taxes, costs and interest against the property described in plaintiff's complaint.

"Done in open Court this 17 day of February, 1933.

"C. N. Andrews
Judge of Superior Court."

[1] An examination of the provisions of this judgment leads us to conclude that it is not *res adjudicata* as to the issues in the instant action and is not a final judgment. It is interlocutory in substance and effect. Citizens Nat. T. & S. Bank v. Brown, 54 Cal.App.2d 688, 129 P.2d 466; Craig of California v. Green, 89 Cal.App.2d 829, 831, 202 P.2d 104; Bakewell v. Bakewell, 21 Cal.2d 224, 130 P.2d 975.

It cannot be determined from the judgment whether the taxpayer would elect to redeem the property under its terms and obviously the title to the lot here involved was not finally adjudicated by the decree.

It is admitted that Pease failed to redeem lot A under the terms and provisions of the Tripp judgment and as the court found, there has never been a compliance with the conditions of said judgment. After having failed to pay the Tripp judgment or any part thereof for approximately seventeen years, Pease filed suit to quiet title against the city (action No. 105388) instead of attempting to redeem the lot in question pursuant to the terms of the Tripp judgment.

In Newcomb v. City of Newport Beach, 12 Cal.2d 235, 238, 83 P.2d 21, 23, the court said: "The proper decree in the event the owner fails to pay the amount fixed by the court within the time limited is not an adjudication that the purchaser at the void tax sale owns the land, but a denial of any relief to the owner. In the usual situation this is accomplished through a dismissal of the action." (Citing cases.) Citizens Nat. T. & S. Bank v. Brown, supra, 54 Cal.App.2d at page 690, 129 P.2d 466.

In the instant case the trial court found and concluded that the time which had elapsed since the making and entry of the Tripp judgment was more than a reasonable time within which to have made the redemption provided for therein and properly concluded that the Tripp judgment was invalid as to the real property involved herein. In this connection, it appears that no time limit was fixed within which redemption might be effected.

Section 3631 of the Revenue and Taxation Code refers to judgments similar in form and substance to the Tripp judgment. It is there provided that the interlocutory decree shall require the payment to be made within six months and if not so made, the final decree shall be entered.

[2] It would seem that the Tripp judgment included in its terms, by implication, a reasonable period of time within which its provisions were to be complied with. That period of time has long since elapsed without any compliance being made as to lot A. The defendant herein offered no evidence at the trial to show that the taxes and assessments, or any part of them, were actually excessive or illegal.

[3] Under the provisions of section 3518 of the Revenue and Taxation Code a deed from the state duly acknowledged and proved is conclusive evidence, except against actual fraud, of the regularity of all other proceedings from the assessment of the assessor to the execution of the deed, both inclusive.

[4] The introduction in evidence by the plaintiff of the tax deed to the State of California and the deed to plaintiff established a prima facie title in the plaintiff and the question whether the defendant satisfactorily rebutted such prima facie case and sustained the burden of proving that such deeds were void was a question of fact for the trial court to determine and its finding will not here be disturbed. Luberco, Ltd. v. Boswell, 96 Cal.App.2d 946, 217 P.2d 105.

[5] Defendant's contention that the curative statutes are not applicable to the facts in this case is probably well taken because there was no showing made of any defects sufficient to invalidate the tax sale and the tax deed. However, if any defects had been shown, we see no reason which

would prevent the application of the 1943, 1945 and 1947 validating acts. Stats. 1943, p. 1993, Chap. 458, in effect August 4, 1943, Deering's Gen. Laws 1944, Act 8443, Vol. 3, p. 2994; Stats. 1945, p. 2176, Chap. 1134, in effect September 15, 1945, Deering's Gen. Laws 1944, 1949 Supp., p. 115, Act 8443a, Stats. 1947, p. 1615, Chap. 605, in effect September 19, 1947, Deering's Gen. Laws 1944, 1949 Supp., p. 116, Act 8443b. Chambers v. Duvall, 26 Cal.2d 139, 143, 156 P.2d 921; Elbert, Ltd. v. Nolan, 87 Cal.App.2d 24, 29, 196 P.2d 88; Howard v. Judson, 86 Cal. App.2d 128, 194 P.2d 138. These acts apply to all tax proceedings consummated prior to their respective effective dates and apply to the instant case. Barrett v. Brown, 26 Cal.2d 328, 331, 158 P.2d 567.

[6] Defendant's final argument that the court erred in holding that the statute of limitation was inapplicable to the instant case is likewise without merit. Section 3521 of the Revenue and Taxation Code limits the time within which actions attacking the validity of a deed such as is before us to one year after recording the deed and the provisions of this section bar any attack against the validity of the deed to the state and against the proceedings leading thereto. Jones v. Bartlett, 94 Cal.App. 2d 418, 419, 420, 210 P.2d 903; Davault v. Essig, 80 Cal.App.2d 970, 972, 183 P.2d 39.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J. concur.

35 Cal.2d 886

HOWARD GREER CUSTOM ORIGINALS v. CAPRITTI et al.

L. A. 21406.

Supreme Court of California, In Bank.

Sept. 13, 1950.

Rehearing Denied Oct. 9, 1950.

Action by Howard Greer Custom Originals, a corporation, against J. C. Capritti, doing business under the fictitious firm name and style of Rose Marie of California, and Rose Marie of California, Inc., sued as Black & White Company, and others, to recover certain personalty and damages for breach of contract. Rose Marie of California, Inc., sued as Black & White Company, filed a cross-complaint. The Superior Court, Los Angeles County, Stanley N. Barnes, J., denied a motion of the defendant Capritti to set aside the default judgment, and defendant Capritti appealed. The Supreme Court, Edmonds, J., held that defendants' motion to set aside the default and their appeal from the subsequent denial of notice of motion to set aside the default judgment were not attacks on the default, and that where entry of default, from which Capritti did not seek relief by the appeal, stood of the record against him, plaintiff was entitled to a judgment upon its complaint.

Order affirmed.

Prior opinion 213 P.2d 78.

Judgment ⇐128

Where defendants' motion to set aside default was denied and judgment was rendered against them, but neither motion to set aside default judgment nor appeal from denial of defendants' subsequent notice of motion to have default judgment set aside on ground that it was taken against them through inadvertence and surprise was an attack on default or order refusing to set it aside, and vacation of judgment would be an abortive act because entry of default stood of record against defendants, plaintiff was properly granted judgment on its complaint.

Geo. W. Rochester, Los Angeles, for appellant.

Abraham Gottfried, Los Angeles, for respondent.

EDMONDS, Justice.

Howard Greer Custom Originals sued J. C. Capritti, doing business under the fictitious name of Rose Marie of California. He has appealed from an order denying his motion to set aside a default judgment entered against him.

The complaint, to recover certain personal property and damages for breach of contract, named a number of defendants fictitiously. Prior to service of the summons, an amended complaint was filed and a writ of attachment issued against the property of "J. C. Capritti, d. b. a. Rose Marie of California." The writ was levied upon furniture, fixtures and merchandise "belonging to the defendant." As an individual, he filed an undertaking to discharge the attachment. Rose Marie of California, a corporation, "sued as Black and White Company" appeared by answer and also filed a cross-complaint.

Later the summons on the amended complaint was served upon Capritti, and no appearance having been made by him within the time allowed therefor, his default was entered. Meanwhile demurrers to the answer and cross-complaint of the corporation were sustained with leave to amend. Shortly thereafter the corporation filed a petition in bankruptcy.

Capritti then moved to set aside the default which had been entered against him, specifying as the ground for such relief "mistake and surprise." The motion was supported by an affidavit averring that he "was under the impression that * * * [the answer filed on behalf of the corporation] would be sufficient and that there was no need for affiant to file an Answer in his individual and personal capacity." He also declared that when he discovered the entry of default, he requested counsel for the corporation to prepare an answer for him. However, the record shows that his answer was filed after the default was entered.

The motion was denied and judgment rendered against Capritti. He immediately filed a notice of motion to have the judgment set aside upon the ground that it was taken against him "through inadvertence and surprise." In an affidavit stating facts

assertedly justifying such relief, he gave as the ground for his "impression" in regard to the sufficiency of the answer of Rose Marie, assurance by the corporation's attorney "that plaintiff and plaintiff's counsel understood the situation." He added that he has a meritorious defense to the action in that he was plant manager of the corporation but at no time did he do business as an individual under its name.

Before the matter came on for hearing, Capritti filed a proposed answer to the complaint in support of his motion. This pleading is substantially the same as the one previously filed. He alleged that he had never done business "under the fictitious firm name and style of Rose Marie of California * * * [but] was employed by Rose Marie of California; * * * that his employment was that of manager of the plant operated by said corporation * * * and he had no other business other than as afore described and did not at any time enter into any agreements, contracts or understandings of any kind whatsoever with the plaintiff herein."

The facts stated in the affidavits filed on behalf of the Greer Company sharply conflict with those presented by Capritti. It is averred that officers of the company visited the premises occupied by Rose Marie on the day before the first complaint was filed. At that time, it is said, Capritti stated to them that he was the owner of Rose Marie. Other allegations are that an attorney representing Capritti telephoned to one of Greer's counsel, and after stating that he "would enter an appearance for Mr. J. C. Capritti", requested a copy of the summons and complaint. There was never any understanding between the Greer Company and any attorney for Capritti, the affiant declared, that the action was intended to be solely against the corporation and not against the appellant as an individual.

As grounds for the reversal of the order adverse to him, Capritti contends that the denial of his motion was an abuse of discretion which deprived him of his day in court and the opportunity to present a meritorious defense. The Greer Company argues that no appeal lies from the determination of the motion, and a motion to set aside a judgment must be denied where the court has refused to set aside the entry of default. The respondent also asserts that the record shows no clear abuse of discretion, and, for that reason, the action of the trial court should be affirmed.

The only order sought to be reversed by this appeal is the one denying defendant Capritti's motion to set aside the default judgment. Neither that motion nor this appeal is an attack upon the entry of default or the order refusing to set it aside.

It is apparent that even if the judgment were now vacated, such action would be abortive. The entry of default, from which Capritti does not seek relief by this appeal, stands of record against him and entitles the Greer Company to a judgment upon its complaint. As stated in Brooks v. Nelson, 95 Cal.App. 144, 147–148, 272 P. 610, 611: "The setting aside and vacating the judgment alone, which was all the relief sought in said motion, would have been an idle act because the default * * * would have stood undisturbed. The default cut off defendants from making any further opposition or objection to the relief which plaintiff's complaint shows he is entitled to demand. A defendant against whom a default has been entered is out of court, and is not entitled to take any further steps in the cause affecting plaintiff's right of action; he cannot thereafter, until such default is set aside in a proper proceeding, file pleadings or move for a new trial or demand notice of subsequent proceedings. [Citing cases.] If the judgment were vacated, it would be the duty of the court immediately to render another judgment of like effect, and the defendants, still being in default, could not be heard in opposition thereto. * * *" Bowman v. Bowman, 29 Cal.2d 808, 178 P.2d 751, 170 A.L.R. 246; Christerson v. French, 180 Cal. 523, 182 P. 27; Title Insurance & Trust Co. v. King Land & Improvement Co., 162 Cal. 44, 120 P. 1066.

The order is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

Rehearing denied; SHENK and CARTER, JJ., dissenting.

35 Cal.2d 858

INDEPENDENT IRON WORKS, Inc. v. AMERICAN PRESIDENT LINES, LIMITED, et al.

S. F. 17971.

Supreme Court of California, in Bank.

Sept. 12, 1950.

The Independent Iron Works, Inc., a corporation, brought action against American President Lines, Limited, a corporation, and others to quiet title to cable in possession of the named defendant under a contract of carriage. The Superior Court of San Francisco County, Milton D. Sapiro, J., rendered an order granting a motion for a change of venue, and the plaintiff appealed. The Supreme Court, Spence, J., held that the named defendant which had its principal place of business in San Francisco County, was not only a proper party defendant but a necessary party, though it claimed only a possessory lien on the cable for carriage charges, and that therefore certain of the other defendants who were nonresidents, were not entitled to a change of venue on ground that the named defendant was not a real party in interest, but only a stakeholder.

Order reversed.

Prior opinion, 211 P.2d 326.

1. Venue ⇐41

A defendant is not entitled to have an action removed to county of his residence unless it appears that none of the other defendants are residents of county where action is brought. Code Civ.Proc. § 395.

2. Venue ⇐41

Even when all defendants join in a demand for or consent to a change of venue the cause will be retained if complaint attempts in apparent good faith to state a cause of action against a defendant who resides in county where action was commenced. Code Civ.Proc. § 395.

3. Venue ⇐41

When a defendant who resides in county in which action is brought is a necessary and proper party defendant, it is immaterial that another and the principal defendant resides in another county. Code Civ. Proc. § 395.

4. Quieting title ⇐34(1)

In action against steamship company and others to quiet title to cable in possession of steamship company under a contract of carriage, complaint alleging that plaintiff was the owner of the cable, that all defendants asserted claims to the cable adverse to the plaintiff but that they were without right, title or interest therein, and requesting a decree adjudging that plaintiff be the owner and entitled to immediate possession of the cable, stated a cause of action to quiet title against all defendants. Code Civ.Proc. § 738.

5. Venue ⇐41

In action in San Francisco County against foreign steamship company having its principal place of business in San Francisco County, and against other defendants who were residents of Los Angeles County, steamship company, which filed an answer alleging that its possession of the cable was rightful under a contract of carriage and that it had a possessory lien on cable for carriage charges, was not only a proper party defendant but a necessary party, and therefore the other defendants were not entitled to a change of venue to Los Angeles County on ground that steamship company was not a real party in interest but only a stakeholder. Corporations Code, §§ 6401, 6403; Code Civ.Proc. §§ 379, 395.

Heller, Ehrman, White & McAuliffe, Lloyd W. Dinkelspiel and Caspar W. Weinberger, all of San Francisco, for appellant.

Balter & Balter and William E. Balter, all of Los Angeles, for respondents.

SPENCE, Justice.

Plaintiff appeals from an order granting a motion for a change of venue from the city and county of San Francisco to the county of Los Angeles. There is no dispute as to the material facts, and it appears therefrom that plaintiff's objection to the venue change is well taken.

This is an action to quiet title to certain personal property—31 reels of cable—brought against defendants American Pres-

ident Lines, Ltd. (hereinafter referred to as President Lines), as the party now in possession of the cable; Eastern Iron & Metals Co., Ltd. (hereinafter referred to as Eastern); and Max Peterman, doing business as Economy Pipe & Supply Company (hereinafter referred to as Peterman). Plaintiff alleged that it was the owner of the cable; that all of the defendants asserted claims to the cable adverse to plaintiff but that they were without right, title or interest therein; and accordingly, plaintiff asked for a decree adjudging it to be the owner and entitled to the immediate possession of the cable.

Defendant President Lines filed an answer, wherein it alleged that it was a Delaware corporation, with its principal place of business in San Francisco; that it now had possession of the cable at Wilmington, California; that its possession was rightful under a contract of carriage whereby the cable had been delivered to it for shipment to Los Angeles in accordance with a bill of lading; and that it had a possessory lien on said cable for carriage charges, but "except as [so] alleged * * * it ha[d] no estate, right, title or interest whatsoever in said personal property * * *." As a separate and distinct answer and defense, said defendant President Lines set forth certain facts showing that the cable was now claimed by plaintiff and defendants Eastern and Peterman; and stated that it could not safely determine ownership as between said claims without great hazard to itself, but offered to deliver the cable into court in order that the claimants might interplead and thereby settle and adjust their claims among themselves. Defendant President Lines then prayed that it be discharged from all liability to any of said claimants and in accordance with its alleged possessory lien for ocean freight, storage, and other charges, it asked the court to order the prevailing party claimant to pay it all such charges, together with costs and attorney fees.

Thereafter defendants Eastern and Peterman filed a demurrer and moved for a change of venue to Los Angeles County upon these grounds: (1) their residence in said county; and (2) the claim that President Lines "was not a real party in interest, but only a stakeholder." Defendant President Lines opposed the motiton for change of venue, as did plaintiff. By counter-affidavit, said President Lines set forth various procedural steps it had taken in compliance with the laws of California for authorization to do business within the state and for the establishment of its residence in San Francisco as its principal place of business. Corporations Code, secs. 6401, 6403, based on former Civ.Code, sec. 405. These matters were not disputed. The court granted the motion for change of venue. From the order accordingly entered, plaintiff has appealed.

Respondents Eastern and Peterman do not contest the sufficiency of appellant's complaint in stating a cause of action against the President Lines, or the latter's place of residence as San Francisco upon its qualifying as a foreign corporation to do business within the state. Bohn v. Better Biscuits, Inc., 26 Cal.App.2d 61, 64–65, 78 P.2d 1177, 80 P.2d 484; Eckles v. Justice's Court, 84 Cal.App.2d 269, 271, 190 P.2d 224; also Western-Knapp Engineering Co. v. Gilbank, 9 Cir., 129 F.2d 135, 136. However, they do challenge the sufficiency of the interest of the President Lines in the outcome of this litigation, maintaining that it is classifiable as no more than a stockholder, a status which does not entitle it to have the case tried in the county of its residence in opposition to respondents' demand for a change of venue. On the other hand, appellant contends that defendant President Lines is a proper and necessary party to the complete adjudication of the entire controversy, that it was not joined as a defendant in the action for the purpose of keeping the place of trial in San Francisco, and therefore the order for the change of venue to Los Angels County cannot be sustained. The record confirms the propriety of appellant's position.

[1-3] Section 395 of the Code of Civil Procedure provides, among other things, that "the county in which the defendants, or some of them, reside at the commence-

ment of the action, is the proper county for the trial of the action." So pertinent are these general rules governing the determination of the venue issue as stated in White v. Anderson, 50 Cal.App.2d 634, at page 636, 123 P.2d 543, at page 544: "A defendant is not entitled to have an action removed to the county of his residence unless it appears that none of the other defendants are residents of the county where the action is brought. Donohoe v. Wooster, 163 Cal. 114, 124 P. 730. Even when all of the defendants join in a demand for or consent to a change of venue the cause will be retained if the complaint attempts in apparent good faith to state a cause of action against a defendant who resides in the county where the action was commenced. McClung v. Watt, 190 Cal. 155, 211 P. 17. When a defendant who resides in the county in which an action is brought is a necessary and proper party defendant it is immaterial that another and the principal defendant resides in another county. Hellman v. Logan, 148 Cal. 58, 82 P. 848."

[4] Unquestionably, appellant's complaint stated a cause of action to quiet title against all defendants. Code Civ.Proc. § 738. However, despite the sufficiency of appellant's pleading, respondents argue that appellant cannot prevail here on the venue issue because "the right to a change of place of trial to the residence of a defendant must necessarily be determined by the status of the parties joined as defendants in the action as revealed by the pleadings existing at the time the party claiming the right first appeared in the action." McClung v. Watt, supra, 190 Cal. 155, 159, 211 P. 17, 19; also, Nelson v. Marsh, 100 Cal.App. 578, 583, 280 P. 695; Konnoff v. Fraser, 62 Cal.App.2d 788, 791, 145 P.2d 368.

At the time respondents first appeared in this action, defendant President Lines had already filed its answer, which respondents claim revealed its status to be merely that of a stakeholder, and so one not having such an interest in the litigation as would justify consideration of its residence in determining the venue issue. Smith v. Smith, 30 Cal.App.2d 70, 85 P.2d 473. But respondents misconstrue the purport of the answer filed by defendant President Lines in setting forth its position. Thus, after asserting its possessory lien for "all charges" due under its "contract of carriage" covering the cable now in its possession, defendant President Lines made this statement in its answer: "*Except as herein alleged,* defendant admits that it has no estate, right, title or interest whatsoever * * *." (Emphasis added.) Nor is President Lines properly classifiable as a disinterested party in the outcome of the litigation coincident with its offer to deliver the cable into the custody of the court pending the determination of the controversy. This is not a case where "a defendant * * * at any time *before answer*" has "appl[ied] to the court for an order to substitute [a third party claimant] in his place, and discharge him from liability to either party, on his depositing in court * * * or delivering the property or its value to such person as the court may direct * * *." Code Civ.Proc. § 386; emphasis added. Rather here, President Lines in its *answer* made the offer to deliver the cable into court and asked to have the parties interpleaded, and hence the court had no opportunity to make the order contemplated by the cited statute *before* an answer was filed and in discharge of the applicant defendant's liability; and President Lines remains a defendant in this action. There also seems to be no place for the *substitution* of a third party claimant in this litigation, for appellant apparently has joined all claimants as defendants herein.

[5] Moreover, as the record here stands, President Lines, so long as it has possession of the cable and asserts its possessory lien thereon, appears to be not only a proper party defendant, but a necessary party in order that a complete determination of the controversy may be had in the single quiet title action upon the adjudication of all adverse claims to the property involved. Code Civ.Proc. § 379; also, 22 Cal.Jur. sec. 26, p. 142. Nor can it be said, as respondents urge, that the interest of President Lines is only "incidental" to the main issue in the case and so insufficient to defeat respondents' demand for a change

of venue. Rather, it may well be that the possessory lien asserted by President Lines will be opposed upon the ground that the assessed charges are excessive or that the duties and obligations of President Lines as carrier and bailee have not been properly performed; and, in addition, there are the items of costs and attorney fees which President Lines also seeks to recover in this action. All of these matters are open to challenge herein, and every claim of President Lines adverse to appellant should be determined in this action. See Winter v. McMillan, 87 Cal. 256, 265, 25 P. 407, 22 Am.St.Rep. 243.

The cases upon which respondents rely are wholly distinguishable: Sayward v. Houghton, 82 Cal. 628, 23 P. 120, where the complaint failed to show that the resident corporation was "in any sense interested in [the] action", 82 Cal. at page 630, 23 P. at page 120; Smith v. Smith, supra, 30 Cal.App.2d 70, 85 P.2d 473, where the court found that the resident defendant, a "title company * * * sued as stakeholder of corporate stocks deposited by [the individual] defendant", with it, 30 Cal.App.2d at page 71, 85 P.2d at page 474, had "been joined solely for the purpose of having the action tried in the county of its residence", 30 Cal.App.2d at page 72, 85 P.2d at page 474; Sourbis v. Rhoads, 50 Cal.App. 98, 194 P. 521, where it was stated that "a defendant * * * moving for a change of venue" was entitled to show that he was "the only real party in interest in the controversy," and that the plaintiff's claim against a codefendant was "a mere pretense" and nominally made "for the fraudulent purpose of" defeating a demand for a change of venue from "the county where the complaint [was] filed", 50 Cal.App. 98 at page 101, 194 P. at page 522; and Modlin v. Walter's Fur Shop, 83 Cal.App.2d 384, 188 P.2d 805, where the "resident defendant was joined as defendant solely because he refused to be joined as a plaintiff and no cause of action was stated as against him", 83 Cal.App.2d at page 387, 188 P.2d at page 807. Rather here, it appears (1) that a cause of action has been pleaded against President Lines; (2) that President Lines is a proper and necessary party defendant in the complete settlement of the controversy involved in this quiet title action; and (3) that President Lines, a foreign corporation, maintains its place of residence in this state in the city and county of San Francisco. It follows that the trial court erred in granting respondents' motion for a change of venue to Los Angeles County. White v. Anderson, supra, 50 Cal.App.2d 634, 636, 123 P.2d 543; Dallman Supply Co. v. Sweet, 86 Cal.App.2d 780, 784, 195 P.2d 864; Stokes v. Newsom, 89 Cal.App.2d 147, 149-150, 200 P.2d 17.

The order is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.



35 Cal.2d 863

Ex parte ETHERINGTON.

Cr. 5070.

Supreme Court of California, In Bank.

Sept. 12, 1950.

Freda Mickelson brought habeas corpus proceedings for release of her minor son, Norman Etherington, from custody after his commitment to the California Youth Authority by the Superior Court of Nevada County, sitting as a juvenile court, James Snell, J. The Supreme Court, Spence, J., held that petitioner waived any insufficiency of notice to her of the hearing resulting in the commitment by personally appearing and participating therein without objection as to the timeliness of the notice, and that the court had jurisdiction to make the order of commitment depriving petitioner of the minor's custody.

Writ discharged and the minor remanded to custody.

Carter and Schauer, JJ., dissented.

1. Infants ⇐16.7

A minor's mother, appearing personally and by counsel at juvenile court hearing in proceeding to adjudge minor a ward of court and commit him to state Youth Authority on day until which proceedings were continued at her request on preceding day, and making no request for further continuance or protest against failure to give her statutory notice of hearing at least 24 hours before time stated therefor, waived any insufficiency of notice as jurisdictional requirement. Welfare and Institutions Code, § 726.

2. Infants ⇐16.11

Where petition in juvenile court proceedings alleged facts bringing minor within statutory provision extending juvenile court's jurisdiction to any minor violating state law, evidence supporting specific charges of law violation by him was adduced, his mother's fitness to retain parental control of minor was directly put in issue, and court, after observing that minor did not deny such charges, stated that he had had five different brushes with the law and that that could not be permitted to go on, court had jurisdiction to adjudge minor a ward of court and commit him to state Youth Authority, thereby depriving mother of his custody. Welfare and Institutions Code, §§ 700(m), 739(d).

Arthur De Beau Carr, Sacramento, for petitioner.

Fred N. Howser, Attorney General, and C. J. Scott, Assistant Attorney General, for respondent.

SPENCE, Justice.

By means of habeas corpus, Freda Mickelson, the mother of Norman Etherington, a minor, seeks his release from custody after he was adjudged by the Juvenile Court of Nevada County to be a ward of the court and committed to the California Youth Authority. She challenges upon these grounds the jurisdiction of the court to make the order of commitment: (1) failure to serve notice of the hearing of the juvenile court proceedings upon her as required by law (Welf. & Inst.Code, § 726); and (2) insufficiency of the findings to justify removal of said minor from her custody (Welf. & Inst.Code, § 739). Neither point of objection is well taken under the record before this court.

Subdivision (m) of section 700 of the Welfare and Institutions Code provides that the jurisdiction of the juvenile court extends to any person under the age of twenty-one years "*who violates any law* of this State or any ordinance of any town, city, or county, of this State defining crime."

The original petition for a writ of habeas corpus sets forth that Freda Mickelson is the mother of Norman Etherington, who was then seventeen years of age; that on November 30, 1949, said minor was brought before the Juvenile Court of Nevada County for hearing on charges of (1) speeding and (2) resisting arrest committed in November, 1949, in the city of Grass Valley, and (3) contributing to the delinquency of a minor within Nevada County as accused by a warrant of arrest issued against said minor some two months previously, but of which neither said minor nor his mother was informed until said minor's arrest in said November; that at the time of the issuance of said warrant, said minor and his mother were domiciled in Nevada City but that after October 19, 1949, they moved their residence to Sacramento, all of which facts were known to the Grass Valley and Nevada City police; that said minor's mother was not notified of the scheduled November 30 hearing on the charges against said minor until 9:00 a. m. of said day, when said minor at Grass Valley was allowed to telephone her at her home in Sacramento to tell her that he was "being taken to court" an hour later or at 10:00 a. m.; that she arrived in Nevada City in the courtroom at about 11:30 a. m., at which time the proceedings had started and testimony was being taken; that at her request, the judge at 12:00 noon that day continued the proceedings to the following day, December 1, 1949, at 10:00 a. m. so as to allow her time to employ counsel; that in the limited time available she did engage an attorney for the defense of said minor,

and that she and said attorney were present in court the next morning, December 1, when the case was completed and the adjudication made declaring said minor to be a ward of the court and committing him to the California Youth Authority.

Upon such representation in the petition as to the manner of notice of the juvenile court proceedings that was given to the mother of the minor as "the person charged with his custody," this writ was issued. The return and answer to the writ was then filed, and included therewith is the record of the proceedings in the juvenile court. It appears therefrom that a verified petition was filed in the Juvenile Court of Nevada County by Thos. J. Barrett, probation officer, on November 28, 1949, setting forth facts as would bring said Norman Etherington, alleged to be seventeen years of age, within the provisions of said above-mentioned subdivision (m) of section 700 of the Welfare and Institutions Code: more particularly, that said minor had on November 18, 1949, committed a misdemeanor through the operation of his motor vehicle in a residential area of the city of Grass Valley at a speed of 56 miles per hour; that on said date he had wilfully and unlawfully resisted arrest by the apprehending police officer; and that on September 13, 1949, he did contribute to the delinquency of two minor girls in committing acts which "would cause or tend to cause said minor persons to lead idle, dissolute, lewd or immoral lives." The petition contained the further allegation setting forth the Nevada City address of Freda Mickelson as the mother of said Norman Etherington and "the person * * * having the custody or control" of him. It also appears that the court issued its order fixing the 30th day of November, 1949, at the hour of 11:00 a. m. as the time for the hearing and directed that a citation be issued to said Freda Mickelson as "the person having the custody and control of said Norman Etherington," directing her to appear for the hearing; that said Freda Mickelson did not arrive at the courtroom for the hearing until 11:35 a. m. of said day, and that after her objection to her failure to receive notice of the hearing until "right close to ten o'clock" that morning and her statement of her desire to employ counsel in the matter, the judge continued the proceedings until the next day, December 1, at 10:00 a. m.; that on December 1, as scheduled, the court convened, said Freda Mickelson and her counsel were present, oral and documentary evidence was introduced in support of the petition, witnesses were produced on behalf of said Norman Etherington—including said minor and his mother, Freda Mickelson—the matter was submitted for decision, the court made written findings that due "notice of the * * * hearing of said petition ha[d] been given," that the "truth" of the alleged facts "ha[d] been established to [the court's] satisfaction," and the said minor, Norman Etherington, was adjudged "a ward of the Juvenile Court" and "committed, until the further order of the court, to the care and custody of the Probation Officer of Nevada County * * * until delivery to the California Youth Authority."

Thereafter an amended petition for a writ of habeas corpus was filed with this court, wherein it was further alleged that said Juvenile Court of Nevada County ordered the commitment of said minor, Norman Etherington, without making such finding of fact as would authorize its exercise of jurisdiction over him as a ward of the court and his removal from the custody of his mother. Section 739 of the Welfare and Institutions Code provides that "no ward of the juvenile court shall be taken from the custody of his parent or legal guardian without the consent of the parent or guardian, unless the court finds one of the following facts: (a) That the parent or guardian is incapable of providing or has failed or neglected to provide proper maintenance, training, and education for the person. (b) That the person has been tried on probation in such custody and has failed to reform. (c) That the person has been convicted of crime by a jury. (d) That the welfare of the person requires that his custody be taken from his parent or guardian." The return and answer to the amended petition expressly denied "any lack of jurisdiction on the part of said Ju-

venile Court to make the order" of commitment and "in that respect" alleged that "said Juvenile Court complied with subdivision d, section 739, Welfare & Institutions Code, by certain oral findings made in open court and reflected by the transcript of the proceedings herein," as theretofore filed "as a part of [the] return to the original petition."

An examination of the record discloses that the jurisdiction of the court to order the commitment in question is not vulnerable to attack in these habeas corpus proceedings.

[1] Petitioner's first point of objection rests upon the claim that the court was without jurisdiction to adjudge the minor a ward of the juvenile court because she was not given notice of the hearing of the proceedings as required by section 726 of the Welfare and Institutions Code. That section requires that "a citation * * directing the parent * * * having the custody or control of the [minor] * * to appear at the [scheduled] hearing" be served "at least 24 hours before the time stated" therefor. It is undisputed here that petitioner, who concededly had the custody of Norman Etherington, did not receive such prerequisite notice; that, in fact, she learned of the scheduled proceedings only an hour or so before they commenced and that, at her request, they were continued until the next day, allowing petitioner a period of twenty-two hours to employ counsel. However, the record of the juvenile court proceedings affirmatively establishes that when the matter was heard the next day, petitioner and her counsel were present in the court, neither she nor her counsel made any request for a further continuance or any protest about the failure to give the notice specified by the statute, and the case was presented entirely anew just as though the previous hearing had never commenced and with the single witness who had testified on the prior day being recalled to the stand for the purpose of restating his testimony in full. The cited code section expressly provides that "Service of citation may be waived by any person by a voluntary appearance entered in the minutes of the court". The minutes of the proceedings on December 1 show the presence of petitioner, Freda Mickelson, in court during the full day's hearing and the fact of her testimony therein. In such circumstances, petitioner's conduct—her personal appearance at the reset hearing and her participation therein without objection as to the timeliness of the notice to her as the only person entitled thereto under the statute—must be deemed to have constituted a waiver of any insufficiency in that respect as a jurisdictional requirement. In re Staser, 84 Cal.App. 2d 746, 753, 191 P.2d 791; In re Orosco, 92 Cal.App.2d 352, 356, 207 P.2d 656; see, also, People v. Spiers, 17 Cal.App.2d 477, 484, 62 P.2d 414.

[2] Likewise without merit is petitioner's challenge of the jurisdiction of the court to make the order of commitment depriving petitioner of the custody of said minor. The parties agree that the validity of the order stems from a consideration of the sufficiency of the court's findings in relation to section 739, subdivision (d), of the Welfare and Institutions Code, as distinguished from the other classifiable situations under the statute which the record herein concededly does not purport to establish.

As above stated, the petition in the juvenile court proceedings alleged facts bringing the minor, Norman Etherington, within subdivision (m) of section 700 of the Welfare and Institutions Code: (1) speeding; (2) resisting an officer; and (3) contributing to the delinquency of a minor. Testimony was adduced in support of these specific charges and, in addition, the files relating to five other occasions when proceedings had been instituted against said minor for various acts of "theft and malicious mischief" in the course of some five years were admitted in evidence. On behalf of the minor in question, there was his own testimony along with that of petitioner, his mother, and other witnesses were called for the purpose of attesting to his conduct and character. In such presentation of the case the fitness of petitioner to retain parental control of said minor, her son, was directly put in issue and in response to such situation, the

court, upon careful consideration of the entire proceedings, summarized its conclusions on this basis: After observing that the "defendant hasn't denied the last escapade"—the speeding charge, his apprehension, escape and re-arrest—and that there "wasn't any denial" by him of his "wrong doing of taking" certain minor girls to a cabin for several days in relation to the charge of contributing to their delinquency, the court, in the presence of the parties and their respective counsel, made these pertinent remarks bearing directly on the welfare of the minor in question: "[There is] a background here, commencing in 1944 and running up to the present time which makes a total of five different brushes with the law, and in most of them Norman has been treated very, very leniently. There were two or three occasions in which he himself admitted that he was guilty of the offenses charged against him. *I do not believe, as Judge of this Court, that that can be permitted to go on. There finally comes a time when something has to be done and at this time I am going to make Norman a ward of this court.* He will be placed in the immediate custody of the Probation Officer, who will have authority to confine him in such place as may be necessary until he can be taken by the Youth Authority and a commitment will issue committing him to the Youth Authority at that time." (Emphasis added.)

Implicit in the foregoing quoted language is the finding that the minor's welfare required that he be taken from the custody of petitioner, as a prerequisite to the court's jurisdiction to make the order of commitment to the California Youth Authority. The authenticity of the complete record of the juvenile court proceedings herein filed is in nowise disputed by petitioner. Under such circumstances and as the pertinent language has been noticed in constituting a finding of the prescribed fact in compliance with the statute's specification, Welf. & Inst. Code, § 739, subd. (d), petitioner may not prevail here. In re Ortiz, 74 Cal.App.2d 810, 813-817, 169 P.2d 664; In re Hartman, 93 Cal. App.2d 801, 807, 210 P.2d 53.

The writ is discharged and the minor, Norman Etherington, is remanded to custody.

GIBSON, C. J., and SHENK, EDMONDS, and TRAYNOR, JJ., concur.

CARTER, Justice.

I dissent. It is conceded by the majority that a finding by the trial court is a jurisdictional requisite to depriving petitioner, Norman Etherington's mother, of her parental right to his custody, he being a minor. There is no finding that the welfare of said minor requires that his mother be deprived of his custody. The majority opinion relies upon some oral remarks made by the trial judge at the conclusion of the hearing. Such remarks do not purport to be the findings of the court contemplated by the statute. It made its written findings in its order making Norman a ward of the court. It there stated, after reciting the fact of a hearing: "The court *now finds* the following facts, and each of them, to be true: That the said Norman Etherington is within the County of Nevada, State of California, and is a person under the age of twenty-one years, to wit: of the age of 17 years; That he did operate a motor vehicle in the residential district of Grass Valley at the speed of 56 miles an hour in a 25 mile an hour zone and did wilfully and unlawfully resist officer Townsend and did escape after apprehension. And did contribute to the delinquency of a minor female by concealing her from her parents, and is a person coming within the provisions of subdivision M of section 700 of said Welfare and Institutions Code."

Not one word is said in said findings about the boy's welfare requiring that his mother no longer have his custody or that she is not fit or capable of being his custodian. To rely upon the oral comments of the trial court as constituting the essential findings required by the statute, not only violates the statutory requirement that findings be in writing, but is clearly contrary to express intention of the court.

The Welfare and Institutions Code requires that the court *find* the facts (sec. 739). It also provides that when the court

shall adjudge the minor to be a ward of the court, its findings, and "All commitment * * * orders shall be in *writing*, and * * * signed by the judge * *." Wel. & Insts. Code, sec. 735. It is the general rule that findings must be in writing and signed by the judge, See Code of Civ. Proc. sec. 632; Millard v. Supreme Council American Legion of Honor, 81 Cal. 340, 22 P. 864, and the oral opinion of the court cannot take the place of findings. In re Ingram Estate, 99 Cal.App. 660, 279 P. 208. The remarks of the court relied upon by the majority opinion are, at the most, no more than its oral opinion. It follows, therefore, that Norman's detention is unlawful and he should be discharged from custody.

SCHAUER, J., concur.



35 Cal.2d 889

Ex parte WELLS.

Cr. 5114.

Supreme Court of California, In Bank.
Sept. 13, 1950.

Proceeding in the matter of the application of Wesley Robert Wells for a writ of habeas corpus to secure release from custody on grounds that execution of the sentence imposed on him would deprive him of life without due process of law, and violate other state and federal constitutional provisions. The Supreme Court, Schauer, J., held that where the trial court allowed a defense to be presented, even though relevant evidence was erroneously excluded, and the Supreme Court on appeal appraised the effect of the erroneously excluded evidence, the requirements of due process were satisfied.

Writ denied.

Edmonds, Carter and Traynor, JJ., dissented in part.

1. Criminal law ⇐1208(9)

Sentence of five years to no fixed maximum was a life sentence and it was within discretion of Adult Authority to maintain such sentence as a life sentence by refraining from remitting any portion of it, or to reduce sentence by fixing or tentatively fixing a span of years.

2. Convicts ⇐5

Statute providing death penalty for life prisoner in a state prison who with malice aforethought commits assault on another, by any means of force likely to produce great bodily injury, applied to felon serving indeterminate sentence with no fixed maximum. Pen.Code, § 4500.

3. Criminal law ⇐1208(9)

Action of Adult Authority charged with power and duty to determine length of time of imprisonment of felons, in refusing to reduce indeterminate sentence of desperate and dangerous felon to term for years, was reasonable, in light of knowledge and facilities available to the authority.

4. Constitutional law ⇐266

In prosecution of life prisoner under mandatory death sentence statute, where trial court allowed a defense to be presented, even though relevant evidence was erroneously excluded, and Supreme Court appraised effect of the evidence erroneously excluded by trial court, requirements of procedural due process were satisfied. Pen. Code, § 4500.

5. Constitutional law ⇐250

In prosecution of life prisoner under mandatory death sentence statute, actions of trial court in erroneously excluding relevant evidence and of Supreme Court in applying section of state constitution authorizing refusal of new trial where error does not result in miscarriage of justice, were not discriminatory and did not deny equal protection. Const. art. 6, § 4½; Pen. Code, § 4500; U.S.C.A.Const. Amend. 14.

6. Jury ⇐37

In prosecution of life prisoner under mandatory death sentence statute, where trial court allowed defense to be presented, but erroneously excluded relevant evidence, and Supreme Court considered effect of excluded evidence and applied section of state constitution authorizing refusal of new

trial where error does not result in miscarriage of justice, prisoner was not deprived of jury trial. Const. art. 6, § 4½; Pen. Code, § 4500.

7. Jury ⇐31(11)

Constitutional right to jury trial does not include absolute right to have all relevant evidence before the jury in every case.

8. Criminal law ⇐1213

Where prisoner, who had been sentenced to five years to no fixed maximum, was convicted for committing violent assault on prison guard, imposition of mandatory death penalty was not cruel and unusual punishment. Const. art. 1, § 6; Pen. Code, § 4500; U.S.C.A.Const. Amend. 14.

C. K. Curtright, Philip C. Wilkins, Sacramento, and Charles R. Garry, San Francisco, for petitioner.

No appearance for respondent.

SCHAUER, Justice.

Wesley Robert Wells, who is confined in San Quentin State Prison under sentence of death, seeks habeas corpus on the grounds that execution of the sentence will deprive him of life without due process and violate other provisions of the federal and state Constitutions. We have concluded that his petition is devoid of merit.

[1] The death penalty was imposed, pursuant to the mandate of the statute, upon Wells' conviction of violation of section 4500 of the Penal Code: "Every person undergoing a life sentence in a State prison * * * who, with malice aforethought, commits an assault upon the person of another * * * by any means of force likely to produce great bodily injury, is punishable with death." The conviction was affirmed by this court on appeal (People v. Wells (1949), 33 Cal.2d 330, 202 P.2d 53), and the United States Supreme Court denied certiorari (338 U.S. 836, 70 S.Ct. 43, 94 L.Ed. 510). Wells had committed a non-fatal but violent battery on a prison guard while he was serving an indeterminate sentence of five years to no fixed maximum. No year-span limitation had been fixed by the Adult Authority; on the contrary the Authority had considered petitioner's case and, as pointed out in our opinion on the appeal (People v. Wells (1949), supra, page 336 of 33 Cal.2d, at page 57 of 202 P.2d), had acted on the case "by refraining from reducing such length of time [of imprisonment] to a term of years." Under the law of this state it is within the discretion of the Authority to either maintain such a sentence as a life sentence by refraining from remitting any portion of it, or to reduce such sentence to a fixed, or tentatively fixed, span of years. See, e. g., People v. McNabb (1935), 3 Cal.2d 441, 456, 45 P.2d 334; People v. Jones (1936), 6 Cal.2d 554, 556, 59 P.2d 89; People v. Ralph (1944), 24 Cal.2d 575, 578, 150 P.2d 401; In re Quinn (1945), 25 Cal.2d 799, 803, 154 P.2d 875; People v. Williams (1945), 27 Cal.2d 216, 219, 163 P.2d 441; In re Cowen (1946), 27 Cal.2d 637, 648, 166 P.2d 279.)

After affirmance of the judgment by this court and denial of certiorari by the Supreme Court of the United States, Wells sought habeas corpus in a United States District Court, D.C., 90 F.Supp. 855, 858. The judge who heard the matter announced his view that "By deliberate and designed inactivity, the administrative body known as the Adult Authority of California kept the petitioner in an indefinite and indeterminate status for the purpose of making it possible to impose the death penalty upon him in the event that he committed an offense under section 4500 of the California Penal Code. It must be concluded that this is not the kind of process that comports with 'the deepest notions of what is fair and right and just.' It may be appropriately characterized as 'overzealousness in an attempt to reach, through the criminal process (and indeed to destroy) those whom we may regard as undesirable citizens.'" The district judge further declared that he reserved final ruling on the petition and ordered execution of the death penalty stayed "in order to enable petitioner to pursue his state remedies by petition for a writ of habeas corpus or other corrective process."

The present petition for habeas corpus was filed pursuant to the above quoted sug-

gestion. It presents the argument embodied in the views of the district judge as above quoted. Furthermore, petitioner contends, the trial court's erroneous exclusion of evidence as to Wells' state of mind, and the holding of this court that such error did not result in a miscarriage of justice, violated due process, equal protection, and deprived Wells of his right to jury trial of the issue whether he acted with "malice aforethought"; and imposition of the death sentence is cruel and unusual punishment. It is to be noted that on his appeal Wells contended, among other things, that "Section 4500 was never intended to apply to persons, such as he, serving an unfixed, indeterminate sentence for a maximum term of life imprisonment, and to apply it to him is to deprive him of equal protection of the laws in violation of the Fourteenth Amendment of the federal Constitution." (See page 334 of 33 Cal.2d, at page 55 of 202 P.2d) However, in part, the precise contentions now advanced by petitioner were not, although they could have been, presented on his appeal.

[2] The People of the State of California, through their Legislature, established the non-discretionary punishment of death for the offense denounced by section 4500 of the Penal Code. (See People v. Finley (1908), 153 Cal. 59, 62, 94 P. 248; Finley v. People of State of California (1911), 222 U.S. 28, 31, 32 S.Ct. 13, 56 L. Ed. 75.) Thereafter, the People, through their Legislature, gave to the Board of Prison Terms and Paroles, which agency by later legislation has become the Adult Authority, the power and duty to determine, within statutorily defined limits, the length of time of imprisonment of felons sentenced to a state prison on judgments not imposing the death penalty. (See In re Lee (1918), 177 Cal. 690, 693, 171 P. 958; People v. Hale (1923), 64 Cal.App. 523, 535, 222 P. 148; In re Northcott (1925), 71 Cal.App. 281, 284, 235 P. 458; In re Collins (1926), 198 Cal. 508, 509, 245 P. 1089; People v. Stratton (1934), 136 Cal.App. 201, 207, 28 P.2d 695). As previously indicated it is well settled that the non-discretionary death penalty applies to a felon who, while serving an indeterminate sentence with no fixed maximum term of years, commits an assault of the sort described in section 4500. (People v. McNabb (1935), supra, pp. 456–458 of 3 Cal.2d at pages 340–341 of 45 P.2d; see also In re Quinn (1945), supra, p. 800 of 25 Cal.2d, at page 876 of 154 P.2d; People v. Williams (1945), supra, p. 219 of 27 Cal.2d, at page 442 of 163 P.2d; People v. Wells (1949), supra, p. 337 of 33 Cal.2d, at page 57 of 202 P.2d.) As said in People v. McNabb (1935), supra, pp. 456–457 of 3 Cal.2d, at pages 340–341 of 45 P.2d: "The authorities of this and many sister states which have an indeterminate sentence law similar to ours hold that a statute which prescribes * * * no maximum is in law a life sentence until and unless a court or executive board charged with the duty of fixing prison terms remits a portion of the life term."

[3] Here, as already stated, no portion of the prisoner's life term had been remitted but before petitioner committed the assault which resulted in the conviction now attacked, the Adult Authority had considered the matter of fixing his term and had declined to reduce it to a term of years. For the purpose of this opinion we accept the view, asserted by Wells in his petition and accepted by the district judge, that the Authority's action in refraining from fixing a term of years was intended to make, or to keep, petitioner a life-termer, under the holding of People v. McNabb (1935), supra, because petitioner was a dangerous, apparently incorrigible prisoner from whom acts of violence were anticipated. It does not follow that the Authority's action was arbitrary, repugnant to traditional concepts of fairness, or designed to "destroy" petitioner. The fact that Wells is a striking example of the failure of our penological system to reform a convicted person or to deter him from further acts of violence should not lead us to the unsound conclusion that the operation of that system was, in Wells' case, unconstitutional, or that the act of the Authority indicates malfeasance, misfeasance or nonfeasance. The Authority was dealing with a desperate and dangerous man (Wells had on separate previous occasions killed a

fellow prisoner, severely injured another prisoner, committed a number of vicious assaults and batteries on guards and inmates, and wantonly destroyed state property). The Authority was administering a system which combines the theory of reformation and the theory of punishment. Such system has long (more than 30 years in California [In re Lee (1918), supra, 177 Cal. 690, 171 P. 958]) been accepted in this state and in many other states as constitutional, and is generally regarded as a modern and enlightened approach to those elements of the problems of penology with which it deals. (See 15 Am.Jur., p. 169; 24 C.J.S., Criminal Law, § 1975, p. 1182.) Unfortunately Wells, under that system apparently did not become susceptible of reform or amenable to discipline. With the knowledge and facilities available to the Authority, its action in refusing to reduce the length of petitioner's imprisonment to a term of years was reasonable; indeed, it might well have concluded that the only reasonable course open to it was the stern (and, as it developed, ineffective) one of placing before petitioner the threat of even more severe punishment—the extreme penalty—should he continue his violent behavior.

[4] As to petitioner's contention that rulings of law by the trial court and this court deprived him of due process, it should first be noted that the solution of the question does not depend on the correctness of those rulings. (See Howard v. Com. of Kentucky (1906), 200 U.S. 164, 173, 26 S. Ct. 189, 50 L.Ed. 421; Paterno v. Lyons (1948), 334 U.S. 314, 320, 68 S.Ct. 1044, 92 L.Ed. 1409.) It is petitioner's position that the exclusion of evidence of his state of mind, offered to show lack of "malice aforethought," deprived him of procedural due process by denying his right to present his defense. (See Matter of Lambert (1901), 134 Cal. 626, 633, 66 P. 851, 55 L.R.A. 856, 86 Am.St.Rep. 296.) The trial court's ruling was an error of law merely; there was no refusal to allow Wells to present a defense, but only a rejection of some evidence concerning the defense. Petitioner cites no authority, and we find neither authority nor reason, which suggests that the hearing requirement of due process is not satisfied by this court's appraisal of the effect of the erroneously excluded evidence. The contention that petitioner was denied due process by this court's holding (People v. Wells (1949), supra, pp. 357–358 of 33 Cal.2d, at pages 69–70 of 202 P.2d) that "the rejection of the physician's proffered testimonies [as to Wells' state of mind at the time of the assault] did not result in a miscarriage of justice" is, in effect, a contention that this court, while carefully scrutinizing and sharply differing among some of the justices as to the effect of the error, ignored the most fundamental concepts of fairness and justice. We need refer only to the opinions on which our previous decision rested (the dissenting opinions as well as the majority opinion) to show that affirmance of the judgment of conviction was not wanting in due process.

[5] The trial court did not discriminate against Wells in ruling on the admissibility of evidence, and this court did not discriminate against him in applying section 4½ of article VI of the state Constitution; therefore, there was no denial of equal protection. (See Howard v. Com. of Kentucky (1906), supra, p. 176 of 200 U.S., at page 192 of 26 S.Ct., 50 L.Ed. 421; State v. Burke (1928), 126 Or. 651 [269 P. 869, 270 P. 756, 759], where defendant contended that application of provisions of the Oregon Constitution and statute similar to art. VI, § 4½, violated the Fourteenth Amendment; appeal dismissed on the ground that the asserted federal question was frivolous, 279 U.S. 811, 49 S.Ct. 262, 73 L.Ed. 971.)

[6, 7] It is true, as petitioner asserts, that he was entitled to a jury trial on the issues of fact raised by his plea of not guilty, including the question whether he acted with "malice aforethought." He was accorded such trial, and our decision did not retroactively deprive him of it. Petitioner is mistaken in his suggestion that the right of jury trial under the Constitution of this state includes the absolute right to have all relevant evidence before the jury in every case.

[8] In support of his contention that imposition of the death penalty in the pres-

ent situation is cruel and unusual punishment, petitioner cites only the Eighth Amendment of the United States Constitution [1] and section 6 of article I of the state Constitution, which forbid infliction of such punishment. In People v. Oppenheimer (1909), 156 Cal. 733, 737, 106 P. 74, imposition of the death penalty on a prisoner who committed a battery under circumstances materially similar to those here was upheld against the objection that it amounted to cruel and unusual punishment. We are convinced that that case was correctly decided. (See also In re Finley (1905), 1 Cal.App. 198, 203, 81 P. 1041.)

For the reasons above stated the application for the writ of habeas corpus is denied.

GIBSON, C. J., and SHENK and SPENCE, JJ., concur.

EDMONDS, Justice (concurring and dissenting).

I concur in the conclusion that Wells, at the time he attacked the prison guard, was "* * * undergoing a life sentence in a State prison * * *" within the meaning of section 4500 of the Penal Code. The decisions of this court uniformly declare that a sentence for a minimum term of years is one for life unless and until reduced. The penal history of Wells conclusively shows that in refusing to remit any portion of his sentence, the Adult Authority committed no abuse of discretion but, on the contrary, exercised sound judgment.

However, the second ground of Wells' petition presents a question which, if more broadly stated, would require a reexamination of the evidence upon which he was convicted. He asserts that he was denied due process of law by the decision of this court upon rulings of the trial judge excluding testimony. I agree that upon the appeal from the judgment, the "appraisal of the effect of the erroneously excluded evidence" did not violate any constitutional guaranty. This answer meets the narrow issue tendered by the allegations of the petition but ignores the basic question which is stated in the points and authorities in support of Wells' demand for relief upon constitutional grounds.

In the petitioner's brief that question is presented as follows:

"A. Petitioner at his trial * * * was not allowed to present to the jury his only major defense; i. e., evidence regarding his state of mind and *intent* at the time of the alleged act;

"B. The matter of the intent with which an act is done is within the exclusive province of the jury." Strictly speaking, these charges are not pleaded as one of the formal grounds for habeas corpus. But unquestionably counsel is not basing his claim of lack of due process solely upon the action of this court in considering the evidence tendered at the trial. His argument challenges the rulings of the trial judge and is built upon the premise that intent is an essential element of the crime of which Wells was convicted.

Under such circumstances, and particularly with human life at stake, niceties of pleading should not be the decisive factor in this court's conclusions. Justice requires a determination of the question as to whether the exclusion of the evidence offered by Wells upon the trial violated constitutional guarantees. As to that question, I again state my conclusions concerning it as follows: "The refusal to admit such evidence allows one to be convicted of the crime defined by section 4500 of the Penal Code without proof of the requisite mental intent specified by the statute and constitutes a denial of due process of law * * *" and "* * * the ruling necessarily constitutes a miscarriage of justice within the meaning of section 4½ of Article VI of the Constitution." (People v. Wells, 33 Cal.2d 330, 359, 202 P.2d 53.)

For these reasons, in my opinion the writ of habeas corpus should issue.

CARTER and TRAYNOR, JJ., concur.

1. Infliction of barbarous punishment would not violate the Eighth Amendment; it might violate the Fourteenth. (See State of Louisiana ex rel. Francis v. Resweber (1947), 329 U.S. 459, 462, 463, 470, 67 S.Ct. 374, 91 L.Ed. 422.)

In re NEWTON'S ESTATE.

KUCHEL v. NEWTON.

L. A. 20827.

Supreme Court of California, in Bank.

Sept. 7, 1950.

Rehearing Denied Oct. 2, 1950.

Proceeding in the matter of the estate of Arthur B. Newton, deceased, wherein the widow of deceased, Beverly M. Newton, filed objections to a part of the report of the inheritance tax appraiser. The Superior Court, Los Angeles County, Harold B. Jeffery, J., sustained objections of the widow and Thomas H. Kuchel, Controller of the State of California, appealed. The Supreme Court, Shenk, J., held that intangible personalty, which was held in New York, and transferred by special power of appointment to wife of donee under will of donee, who was a resident of California at death, was subject to California inheritance tax.

Order reversed.

Prior opinion, 210 P.2d 551.

1. Wills ⇐77, 589

The exercise of a power of appointment occurs at time of donor's death, because a will only takes effect as of time of death of testator.

2. Taxation ⇐878(2)

Intangible personalty, which was held in New York, and transferred by special power of appointment to wife of donee under will of donee, who was a resident of California at death, was subject to California inheritance tax. Revenue and Taxation Code, §§ 13692, 13693.

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Leon W. Delbridge, Pasadena, Brady & Nossaman, and Walter L. Nossaman, all of Los Angeles, for respondent.

McCutchen, Thomas, Matthew, Griffiths & Greene, San Francisco, amici curiæ.

SHENK, Justice.

The state controller has appealed from an order sustaining objections to the report of the inheritance tax appraiser and fixing inheritance tax in the sum of $14.08, which was less by $31,105.19 than the amount fixed in the report.

The facts are not in dispute. A testamentary trust was created in the state of New York by Charles E. Newton, the decedent's father, who died a resident of that state on October 19, 1921. The trust provided for an income to the decedent during his life. Further provisions gave him the power by will to appoint his wife to take on his death a specified proportion of the trust assets. The decedent executed a will in New York on May 2nd, 1930, whereby he appointed his wife as the beneficiary. Later he and his wife removed to California where as a resident he died on March 11, 1943, leaving his widow, the respondent herein. His will was admitted to probate.

The assets of the trust subject to the appointment consist entirely of intangibles valued at $412,510.36 held in trust by New York trustees. There are no shares of California corporations. The widow objected to the controller's report on the ground that under the decision in Re Estate of Bowditch, 189 Cal. 377, 208 P. 282, 23 A.L.R. 735, the state was without jurisdiction to impose the portion of the tax measured by the appraised value of the intangibles held in New York.

[1] There is no merit in the contention that the exercise of the power of appointment occurred at the time the decedent made his will in New York. Since a will takes effect as of the time of the death of the testator there can be no question that the death of the decedent determined the time of the exercise of the power. Nichols v. Emery, 109 Cal. 323, 329, 41 P. 1089, 50 Am.St.Rep. 43.

Prior to 1922 the history regarding the taxation in this state of transfers of property through the gift or exercise of powers of appointment was substantially the following:

The Inheritance Tax Act of 1905, Stats. 1905, p. 341, section 1, made taxable the exercise of powers of appointment as a transfer of property by will from the donee of the power. (Provisions regarding non-

exercise of the power will not be noted.) The Inheritance Tax Act of 1913, Stats. 1913, p. 1066, repealed that provision with a saving clause, and in section 3 provided that the gift of a power of appointment was a taxable transfer of property from the doner to the donee upon the death of the donor. In 1917, Stats.1917, p. 880, the 1913 enactment was repealed with a saving clause and the legislature reverted to the 1905 provision, again making taxable the transfer by the exercise of the power, section 2(6), and it remained so until 1935. In the 1917 act, sec. 1(2), the words "estate" and "property" included all personal property of resident decedents within or without the state.

In August 1922 this court decided In re Estate of Bowditch, supra, 189 Cal. 377, 208 P. 282, 23 A.L.R. 735. The resident decedent, Charlotte Bowditch, was the donee of a power to appoint and did appoint by will the beneficiary of a trust created under the will of her father, a Massachusetts domiciliary. The trust assets amounting in value to some $299,000 consisted entirely of personal property, the nature of which was not disclosed in the opinion, located in Massachusetts. The facts were in essence parallel to those of the present case and the appeal brought to this court the question whether the state had jurisdiction to include the transfer by the decedent's exercise of the power of appointment as a taxable transfer. The court recognized that a succession to property effected independently of the authority of a particular state was not taxable by that state and was not within the purview of its inheritance tax acts. In applying the test it was observed that the state had plenary power over the administration and disposition of estates of persons domiciled here including personal property wherever situated, and that jurisdiction to exercise the taxing power attached when there was actual or constructive situs of the property within the state. The court concluded, however, that under the facts the state could not tax the transfer effected through the exercise of the power by the decedent. The court relied on United States v. Field, 255 U.S. 257, 41 S. Ct. 256, 65 L.Ed. 617, 18 A.L.R. 1461, Walker v. Treasurer & Receiver General, 221 Mass. 600, 109 N.E. 647, and Shattuck v. Burrage, 229 Mass. 448, 118 N.E. 889, in making the following statement: "But personal property which is the subject of a power of appointment does not acquire a constructive *situs* in the state of the domicile of the donee of the said power under this theory [i.e. that personal estate wherever situated is deemed to have the situs of the domicile of the owner], for such property *is no part of the estate of the donee.* 'When a donor gives to another power of appointment over property, the donee of the power does not thereby become the owner of the property. The donee has no title whatever to the property. The power is simply a delegation to the donee of authority to act for the donor in the disposition of the latter's property.' * * * Therefore, for the purpose of testamentary succession and distribution, the property here involved has acquired no *situs* in this state, either actual or constructive, and the laws of Massachusetts alone control the transfer thereof under the will of Charlotte Bowditch." [189 Cal. 377, 208 P. 283]. Thus the theory was that since the interest of the transferee was derived from the will of the Massachusetts donor, there was no resort to the sovereignty of this state for the transfer of the property interest through the decedent's exercise of the power of appointment. See In re Estate of Dillingham, 196 Cal. 525, 533–534, 238 P. 367.

In 1923, Stats.1923, p. 693, sec. 1(2), the following italicized words were added in the definition of "estate" and "property" to include "all personal property within or without the state *or subject to the jurisdiction thereof.*"

Between that year and the next statutory change the United States Supreme Court decided Wachovia Bank & Trust Co. v. Doughton, 1926, 272 U.S. 567, 47 S.Ct. 202, 71 L.Ed. 413. The facts were somewhat similar to those in the Bowditch case. The donor died in Massachusetts leaving a will probated there. A trust created thereby, located and administered in Massachusetts, gave to the donor's daughter the power to appoint the beneficiary of trust assets con-

sisting of intangibles valued at nearly $400,000. The donee appointed beneficiaries by will and died a resident of North Carolina. The question of the jurisdiction of North Carolina to tax the exercise of the power under a statute designating the exercise thereof as a transfer taxable in the same manner as though the property belonged absolutely to the donee was presented to the Supreme Court. The court noted the principles of the cases above cited, among others, as those commonly accepted as controlling the question of the constructive situs of the intangibles in the taxing state and concluded that no right exercised by the donee was conferred by North Carolina; therefore that North Carolina did not have jurisdiction to impose the tax. Mr. Justice Holmes stated his dissenting view that the result was irreconcilable with Bullen v. Wisconsin, 240 U.S. 625, 36 S.Ct. 473, 60 L.Ed. 830, where the general power was considered to have the same effect as ownership.

In 1935, Stats. 1935, p. 1266, the legislature amended section 2(6) to make the gift of the power a taxable transfer as in the 1913 statute. As amended the section read: "Whenever any person or corporation shall be given a power of appointment by virtue of any disposition of property made before or after the passage of this act, such gift of power of appointment shall, under the provisions of this act, be deemed a taxable transfer made from the donor of said power to the donee thereof at the date of the donor's death; provided that where the donor of a power of appointment dies prior to the taking effect of this amendment and the power is exercised thereafter the exercise of said power of appointment shall be deemed a transfer taxable as provided in subdivision 6 of section 2 of the Inheritance Tax Act of 1921 as amended in 1929." At the same time the definition of "estate" and "property", sec. 1(2), was amended to include "all intangible personal property of resident decedents within or without the State or subject to the jurisdiction thereof."

The foregoing provisions of section 2(6), with the addition of the words "general or limited" preceding the words "power of appointment", were in effect retained by the amendment of 1941, Stats. 1941, p. 1222, now embodied in secs. 13692 and 13693, Rev. and Tax Code. The 1935 act as amended in 1941 was the statute in force at the time of the decedent's death in 1943. The result was to impose the tax on a transfer by the gift of the power of appointment made by a resident donor, except that the imposition of the tax on a transfer through the exercise of the power by a resident donee was saved where the donor had died prior to the effective date of the 1935 amendment. The death of the donor, decedent's father, prior to the effective date of the 1935 statute calls for the application of the saving clause to the decedent's exercise of the power. There is no question of the correctness of the inheritance tax appraiser's computation of the tax if the statute applies to impose it.

In 1938 the Supreme Court decided Curry v. McCanless, 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339, 123 A.L.R. 162, and Graves v. Elliott, 307 U.S. 383, 59 S.Ct. 913, 83 L.Ed. 1356. In the McCanless case the question was whether Tennessee as well as Alabama might constitutionally impose death taxes upon the transfer of an interest in intangibles held in trust in Alabama but passing by testamentary appointment under a donated power exercised by a decedent domiciled in Tennessee. The decedent was both the donor and the donee of the power. By statute Tennessee imposed a tax on transfers of resident decedents' intangible property wherever located including transfers under powers of appointment. The Supreme Court noted the nature of intangibles, the practical difficulties in applying to them a physical situs, and the sovereign power which extends over intangibles of a domiciled decedent although they have no physical location within the state exercising the power. It was declared that a jurisdiction which does not depend on physical presence within the state is not lost by declaring that it is absent. It was held that the power to tax the intangibles was not lost because the court might choose to say that they were located elsewhere; that the decedent's power to dispose of intangibles was a potential source of wealth and therefore property in his hands; and that there

was no substantial difference between that and any other case in which at the moment of death the evidences of intangibles passing under the will of a decedent domiciled in one state were physically present in another. The conclusion followed that the transfer was taxable under the Tennessee statute. The Elliott case determined that New York might constitutionally tax a domiciliary's relinquishment at death of a power to revoke a trust of intangibles held by a Colorado trustee. Following the McCanless decision it was held that the right to revoke the trust had the attributes of property and was a potential source of wealth; that the legal interest in the intangibles held in trust in Colorado was not so dissociated from the person of the decedent as to be beyond the taxing power of the state of domicile any more than the decedent's other rights in intangibles. The court said that, as in the case of any other intangibles, control over the person and estate of the decedent at the place of domicile and the duty of decedent to contribute to the support of government there, afforded adequate constitutional cases for the imposition of a tax measured by the value of the intangibles transmitted or relinquished at death. The fact that the power was donated by another was held to be without significance. Reliance was in part on Bullen v. Wisconsin, 240 U.S. 625, 36 S.Ct. 473, 60 L.Ed. 830, invoked as support for the dissenting view in the Wachovia case. See also Orr v. Gilman, 1901, 183 U.S. 278, 22 S.Ct. 213, 46 L.Ed. 196; Blackstone v. Miller, 188 U.S. 189, 23 S.Ct. 277, 47 L.Ed. 439; Chanler v. Kelsey, 205 U.S. 466, 27 S.Ct. 550, 51 L.Ed. 882. Cf. Brooke v. City of Norfolk, 277 U.S. 27, 48 S.Ct. 422, 72 L.Ed. 767; Safe Deposit & T. Co. v. Virginia, 280 U.S. 83, 50 S.Ct. 59, 74 L.Ed. 180, 67 A.L.R. 386.

The foregoing declarations disclosed the fundamental error in arriving at a contrary conclusion in the Wachovia and Bowditch cases by the failure to ascribe the recognized proprietary attributes to similar acts. Consequently in Graves v. Schmidlapp, 1942, 315 U.S. 657, 62 S.Ct. 70, 86 L.Ed. 1097, 141 A.L.R. 948, the Supreme Court overruled the Wachovia case in applying the Bullen, McCanless and Elliott decisions to sustain the constitutional power of New York to tax the transfer effected by a resident decedent's exercise of a power of appointment created by the will of a nonresident donor in respect to intangibles held in trust in Massachusetts. In reversing the New York Court of Appeals; In re Thayer's Estate, 286 N.Y. 596, 35 N.E.2d 937, affirmance of the Surrogate's decree, 172 Misc. 426, 15 N.Y.S.2d 208, which reduced the assessed estate tax on the authority of the Wachovia case, the Supreme Court said: "The conclusion there reached and the reasons advanced in its support cannot be reconciled with the decision and the reasoning of the Bullen, the McCanless and the Elliott cases. It is plain that if appropriate emphasis be placed on the orderly administration of justice rather than blind adherence to conflicting precedents, the Wachovia case must be overruled. There is no reason why the state should continue to be deprived of revenue from a subject which from the beginning has been within the reach of its taxing power; a subject over which we cannot say the state's control has been curtailed by the due process clause of the Fourteenth Amendment. No interest which could be served by so rigid an adherence to stare decisis is superior to the demands of a system of justice based on a considered and a consistent application of the Constitution." [315 U.S. 657, 62 S. Ct. 875]

[2] Points of similarity or difference in the various cases are immaterial because they also are of no significance here. There can now be no question of the power of California to impose the tax in question; and conflicting declarations which led to a contrary result in the Bowditch case are overruled. The statute clearly provides that the exercise of the power of appointment is deemed "a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will." Inheritance Tax Act of 1921, as amended in 1929, sec. 2(6), Stats. 1929 p. 1834. The statutory provision as incorporated in the

1935 act is applicable here and supports the imposition of the tax reported by the inheritance tax appraiser.

The order is reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

TRAYNOR, Justice.

I concur, but deem it advisable to spell out with particularity the reasons for my concurrence.

The Inheritance Tax Acts of this state plainly provide for the imposition of the tax in the present case. Section 2 of the Inheritance Tax Act of 1935, as amended in 1941, by which this appeal is governed, provides:

"A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise * * said taxes to be upon the market value of such property at the date of death of the decedent and at the rates hereinafter prescribed * * *

"(6) *Powers of appointment.* Whenever any person or corporation shall be given a general or limited power of appointment by virtue of any disposition of property made before or after 5 p. m. of June 25, 1935, such gift of power of appointment shall, under the provisions of this act * * * be deemed a taxable transfer made from the donor of said power to the donee thereof at the date of the donor's death, except that:

"(a) Where the donor of a power of appointment died prior to 5 p. m. of June 25, 1935, and the power is exercised thereafter, the exercise of said power of appointment shall be deemed a transfer taxable as provided in Subdivision (6) of Section 2 of the Inheritance Tax Act of 1921, as amended in 1929." 3 Deering's Gen. Laws, Act 8495, § 2, pp. 3207–3208.

Subdivision (6) of Section 2 of the Inheritance Tax Act of 1921 as amended in 1929 provides: "Whenever any person, trustee or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, *such appointment, when made, shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power,* and had been bequeathed or devised by such donee by will." Stats.1929, c. 844, pp. 1836–1837. Italics added.

Subdivision (2) of Section 1 of the 1935 act provides that " 'property' as used in this act * * * shall include all intangible personal property of resident decedents within or without the State or subject to the jurisdiction thereof." 3 Deering's Gen. Laws, Act 8495, § 1(2), p. 3206.

Decedent's father, the donor of the power, died in 1921. Decedent died domiciled in California on March 11, 1943, leaving a will executed in New York in 1930 appointing his wife, respondent herein, beneficiary under his power of appointment of the trust assets. His will was probated in California. Since the donor of the power died before June 25, 1935, and the power was exercised after that date, the 1921 and 1935 acts clearly impose a tax on the transfer of the trust assets from decedent to his wife by virtue of decedent's exercise of the power of appointment since the appointment is "deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will."

Respondent contends, however that, notwithstanding the express statutory provisions for the taxation of the transfer, the transfer is not taxable under the decision of this court in Re Estate of Bowditch, 189 Cal. 377, 208 p. 282, 23 A.L.R. 735. In her view, the Bowditch case, unlike Wachovia Bank & Trust Co. v. Doughton, 272 U.S. 567, 575, 47 S.Ct. 202, 71 L.Ed. 413, did not decide that there is a constitutional impediment to the imposition of the tax. She views Estate of Bowditch as a decision that the California Inheritance Tax Acts do not apply to transfers of property by one who, under California property law, is not the owner of the property trans-

ferred. She asserts that since the Bowditch case decided only that the statute did not impose such a tax, it is unaffected by the decision of the United States Supreme Court in Graves v. Schmidlapp, 315 U.S. 657, 62 S.Ct. 870, 86 L.Ed. 1097, 141 A.L.R. 948, that the Fourteenth Amendment does not prohibit its imposition.

Respondent's contention finds no support in the language of the statute or in the decision of this court in Estate of Bowditch. The imposition of an inheritance or estate tax does not depend on the decedent's ownership of the property under common-law principles. The tax is not imposed on the property, but on the decedent's transfer of that property. When, as in the present case, the statute expressly makes the transfer of property taxable "in the same manner as though the property * * * belonged absolutely" to the decedent, it is irrelevant that under common-law concepts of property ownership the property did not belong absolutely to the decedent. The only question then is whether the imposition of such a tax is within the constitutional power of the state.

Since 1901 it has been recognized that the state may properly tax the transfer of property by the donee of the power to his appointee under its plenary power to control succession to the estates of its domiciliaries. "Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that, in reality and substance, it is the execution of the power that gives to the grantee the property passing under it. * * * When David Dows, Sr., devised this property to the appointees under the will of his son, he necessarily subjected it to the charge that the state might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself; that is, for the privilege of succeeding to property under a will." Orr v. Gilman, 183 U.S. 278, 282–283, 22 S.Ct. 213, 215, 46 L.Ed. 196; Chanler v. Kelsey, 205 U.S. 466, 474–475, 477, 27 S.Ct. 550, 51 L.Ed. 882.

"Decedent's * * * power to dispose of the intangibles at death was property in his hands in New York, where he was domiciled. Graves v. Elliott, supra. He there made effective use of the power to bestow his bounty on the widow. Its exercise by will to make a gift was as much an enjoyment of a property right as would have been a like bequest to his widow from his own securities. See Helvering v. Horst, 311 U.S. 112, 117, 61 S.Ct. 144, 147, 85 L.Ed. 75, 131 A.L.R. 655. * * * Taxation of such enjoyment of the power to dispose of property is as much within the constitutional power of the state of his domicile as is the taxation of the transfer at death of intangibles which he owns.

"Since it is the exercise of the power to dispose of the intangibles which is the taxable event, the mere fact that the power was acquired as a donation from another is without significance. We can perceive no ground for saying that its exercise by the donee is for that reason any the less the enjoyment of a property right, or any the less subject to taxation at his domicile. The source of the power by gift no more takes its exercise by the donee out of the taxing power than the like disposition of a chose in action or a share of stock, ownership of which is acquired by gift." Graves v. Schmidlapp, 315 U.S. 657, 662–663, 62 S.Ct. 870, 874, 86 L.Ed. 1097, 141 A.L.R. 948.

Graves v. Schmidlapp did not alter any concepts of property ownership. The taxability of transfers of property by a donee's exercise of a power of appointment was established by the Orr and Chanler cases under statutes identical with section 2(6) of the 1921 act under which Estate of Bowditch was decided. See also, Bullen v. Wisconsin, 240 U.S. 625, 36 S.Ct. 473, 60 L.Ed. 830. Nor did United States v. Field, 255 U.S. 257, 41 S.Ct. 256, 257, 65 L.Ed. 617, 18 A.L.R. 1461, announce a different rule. In that case, the court was not concerned with a statute expressly taxing the transfer of property by the donee's exercise of a power of appointment such as those before it in the Orr and Chanler cases or that before the California Supreme Court in Estate of Bowditch. The Commissioner of Internal Revenue sought to include in the decedent's gross estate the value of property subject to the decedent's power of appointment de-

rived from her husband's will, on the theory that the donee of a power of appointment was the owner of property subject thereto within the meaning of section 202(a) of the Revenue Act of 1916.[1] He relied, not on a statutory provision taxing the transfer of property by the exercise of a power of appointment, but on the general provision including in a decedent's gross estate all property owned by the decedent at the time of his death. The court held that there was no question "as to the power of Congress to impose a tax upon the passing of property under testamentary execution of a power of appointment," regarding that question as settled by Chanler v. Kelsey. It held that the only question was whether Congress had done so. The exercise of the power, in the absence of specific statutory provision therefor, did not of itself require the inclusion of the appointed property in the gross estate of the donee, and the court held that since Congress had not expressly authorized the inclusion of the appointed property in the decedent's gross estate the tax could not be sustained. United States v. Field, 255 U.S. 257, 263, 41 S.Ct. 256, 257, 65 L.Ed. 617, 18 A.L.R. 1461. Since the decision in the Field case, and without any change in concepts of property ownership, Congress has enacted legislation including in the donee's gross estate property subject to his power of appointment as if he were the absolute owner thereof. Internal Revenue Code § 811(f). There has been no change in the concept of property ownership enunciated by the Field case; that decision is still applicable to powers of appointment exercised before the enactment of section 811(f). Helvering v. Safe Deposit & Trust Co., 316 U.S. 56, 63, 62 S.Ct. 925, 86 L.Ed. 1266, 139 A.L.R. 1513. Congress did, however, under the same concepts of property ownership underlying the Field decision, enact a statute by which property transferred by the exercise or nonexercise of a power of appointment is deemed transferred by the donee of the power and included in his gross estate. Helvering v. Safe Deposit & Trust Co., 316 U.S. 56, 65, 62 S.Ct. 925, 86 L.Ed. 1266, 139 A.L.R. 1513.

The basis of the decision in the Bowditch case is not that the transfer of property by appointment may not be taxed as a transfer by will from the donee, but that California did not have the constitutional power to tax the transfer if the evidences of ownership of the intangible personal property transferred were located outside the state. The court expressly held that the plenary power of the state to tax succession to property could not be asserted in that case for the reason that "both the physical and constructive *situs* of the [appointed] property" was outside the state. Since the legal title was held by nonresident trustees and the evidences of ownership of the intangibles transferred in that case were located outside the state, the court held that California did not have jurisdiction to tax the transfer of that property by the will of a resident decedent. The tax could be sustained "only in the event that the personal property which is the subject of the said power is within the jurisdiction of the state." In re Estate of Bowditch, 189 Cal. 377, 380, 208 P. 282, 284, 23 A.L.R. 735. The court's determination of California's "jurisdiction to impose an inheritance tax" was cited with approval in the 1926 decision of the United States Supreme Court holding that the imposition of a similar tax under an identical statute was beyond the constitutional power of the state of North Carolina. Wachovia Bank & Trust Co. v. Doughton, 272 U.S. 567, 575, 47 S.Ct. 202, 71 L.Ed. 413.

The error of the decisions in the Bowditch and Wachovia Bank & Trust cases arose out of the reasoning that intangible personal property must have a situs or physical location. Although the situs of realty or tangible personal property controls the jurisdiction of a state to tax the transfer thereof, Frick v. Pennsylvania, 268 U.S. 473, 489, 45 S.Ct. 603, 69 L.Ed. 1058, 42 A.L.R. 316; Treichler v. State of Wisconsin, 338 U.S. 251, 70 S.Ct. 1, 3–4, "very

1. Now section 811(a) of the Internal Revenue Code, 26 U.S.C.A. § 811(a), requiring the inclusion in the decedent's gross estate of all property "to the extent of the interest therein of the decedent at the time of his death."

different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. See Chicago, R. I. & P. Ry. Co. v. Sturm, 174 U.S. 710, 716, 19 S.Ct. 797, 799, 43 L.Ed. 1144; Harris v. Balk, 198 U.S. 215, 222, 25 S.Ct. 625, 626, 49 L.Ed. 1023, 3 Ann.Cas. 1084. Obviously, as sources of actual and potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived. They are not in any sense fictions. They are indisputable realities.

"The power to tax 'is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.' McCulloch v. Maryland, 4 Wheat. 316, 429, 4 L.Ed. 579. But this does not mean that the sovereign power of the state does not extend over intangibles of a domiciled resident because they have no physical location within its territory, or that its power to tax is lost because we may choose to say they are located elsewhere. A jurisdiction which does not depend on physical presence within the state is not lost by declaring that it is absent. From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile of the owner within the taxing state, or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax." Curry v. McCanless, 307 U.S. 357, 365–367, 59 S.Ct. 900, 905, 83 L.Ed. 1339, 123 A.L.R. 162; Graves v. Elliott, 307 U.S. 383, 386, 59 S.Ct. 913, 83 L.Ed. 1356.

It follows, therefore, that since California did have the power to tax the transfer of the appointed property by the donee and plainly provided for such a tax, and since its jurisdiction to impose the tax did not depend upon "the attribution to intangibles of a physical presence within its territory," the fact that the legal title to the intangibles was held by nonresident trustees and the evidences of ownership of the securities subject to Charlotte Bowditch's power of appointment were physically located outside the state should not have deprived California of jurisdiction to tax their transfer. In the light of its decision in Curry v. McCanless, the United States Supreme Court in Graves v. Schmidlapp, 315 U.S. 657, 662–663, 665, 62 S.Ct. 870, 86 L.Ed. 1097, 141 A.L.R. 948, overruled its earlier decision in the Wachovia Bank & Trust Co. case and held that the state's jurisdiction to tax the transfer of the appointed property was not lost because the "intangibles * * * have no geographical location" within its territory, so long as the donee of the power was domiciled in the taxing state. The court held that there was no question that the statute there under consideration, essentially identical with section 2(6) of the 1921 act, taxed the transfer as one from the donee of the power of appointment,[2] or that New York had the constitutional power to enact such a statute. Chanler v. Kelsey, 205 U.S. 466, 477, 27 S.Ct. 550, 51 L.Ed. 882. Since the transfer by the donee of the power was

2. "We are here concerned with a tax on the transfer of property from a decedent who by virtue of her power of appointment is, by the express language of the statute [the same as section 2(6)], deemed the absolute owner of the property to which her power of appointment relates." In re Estate of Rohnert, 244 Wis. 404, 409, 12 N.W.2d 684, 686.

the taxable event, the residence of the donor was immaterial. "The mere fact that the power was acquired as a donation from another is without significance." 315 U.S. at pages 662, 663, 62 S.Ct. 870, 874, 86 L.Ed. 1097, 141 A.L.R. 948. Since the jurisdiction to tax intangibles is not dependent on physical presence within the state, Curry v. McCanless, supra, it was held that neither the residence of the trustees nor the location of the evidences of ownership of the appointed intangibles affected the jurisdiction of the taxing state. 315 U.S. at pages 664–665, 62 S.Ct. 870, 86 L.Ed. 1097, 141 A.L.R. 948. For these reasons, the New York statute, admittedly valid as to property located within the state, was held valid as to resident donees irrespective of the "physical and constructive *situs*" of the property. With the decision of the United States Supreme Court in Graves v. Schmidlapp, the decision of this court in Estate of Bowditch that California did not have the constitutional power to tax the transfer therein has been as conclusively repudiated as the similar decision of the New York Court of Appeals, In re Thayer's Estate, 286 N.Y. 596, 35 N.E. 2d 937, which was reversed in Graves v. Schmidlapp. The question therefore is not, as respondent asserts, whether Estate of Bowditch as a decision on statutory construction should be overruled, but whether Estate of Bowditch as a decision on California's constitutional power to tax contrary to the latest decision of the United States Supreme Court *must* be overruled. As a decision predicated on the due process clause of the United States Constitution, Estate of Bowditch cannot survive Curry v. McCanless and Graves v. Schmidlapp.

Respondent, however, contends that "even if Estate of Bowditch has been overruled by a 1942 decision [Graves v. Schmidlapp] as to any constitutional question involved, the 1935 act and the 1941 amendments were made in view of, and adopted the rule of that case." It is her view that the reenactment of section 2 (6) of the 1921 act after Estate of Bowditch without change therein was "obviously motivated by a desire to conform the statute to the Court's decision," for, had the Legislature disapproved the decision therein, it would have expressly repudiated it. It is in effect contended that the perpetuation of an erroneous interpretation of the United States Constitution may be achieved by legislative failure to defy the decisions of this court and of the Supreme Court of the United States announcing that interpretation.

Section 2 (6) of the 1921 act insofar as it governs the present case was not amended in 1935; it was incorporated into the 1935 act just as it read at the time the Bowditch case was decided. The shifting of the tax from the exercise of the power by the donee to the creation of the power by the donor was expressly made applicable only to powers created by donors dying after June 25, 1935, the effective date of the amendment; as to powers created by donors dying before that date but exercised thereafter, the exercise of the power remained "a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power". The express language of the statute negatives any inference that the Legislature repealed the provision taxing the transfer by the exercise of the power because of the construction and application it was given by Estate of Bowditch. How, in the face of the fact that the Legislature incorporated the earlier statute verbatim into the 1935 act, can it be said that it repealed the provision? The Legislature could not more clearly demonstrate an intention to stand by the method of taxing such transfers so far as it constitutionally could do so. That intention is also demonstrated by the 1923 amendment of section 2 (1) of the 1921 act, Stats.1923, c. 337, p. 694, providing for the taxation of all transfers at death of intangible personal property of resident decedents "within or without the state *or subject to the jurisdiction thereof*". Italicized words added by the 1923 amendment. By that amendment the Legislature clearly expressed an intention to tax all transfers at death to the full extent of California's jurisdiction to tax. No other con-

struction of legislative intention can be maintained consistently with this amendment.

Whatever merit there may be in the theory that the re-enactment of a statute without change adopts the judicial construction thereof, cf. Girouard v. United States, 328 U.S. 61, 69, 66 S.Ct. 826, 90 L.Ed. 1084; Cleveland v. United States, 329 U.S. 14, 22-23, 67 S.Ct. 13, 91 L.Ed. 12; Helvering v. Hallock, 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368, it is limited to cases in which the preceding decision has purported to interpret the statute. It has no application when the decision was that enforcement of the statute was beyond the state's constitutional power. Estate of Bowditch did not interpret section 2 (6) of the 1921 act; it decided that, as properly interpreted, the statute prescribed a tax that was beyond California's jurisdiction to impose. The decision therein was so interpreted by a later decision of this court, Estate of Dillingham, 196 Cal. 525, 534, 238 P. 367, and was cited by the United States Supreme Court as authority for its decision that a similar application of an identical statute by North Carolina was beyond its constitutional power. Wachovia Bank & Trust Co. v. Doughton, 272 U.S. 567, 575, 47 S.Ct. 202, 71 L.Ed. 413; see also, Wachovia Bank & Trust Co. v. Doughton, 189 N.C. 50, 55, 126 S.E. 176; Trowbridge, Recent Inheritance Tax and Estate Tax Decisions, 14 Cal.L. Rev. 1, 8; Nossaman, State Taxation of Intangibles, 18 Cal.L.Rev. 345, 369. It would be an anomalous doctrine that legislative re-enactment of a statute held partially unconstitutional adopts the decision on the issue of constitutionality as part of the statute. This court is not estopped to correct its own error merely because the Legislature has not chosen to defy the court's interpretation of the United States Constitution.

For the same reasons, it cannot be inferred from the Controller's failure to reassert the provisions of section 2 (6) in cases such as Estate of Bowditch that his inaction constitutes an administrative interpretation of the statute the same as that now urged by respondent. The Controller's failure after Estate of Bowditch to attempt to tax such transfers did not demonstrate an interpretation of the statute, but only the recognition that under Bowditch and Wachovia the application of the statute according to the plain meaning of its provisions would be unconstitutional. The Controller can no more be required to defy the decisions of this court and the United States Supreme Court on the constitutionality of a statute than can the state Legislature. The Controller did not unduly delay in asserting the jurisdiction that the United States Supreme Court in 1942 asserted that he has; this proceeding was begun in 1943. It cannot reasonably be said that this is a case in which administrative or legislative inaction demonstrates an intention to accept an interpretation of the statute at variance with its plain meaning and the interpretation given identical statutes by the United States Supreme Court and the courts of other states. Graves v. Schmidlapp, 315 U.S. 657, 662-663, 62 S. Ct. 87, 86 L.Ed. 1097, 141 A.L.R. 948; Wachovia Bank & Trust Co. v. Doughton, 189 N.C. 50, 53, 126 S.E. 176; Pitman v. Pitman, 314 Mass. 465, 469, 50 N.E.2d 69, 150 A.L.R. 509; National Shawmut Bank v. Joy, 315 Mass. 457, 472, 53 N.E.2d 113; Pennsylvania Co. v. Kelly, 134 N.J.Eq. 120, 133, 34 A.2d 538; Estate of Rohnert, 244 Wis. 404, 409, 12 N.W.2d 684.

Amici curiæ on behalf of respondent contend that if section 2 (6) of the 1935 act is construed to apply to the transfer in the present case, the statute violates the equal protection clause of the Fourteenth Amendment in that it arbitrarily discriminates between resident donees exercising powers of appointment created by donors dying before June 25, 1935, and resident donees exercising powers created by donors dying after that date. It is contended that, since the taxability of the exercise of the power by the donee depends upon the date of death of the donor, the statute is invalid for the reasons stated in Binney v. Long, 299 U.S. 280, 57 S.Ct. 206, 81 L.Ed. 239.

Binney v. Long involved a 1909 Massachusetts statute under which the transfer of property by the exercise or nonexercise of a power of appointment created by a donor

dying before 1907 was taxed, but no tax was imposed if the power was created after 1907. A divided court, Justices Cardozo and Brandeis dissenting, held that the statute was invalid in that it arbitrarily selected a past date and discriminated between powers of appointment created before that date and those created thereafter. It is clear that the invalidity of the statute was not predicated upon the selection of a date upon which the taxability or nontaxability of the transfer depended, but upon the fact that the selection of the date bore no reasonable relation to any legitimate legislative purpose. "Upon its face the statute arbitrarily selects a past date, taxing the beneficiaries of an act if done prior to, and leaving untaxed beneficiaries of a precisely similar act if done subsequent to that date." Binney v. Long, 299 U.S. 280, 289, 57 S.Ct. 206, 210, 81 L.Ed. 239.

Binney v. Long has since been limited to the particular situation with which it was concerned and held not to apply to a statute in which the date upon which taxability is made to depend is not arbitrarily selected but is designed to effectuate a legitimate legislative purpose. Whitney v. State Tax Comm. of New York, 309 U.S. 530, 541, 60 S.Ct. 635, 84 L.Ed. 909. In the Whitney case the court held constitutional a New York statute similar to that in the present case in which the taxation of transfers of property subject to a power of appointment was shifted from the exercise of the power to the gift thereof, and in which an unintended tax immunity was averted by the provision that powers created before the effective date of the change but exercised thereafter would be taxed under the statute in effect at the time of their creation. In 1930 the New York Legislature shifted the tax on transfers of property subject to a power of appointment from the exercise by the donee to the creation by the donor. Powers created before 1930 but exercised after that date were immune from taxation, since they were created at the time the tax was imposed upon their exercise and they were exercised at the time the tax was imposed on their creation. By amendment to the inheritance tax act in 1932, New York specifically provided that as to such powers the method of taxation prevailing before 1930 should govern, just as the California Legislature has done in the 1935 and 1941 amendments of section 2 (6). The court upheld the statute against the contention that it was invalid under the doctrine of Binney v. Long, supra, in that it discriminated between donees whose powers were created before 1930 and who were taxed on the exercise thereof, and those whose powers were created after 1930 and were exempt from taxation on their exercise. The Binney case was distinguished on the ground that the date upon which taxation depended was arbitrarily selected whereas in the Whitney case it was the date upon which the change in method of taxation became effective, and the classification of powers into those created before 1930 and those created thereafter was reasonably related to the legislative purpose of preventing an unintended tax immunity. It was this statute that, as applied to resident donees of powers created by nonresident donors, was upheld by the United States Supreme Court in Graves v. Schmidlapp, 315 U.S. 657, 62 S. Ct. 870, 86 L.Ed. 1097, 141 A.L.R. 948.

The Whitney case cannot be distinguished on the ground that the power there considered was created by a resident donor. There, as in the present case, the statute unequivocally imposed the tax on the exercise of the power by the resident donee whether the donor was a resident of the state or not. The statute was upheld on the ground that it was merely a continuation of the method of taxation in force at the time of their creation for powers created before 1930 but exercised thereafter. Such a tax may be properly imposed even though the donor of the power was a nonresident and the transfer would not have been taxable had the power been created after 1930. Graves v. Schmidlapp, supra, 315 U.S. 657, 62 S.Ct. 870, 86 L.Ed. 1097, 141 A.L.R. 948. Since the residence of the donor does not control the imposition of a tax upon the transfer by the donee, it cannot be material to a claim that equal protection of the laws has been denied.

This appeal is therefore governed by Whitney v. State Tax Commission and not by Binney v. Long. Before June 25, 1935,

the exercise of the power of appointment was made the taxable event; after that date, the tax is imposed upon the creation of the power. In cases such as the present, however, where the donor died before the effective date of the change and the donee exercised the power after that date, neither tax would apply and the same unintended tax immunity would be created as in the New York statute before its amendment. The California Legislature took the same course as the New York Legislature and provided that as to such powers the tax would be imposed under the statute previously in effect. Section 2 (6) of the 1921 act, as amended in 1929. In this manner, the Legislature created the same two classes of resident donees as those approved in the Whitney case. Given the legislative purpose to be achieved by the classification, the equal protection clause only requires that the classification be reasonably related to the achievement of that purpose and that all persons within each class be treated alike. In re Estate of Elston, 32 Cal.App.2d 652, 658–659, 90 P.2d 608.



99 Cal.App.2d 492

WETMORE et al. v. BRIG LUMBER MILLS CO. et al.

Civ. 14318.

District Court of Appeal, First District, Division 1, California.

Sept. 19, 1950.

Rehearing Denied Oct. 19, 1950.

Hearing Denied Nov. 16, 1950.

P. T. Wetmore and Margaret Wetmore brought action against the Brig Lumber Mills Company (a partnership) and others to recover damages for breach of contract to cut timber sold by plaintiff to defendants for $2 per 1,000 feet board measure of manufactured salable lumber. The Superior Court in and for the County of San Mateo, Ralph McGee, J., rendered a judgment for the plaintiffs, and defendants appealed. The District Court of Appeal, Bray, J., held that lumberman was entitled to give his opinion as to the quantity of timber on the land in question, and that evidence sustained finding that at time of breach of contract there were 1,500,000 feet of commercially, marketable timber left, entitling plaintiffs to $3,000 damages.

Affirmed.

1. Evidence ⇐474(5), 568(1)

In action for breach of contract to cut timber, lumberman who had spent ten years in felling timber, and who was familiar with the timber involved in the suit, was entitled to give his opinion as to the quantity of timber on the land, and his failure to cruise the timber went to the weight of his testimony only.

2. Logs and logging ⇐8(5)

In action for breach of contract to cut timber sold by plaintiffs to defendants for $2 per 1000 feet board measure of manufactured salable lumber, evidence sustained finding that at time of breach of contract by defendants there were 1,500,000 feet of commercially marketable timber left on the land, entitling plaintiffs to $3,000 damages.

Henry F. Wrigley, San Francisco, James A. Himmel, San Francisco, of counsel, for appellant.

Wallace S. Myers, San Anselmo, for respondents.

BRAY, Justice.

The issues on this appeal by defendants from a judgment for $3,250 in favor of plaintiffs in an action for breach of a contract to cut timber have by express concession of counsel for defendants been narrowed to the one question: Is there sufficient evidence to support the court's finding that at the time of the breach of the contract there was 1,500,000 feet of commercially marketable timber?

Facts.

On May 2, 1946, the parties entered into a written agreement whereby plaintiffs sold and defendants bought all the timber located on described land in Trinity County at the price of $2 per 1000 feet board measure of manufactured salable lumber. De-

fendants agreed to remove all lumber, tree tops and trimmings so that the "property shall be clean and free from Second Party's lumbering operation debris * * *." After removing approximately 213,000 feet of timber, for which they paid plaintiffs the agreed price, defendants abandoned the contract, and refused to cut any more timber or to clean up the debris. The court found the foregoing facts and gave judgment for plaintiffs in the sum of $250 damages for defendants' failure to remove the tree tops, trimmings, etc., and in the sum of $3000 damages for the breach of contract. This sum was based upon its finding that there was left 1,500,000 feet of commercially marketable timber, upon which the court allowed the contract price of $2 per 1000 feet.

Sufficiency of Evidence.

[1] While other questions are discussed in defendants' briefs, their closing brief stated (p. 11): "If the respondents by a preponderance of the evidence at the time of the trial had proved that there was 1,500,000 feet of merchantable marketable lumber on the respondents' land, appellant would be liable for the damages of $2.00 per thousand feet. But such is not the evidence in the instant case." On page 7 substantially the same concession is made. At oral argument, defendants' counsel, in response to a direct question by the court, conceded that the sole question before the court was the sufficiency of the evidence to support the court's finding as to the *amount* of marketable timber left. Therefore, we are confining our opinion to that single question. Plaintiff P. T. Wetmore testified that prior to the signing of the agreement, defendant Fisher and he went to the premises with a Mr. Moore who was employed by defendants as "their woodsman" and that after going over the property he stated to defendant Fisher that there were eight to twelve million feet of timber. This conversation was not denied. Plaintiff P. T. Wetmore also testified, without objection, that Jack Woods who "was in charge of the lumbering operations for the defendants" stated that he was willing to bet a hundred dollars "they would get 4 million feet out of there." This statement was not denied. Witness Hardin testified, without objection, that for ten years he had been engaged in the timber business, felling timber, trucking and sawing logs, and that there were between two and three million feet of marketable timber there. On cross-examination he testified that he had had no experience in cruising timber to find the quantity in a given area, and had not cruised the timber on the Wetmore property to find the exact amount thereon. When asked if he knew how much timber there was on the property he stated, "Well, no, not exactly." He had previously testified that he had gone on the property many times and observed the timber that was there. A lumberman who has spent ten years in felling timber is entitled to give his opinion as to the quantity of timber on land with which he is familiar. His failure to cruise the timber went to the weight of his testimony only.

[2] Witness, Stevens, who formerly lived on the property and had worked in the timber there, testified, without objection, that he estimated that there were two million feet. On cross-examination he testified that he did not know how much lumber was made out of the logs actually hauled from the property. Defendant Kalajian testified that in January or February, 1947, he sent two timber contractors, experienced cruisers, to look at the property, and they told him there were about two million feet—"One of them said there wasn't 2 million feet, but it was all good; the other said there was 2 million feet." Later he testified: "I know from what different men came down and told me. Three of them came down and told me there was around 2 million feet, so I assumed it is 2 million feet." Again he testified: "I found out we had at that time spent about $48,000 there and only had two million feet of timber * * *." Defendants offered no evidence as to the amount of timber remaining. Deducting from the two million feet (which was the lowest estimate given of the amount of merchantable timber on the property at the time of the contract) the amount of timber which defendants removed before abandonment, and the

difference in footage between standing timber and manufactured lumber, left approximately 1,587,000 feet. Apparently the court in this manner arrived at its finding of 1,500,000 feet. It is obvious from the foregoing recital of the evidence that there was sufficient to justify the court's finding.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



99 Cal.App.2d 393

STERLING DRUG, Inc. v. BENATAR et al.

Civ. 14198.

District Court of Appeal, First District, Division 2, California.

Sept. 14, 1950.

Hearing Denied Nov. 9, 1950.

The Sterling Drug, Inc., brought suit against Morris V. Benatar, doing business as Benatar's Cut Rate Stores, and others, to obtain an injunction under the Fair Trade Act. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., rendered a judgment for plaintiff, and the named defendant appealed. The District Court of Appeal, Nourse, P. J., held that the act applied to war surplus tooth powder, that sales of war surplus tooth powder were not "close out sales" exempted by the act, that war surplus tooth powder was not exempted by the act on ground that it was damaged or deteriorated in quality, that plaintiff was not precluded from recovery of punitive damages, that injunction granted was not too broad in scope, and that evidence sustained findings that plaintiff had not waived its fair trade rights.

Judgment affirmed.

1. Statutes ⇐234½

The Fair Trade Act is applicable to war surplus goods, though war surplus goods did not exist at time of enactment of the Fair Trade Act. Business and Professions Code, § 16900 et seq.

2. Statutes ⇐234½

Where a statute deals with a genus, and the thing which afterward comes into existence is a species thereof, the language of the statute will generally be extended to the new species, though it was not known and could not have been contemplated by the legislature when the statute was passed.

3. Statutes ⇐228

When the Legislature has made exceptions to a general rule, it must be deemed to have included in its exceptions all that it intended to except.

4. Constitutional law ⇐70(3)

Question whether, in the interest of an efficient and advantageous disposal of war surplus goods, exemption of such goods from the Fair Trade Act is desirable, belongs solely to the province of the legislature. Business and Professions Code, § 16900 et seq.

5. Trade-marks and trade-names and unfair competition ⇐68(2.21)

Where, at the time a druggist sold war surplus tooth powder, he also had for sale the same tooth powder which was bought through regular channels, and though there were some differences in the packaging and cans of the war surplus and regular supply, the trade-mark, brand and name, quantity, quality, and all other characteristics were the same, the sales of the war surplus were not "close out sales" within meaning of exemption in the Fair Trade Act. Business and Professions Code, § 16902(b).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Close Out Sales".

6. Trade-marks and trade-names and unfair competition ⇐68(2.21)

Where druggist advertised war surplus tooth powder as guaranteed to be in 100 percent perfect condition, the tooth powder was not exempted from provisions of the Fair Trade Act on ground that it was damaged or deteriorated in quality and that no-

tice was given to the public thereof. Business and Professions Code, § 16902(b).

7. Trade-marks and trade-names and unfair competition ⇐92

In suit for injunction under the Fair Trade Act, allegations of complaint that defendant acted wilfully and knowingly and in defiance of repeated protest and notices of plaintiff and that defendant's conduct was oppressive and malicious and for purpose of annoying and injuring plaintiff and damaging plaintiff's business were sufficient basis for recovery of exemplary damages. Business and Professions Code, § 16900 et seq.; Civ. Code, § 3294.

8. Stipulations ⇐14(7)

Stipulation that plaintiff should be deemed to have filed affidavits supporting all allegations of the entire complaint and that such stipulation should have the same force and effect as sworn oral testimony applied to and gave evidentiary support to allegations in suit for injunction under the Fair Trade Act that defendant acted wilfully and knowingly and in defiance of plaintiff's repeated protest and notices and that defendant's conduct was oppressive and malicious and for purpose of annoying plaintiff and damaging plaintiff's lawful business. Business and Professions Code, § 16900 et seq.

9. Stipulations ⇐14(1)

A valid stipulation is binding on the parties and precludes objection to matters concerning procedure and evidence which have been expressly or impliedly agreed on.

10. Damages ⇐87(2)

Exemplary damages are generally not recoverable in absence of a showing of actual damages.

11. Damages ⇐8, 87(2)

Nominal damages are not only recovered where no actual damage resulted from an ascertained violation of right but also where actual damages have been sustained, the extent of which cannot be determined, and the granting of exemplary damages in cases of the latter kind is not inconsistent with the rule that actual damage is a necessary predicate of punitive damages. Civ. Code, § 3294.

12. Trade-marks and trade-names and unfair competition ⇐98

Where it was established in suit for injunction under the Fair Trade Act that the result of conduct of defendant caused a great and irreparable damage to business of plaintiff and good will pertaining thereto and to trade-marks, brands and names of drugs sold by plaintiff, but it was extremely difficult to ascertain the amount of compensation which would afford adequate relief to plaintiff for such damage, fact that only $1 nominal damages were allowed to plaintiff did not preclude the granting of $200 punitive damages. Business and Professions Code, § 16900 et seq.; Civ. Code, § 3294.

13. Trade-marks and trade-names and unfair competition ⇐97

Injunction granted in suit under the Fair Trade Act was not too broad in scope because it listed 23 articles of fair trade commodities of plaintiff which it enjoined defendant from selling at less than listed price whereas it was proved only that defendant sold one of those commodities at less than listed price. Business and Professions Code, § 16900 et seq.

14. Injunction ⇐102

Generally, when one has been found to have committed acts in violation of law he may be restrained from committing other related and unlawful acts.

15. Trade-marks and trade-names and unfair competition ⇐93(3)

In suit for an injunction under the Fair Trade Act, evidence sustained finding that plaintiff proceeded diligently to prevent price cutting by others than defendant, and that plaintiff did not by lack of diligence waive its fair trade rights. Business and Professions Code, § 16900 et seq.

Noal R. Gray, San Francisco, for appellant.

Landels & Weigel, Stanley A. Weigel, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal by defendant from a final judgment and decree of permanent

injunction under the Fair Trade Act, Business and Professions Code, Div. 7, Pt. 2, Ch. 3, certain orders modifying findings and judgment and denying modification in other respects and from the judgment as modified. As the preliminary steps have no separate importance and no separate errors have been submitted the appeal will be treated as one from the judgment as modified.

The complaint alleges in effect that defendants (sued under several fictitious names) with knowledge of the Fair Trade agreements signed and maintained between plaintiff's predecessors and a great number of California retail dealers but rejected by defendants, and despite plaintiff's repeated protests, sell commodities the subject of these contracts and identified by trade marks, brands or names belonging to plaintiff, among others Dr. Lyon's Tooth Powder, at prices substantially less than the prices stipulated in said contracts; that defendants purchased huge stocks of one or more of these commodities with the plan of selling them at cut-rate prices under the pretense of "close-out" sales; that they plan to continue such price cutting, and, as a second cause of action, that defendants committed acts of unfair competition by advertising and selling Dr. Lyon's Tooth Powder below the minimum price stipulated in said contracts; that the conduct of defendants described in both causes of action was oppressive and malicious and intended to injure plaintiff and damage its business, with prayer for a permanent injunction, temporary restraining order and preliminary injunction and compensatory and exemplary damages.

The case was decided below on stipulations to the effect that the hearings on the motion for a preliminary injunction should be deemed the final trial of the action, evidence introduced by affidavits should have the force of oral testimony, the complaint should be deemed an affidavit as well as a pleading and plaintiff should be deemed to have filed affidavits supporting all allegations of the entire complaint, defendant should be deemed to have denied those allegations of the complaint denied or controverted by affidavits actually filed in its behalf and moreover certain specified allegations, to have filed affidavits supporting all of those denials and to have alleged affirmatively that defendant's acts complained of involved only "war surplus" goods, that plaintiff discriminated against defendant by bringing this action against it alone, whereas it had otherwise waived its fair trade rights with regard to "war surplus" goods by not proceeding with reasonable diligence to prevent such sale by others, and that sales of "war surplus" goods, even if within the Fair Trade Act, are close-out sales which are and continue within an exception of the Fair Trade Act.

The court found in all respects in accordance with the complaint restricting its allegations to defendant Benatars, a California corporation, and made moreover specific findings as to the oppressive and malicious character of said defendant's conduct, the character of the commodity so sold by defendant and plaintiff's diligence in stopping violations of its rights under the Fair Trade Act by others. It issued a permanent injunction against cut rate selling etc. by defendant of any of the stated commodities distributed by plaintiff except where all reference to trade-marks, brands etc. showing derivation from plaintiff were omitted or under circumstances bringing the transaction under one of the three exceptions of sec. 16902 subd. (b) of the Business and Professions Code and granted plaintiff $1 as nominal damages, $200 as exemplary damages and costs.

Appellant's main argument is that the sales in dispute related only to war surplus property purchased by appellant indirectly from the War Assets Administration and that such property is not subject to the California Fair Trade Act. This argument is not based on any express exemption in the statute but on contentions that war surplus goods are a kind of commodity separate and distinct from regular merchandise and unknown in the year 1941 when the Fair Trade Act was added to the Business and Professions Code and that the legislature would not have made the Act applicable to war surplus goods had they existed at the time because the application would seriously hamper the sale

of these goods by the United States government and would be detrimental to the general public both as taxpayer and as consumer. In support of the separate character of war surplus goods appellant points to certain statutory enactments in this state, among which section 17531.5 of the Business and Professions Code added by Statutes 1945, Chapter 1144 which requires advertisement of sales of war surplus material clearly to indicate the war surplus character thereof.

[1-3] The contentions are without merit. Even if it were accepted that war surplus goods form a separate species of the genus "commodities" which are the subject of the act and that that species was unknown at the time when the act became law, such would not exclude the applicability of the act. "Where a statute deals with a genus, and the thing which afterward comes into existence is a species thereof, the language of the statute will generally be extended to the new species, although it was not known and could not have been contemplated by the legislature when the act was passed; * * *." 59 C.J. 973-974; Hurley v. Inhabitants of South Thomaston, 105 Me. 301, 74 A. 734, 736; McCleary v. Babcock, 169 Ind. 228, 82 N.E. 453, 457; Crawford, Statutory Construction, p. 268. There is no reason why that rule should not be followed here. The statute is generally applicable to "any commodity", defined as "any subject of commerce." Sec. 16901, Business and Professions Code. The exceptions to the prohibition of cut rate selling contained in sec. 16902, subd. (b), do not include any exception relating to the manner in which the seller acquired them. Moreover the fact that the legislature in the year 1945 when it was aware of the problems of disposition of war surplus material added new provisions in that respect to the Business and Professions Code, §§ 17531.5, 17533.5, Statutes 1945, Chapter 1144, supra, but did not add an exception to the chapter containing the Fair Trade Act may well indicate the legislature did not desire the exception advocated by appellant. Under the above circumstances for the court to add an exception in no way expressed in the statute would be a wholly unwarranted invasion of the function of the legislature. In this respect the well settled principle may be mentioned "that when the Legislature has made exceptions to a general rule it must be deemed to have included in its exceptions all that it intended to except." Rothschild v. Superior Court, 109 Cal.App. 345, 348, 293 P. 106, 108.

[4] The question whether in the interest of an efficient and advantageous disposal of the war surplus goods exemption from the state Fair Trade Act is desirable evidently also belongs solely to the province of the legislature. It is not contended that any federal statute excludes the applicability. It may nevertheless be pointed out that the federal government has given no indication whatever that it desires such exemption. As set out at length in the opinion of the learned trial judge the Surplus Property Act of 1944, 50 U.S.C.A. Appendix, § 1611 et seq., mentions in effect among its declared objectives, sec. 1611, orderly disposal without dislocation of markets, dumping speculation or excessive profits and utilizing normal channels of trade and commerce; there is in that statute no mention whatever of an exception to fair trade laws, although the federal provision which permits minimum price agreement for trade-marked commodities, 15 U.S.C.A. § 1, is referred to as applicable in sec. 1629. Moreover the position taken by the War Assets Administration is shown clearly by its "General Disposal Letter No. 20", which instructs its regional and district offices to give notice that the resale or use of branded or trade-marked drug and cosmetic items offered for sale and/or sold by the government may be affected by applicable state "Fair Trade" Practice Acts, or other similar regulatory laws.

[5] Appellant further maintains that its sales of war surplus material below fair trade prices were "close out sales" as exempted in sec. 16902, subd. (b) (1), Business and Professions Code, arguing that the government sales of war surplus goods were "close out sales" and that its sales of goods indirectly acquired from the govern-

ment retained the same character. The provision referred to permits deviation from fair trade prices: "(1) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity." It does not give a general exemption from fair trade prices for goods bought at a close out sale independent from the circumstance whether the reseller himself also intends to discontinue delivering any such commodity. It seems very doubtful whether a merchant who, like appellant, bought large quantities of a war surplus commodity for the express purpose of selling them below fair trade price, can be said to be "closing out the owner's stock", even if he does not intend to further carry the same commodity. See National Distillers Products Corporation v. Louis Greenwalds Liquors, D.C.Colo.1939.[1] But appellant intended to continue selling Dr. Lyon's Tooth Powder, also after his war surplus lot would be exhausted. It is undisputed that appellant at the same time at which he advertised and sold the war surplus Dr. Lyon's Tooth Powder, also had for sale Dr. Lyon's Tooth Powder in containers of the same size, bought through the regular channels and that he intended to continue carrying this regular commodity. The court found that there were some differences between the packaging and cans of the war surplus and the regular supply but that trade-mark, brand and name, quantity, quality and all other characteristics of the two supplies were the same, and that all differences were due to shortages of material and production problems which since World War II caused variations in the cans, whether war surplus or not. It cannot be said that such small differences caused the regular supply not to be "any such commodity" as the war surplus supply and the court was justified in finding in accordance with the plaintiff's allegation that appellant did not have any intention of closing out its stock for the purpose of discontinuing delivery. To hold otherwise would undermine the purpose of the statute.

[6] It is true that sec. 16902, subd. (b), Business and Professions Code contains also an exemption from fair trade prices "When the goods are damaged or deteriorated in quality, and notice is given to the public thereof" and that according to appellant the fact that goods were war surplus indicated in itself that such goods were damaged and deteriorated. However appellant advertised the war surplus supply here involved as guaranteed "to be in 100% perfect condition", a fact which evidently prevents it from bringing them under the last mentioned exemption.

[7–9] Next appellant urges that it could not be liable for exemplary damages because it believed in good faith that it had the right to sell war surplus goods at less than fair trade prices and did so openly and therefore did not act with malice, fraud or oppression which section 3294, Civil Code, requires for the allowance of such damages. The complaint alleged and the court found otherwise. It was alleged among other descriptions of appellant's intent and purpose that appellant acted wilfully and knowingly "and in defiance of plaintiff's repeated protest and notices" and further that its conduct "was oppressive and malicious and for the purpose of annoying and injuring plaintiff and damaging plaintiff's lawful business." Such allegations are a sufficient basis for the recovery of exemplary damages. Morgan v. French, 70 Cal.App.2d 785, 788 et seq., 161 P.2d 800; Kouff v. Bethlehem-Alameda Shipyard, 90 Cal.App.2d 322, 325, 202 P.2d 1059. The stipulation that "plaintiff shall be deemed to have filed affidavits supporting all allegations of the entire complaint" together with the stipulation to the effect that such stipulations shall have the same force and effect as sworn oral testimony applies also to said allegations and gives them evidentiary support, which necessarily creates a conflict in the evidence with respect to appellant's good faith and supports the findings made responsive to plaintiff's allegations. Moore v. Moffatt, 188 Cal. 1, 4, 204 P. 220; O'Hare v. Peacock Dairies, Inc., 42 Cal.App. 2d 788, 793, 110 P.2d 90; and compare People v. Blacks Food Store, 16 Cal.2d 59, 61–62, 105 P.2d 361. "A valid stipulation is, of course, binding upon the parties, and precludes objection to matters concerning procedure and evidence which have been expressly or impliedly agreed upon." 23

1. No opinion for publication.

Cal.Jur. 826; Corbett v. Benioff, 126 Cal. App. 772, 777, 14 P.2d 1028.

[10, 11] Appellant also claims that exemplary damages must be based on actual damages and that where only $1 nominal damages were allowed no punitive damages or at least no punitive damages disproportionate to that $1 could be granted. It is true that exemplary damages are generally not recoverable in the absence of a showing of actual damages, but upon the question whether the money extent of the actual damages must be found to permit a finding of punitive damages there is a hopeless conflict in the decisions, Clark v. McClurg, 215 Cal. 279, 282, 9 P.2d 505, 81 A.L.R. 908; 15 Am.Jur. 707; 25 C.J.S., Damages, § 118, page 714, and also upon the related question whether an award of nominal damages will support punitive damages. 15 Am.Jur. 707–708; 25 C.J.S., Damages, § 118, page 715; Annotations 33 A.L.R. 400 et seq.; 81 A. L.R. 917. Nominal damages are not only recovered where no actual damage resulted from an ascertained violation of right but also where actual damages have been sustained, the extent of which cannot be determined. Gray v. Craig, 127 Cal.App. 374, 378, 15 P.2d 762, 16 P.2d 798. The granting of exemplary damages in cases of the latter kind is not inconsistent with the rule that actual damage is a necessary predicate of punitive damages. 15 Am.Jur. 708.

Clearly the case before us is of the latter kind. The court found to be true the allegations of Paragraph XI of the complaint which recite among other things that the result of defendants' conduct "has been and will continue to be, great and irreparable damage to plaintiff's business and the goodwill pertaining thereto and to the said trade marks, brands and names" and also that "[i]t would be extremely difficult to ascertain the amount of compensation which will afford adequate relief to plaintiff for the damage which, as herein alleged, is resulting and will continue to result from said scheme, plan and acts of defendants." Even without the support of the stipulations mentioned before the truth of the allegations with respect to the damage caused by defendant's cut rate sale of large quantities of plaintiff's fair trade goods is obvious. The question in this case therefore is not whether punitive damages can be recovered where no actual damage was suffered, but whether such punitive damages are recoverable when actual damage has been sustained and that fact found but the extent of the damage not determined because of the difficulty in ascertaining it.

[12] Although, as stated, there is a split in the authorities on this point we answer the question in the affirmative. In so doing we follow what according to 15 Am.Jur. 708, supra, is the weight of authority and what we think is the better reasoning. The reason given for the rule that punitive damages are not recoverable in the absence of actual damage is that they are mere incidents to the cause of action and never constitute the basis thereof. Clark v. McClurg, supra; 15 Am.Jur. 706. Where there is an invasion of legal right and actual damages the amount of which cannot be ascertained but which entitles plaintiff to a nominal recovery there appears to be a sufficient basis for an action independent of the exemplary damages. The recent decision of our Supreme Court in Finney v. Lockhart, 35 Cal.2d 161, 217 P.2d 19, though not directly in point because specifically concerned with damages for defamation per se where general damages are presumed, points in the same direction. Among the authorities there cited with respect to the relation of actual and punitive damages is State ex rel. St. Joseph Belt R. Co. v. Shain, 341 Mo. 733, 108 S.W. 2d 351, not a defamation case but an action for damages because of the malicious failure to give a proper service letter to a workman on his discharge, for which a judgment of $1 actual damages and $4000 punitive damages is upheld, the court stating that punitive damages may be assessed though the actual damages recovered are only nominal or not ascertained and that there is no fixed relation between the amount of actual damages and of punitive damages, which serve different purposes. It is pointed out that the actual damages assessed do not furnish a guide for the amount of punitive damages recoverable especially where the amount of $1 actual damages is only found because of the in-

ability to prove the amount of damages actually suffered. In the opinion in the Finney case itself it is stated that the fact that the jury awarded only nominal damages in the compensatory class does not necessarily imply a finding that no more actual damage was sustained. 217 P.2d 21. It is further held that the rule that the exemplary should bear a reasonable relation to the actual damages is only for the purpose of guarding against excess, that there is no fixed proportion which is proper between the two classes of damages, and that with respect to punitive damages as well as actual damages the appellate court can only declare an award excessive when the amount at first blush suggests passion or prejudice. The award in our case of $1 nominal damages and $200 punitive damages for the continued illegal cut rate selling of large quantities of goods does not convey any such suggestion. It seems an expedient and just way of overcoming the difficulty of finding the exact extent of the actual damage in a case where exemplary damages are recoverable.

[13, 14] Appellant contends that the injunction granted is too broad in scope because it deprives appellant of the right to sell below fair trade prices also in the situations excepted in sec. 16902 of the Business and Professions Code and because it lists 23 articles of plaintiff's fair trade commodities which appellant is enjoined from selling at less than listed price whereas it was proved with respect to only one of these commodities that appellant actually so sold it. The first contention is frivolous as the injunction carefully provides for all statutory exceptions. The second contention is also wholly without merit. The general rule in this respect is that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. The scope of the injunction must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to the unlawful acts found to have been committed. National Labor Relations Board v. Express Publishing Co., 312 U.S. 426, 436, 61 S.Ct. 693, 85 L.Ed. 930. In this case there can be no doubt of the similarity of the acts enjoined and the existence of a threat of violation as to all. Appellant refused to stop selling below listed price, giving as its reason an assumed and unfounded rule of law that war surplus goods were exempt from the Fair Trade Act. There was as much danger that appellant would next apply its theory to another of respondent's commodities as to the same one. Undue restrictions of the injunction would invite multiplicity of suits, the prevention of which is one of the statutory purposes of the injunction. Code of Civil Procedure, § 526, first par. subd. 6. Weisstein v. Freeman's Wines & Liquors, Inc., 169 Misc. 391, 7 N.Y.S.2d 234 upholding an injunction of the same scope as the one before us, as against a similar contention of a fair trade price violator is directly in point.

[15] Finally appellant contends that respondent was not entitled to an injunction because respondent did not proceed diligently to prevent price cutting by others, and thereby waived its fair trade rights, which it cannot be allowed to enforce discriminatorily against appellant only. Contrary to this contention the court found "that plaintiff has diligently and impartially acted to stop, and has actually stopped, all violations of its rights under the Fair Trade Act which have come to plaintiff's attention", and further in substance that plaintiff's Fair Trade contracts were generally observed by dealers and that its rights under the Fair Trade Act have not been waived. Said findings find substantial support in the evidence, especially in the supplemental affidavit of C. R. Danielson, plaintiff's Pacific Coast Manager, dated March 15, 1948. Appellant's last contention therefore lacks all factual basis.

The judgment is affirmed.

GOODELL and DOOLING, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

99 Cal.App.2d 376

PROCTOR & SCHWARTZ, Inc. v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY et al.

Civ. 14541.

District Court of Appeal, First District, Division 2, California.

Sept. 12, 1950.

Proctor & Schwartz, Incorporated, filed a petition against the Superior Court of the State of California, in and for the County of San Mateo, Honorable A. R. Cotton, Judge thereof, and others, for writ of prohibition or, alternatively, review or mandate, to halt further proceedings in the case of John C. Turner v. Proctor & Schwartz, Incorporated, pending in the Superior Court in San Mateo County. The District Court of Appeal, Goodell, J., held that a motion filed by petitioner to quash service of summons was not a general appearance and that petitioner was not doing business in the state of California so as to be subject to service of process.

Order in accordance with opinion.

1. Appearance ⇐9(1)

If a party appears and objects only to consideration of the case or any procedure in case because court had not acquired jurisdiction of defendant or party, appearance is a "special appearance", but if party appears and asks for any relief which could be given only to a party in a pending case, or which itself would be a regular proceeding in case, the appearance is a "general appearance" regardless of how adroitly, carefully or directly the appearance may be denominated or characterized as special.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "General Appearance" and "Special Appearance".

2. Appearance ⇐9(5)

Ground of motion of foreign corporation to which papers were forwarded by Secretary of State after trial court in action for injuries ordered service of summons on Secretary of State, that summons did not state nature of action alleged against foreign corporation, and that neither summons nor complaint stated facts sufficient to show that foreign corporation was amenable to processes of California courts, was neither a general nor a special demurrer, nor a demurrer for lack of jurisdiction of subject matter, and ground sought no relief which would be had only in a pending case, so that motion did not constitute a "general appearance."

3. Corporations ⇐673

Where it appears that a defendant is a foreign corporation, and validity of service of process is challenged, plaintiff has burden to prove that such defendant was doing business in state.

4. Commerce ⇐40(1)

A contract whereunder foreign corporation agreed to sell manufacturing machinery to California corporation and to loan an employee to supervise installation of machinery by buyer's employees in California after its shipment from sister state to California, was a transaction in "interstate commerce".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Interstate Commerce".

5. Corporations ⇐642(4½)

Where foreign corporation contracted to sell manufacturing machinery to California corporation, and to loan an employee to supervise installation of machinery by buyer's employees in California after shipment of machinery from sister state to California, services rendered by such employee in supervising installation did not constitute "doing business" in California by foreign corporation, and did not subject foreign corporation to service of process through Secretary of State of California.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Doing Business".

Keith, Creede & Sedgwick, San Francisco, for petitioner.

Edmund J. Holl, San Francisco, for respondents.

GOODELL, Justice.

Petitioner seeks a writ of prohibition or, alternatively, review or mandate, to halt

further proceedings in the case of John C. Turner v. Proctor and Schwartz, Incorporated, pending in the Superior Court in San Mateo County.

That action is to recover $100,000 damages for personal injuries alleged to have been sustained by the plaintiff Turner at the plant of Consolidated Chemical Industries, Inc., in San Mateo County, where he was employed. From the complaint it appears that a contract had been entered into between Proctor and Schwartz, Inc., a Pennsylvania corporation, as seller, and Consolidated, as buyer, for the sale of certain chemical manufacturing machinery, devices and equipment, for installation in Consolidated's plant, which contract provided that Proctor would send out a man to supervise the installation. It alleges that a man was sent out and during such installation and because of his negligence plaintiff Turner sustained serious bodily injuries.

On plaintiff's motion the court ordered service of summons on Secretary of State. On August 16, 1949 service was so made and he forwarded the papers to petitioner in Pennsylvania, whereupon the latter appeared specially and moved to quash the service. The motion was denied, and the present application was filed.

Respondents contend that the court properly denied the motion because one of the grounds thereof went beyond the bounds of a special appearance and converted it into a general appearance.

The language claimed by respondents to constitute a general appearance is contained in the third ground of the motion to quash, reading as follows: "3rd. That said summons does not state the nature of the so-called action alleged against the defendant, nor does the summons or complaint state facts sufficient to show that the defendant is amenable to the processes of the courts of the State of California."

[1] If this is no more than an objection, phrased in the language of a demurrer, on the ground that the court had not acquired jurisdiction of the person of the defendant, then it is nothing but a special appearance. Judson v. Superior Court, 21 Cal.2d 11, 13, 129 P.2d 361, 362, so holds when it says: "* * * The test is—Did the party appear and object only to the consideration of the case or any procedure in it because the court had not acquired jurisdiction of the person of the defendant or party? If so, then the appearance is special. If, however, he appears and asks for any relief which could be given only to a party in a pending case, or which itself would be a regular proceeding in the case, it is a general appearance regardless of how adroitly, carefully or directly the appearance may be denominated or characterized as special. In re Clarke, 125 Cal. 388, 58 P. 22. * *" See also Lacey v. Bertone, 33 Cal.2d 649, 651, 203 P.2d 755.

In support of their position respondents rely on a group of cases wherein the so-called special appearance contained what amounted to either a general or special demurrer, or a demurrer on the ground that the court had no jurisdiction of the subject matter of the action, for which reason they are readily distinguishable from the third ground of the motion in this case. They are: Raps v. Raps, 20 Cal.2d 382, 384–385, 125 P.2d 826; Security Loan & Trust Co. of Southern California v. Boston, etc., Co., 126 Cal. 418, 58 P. 941, 59 P. 296; Maclay Co. v. Meads, 14 Cal.App. 363, 369, 112 P. 195, 113 P. 364, infra; Roberts v. Superior Ct., 30 Cal.App. 714, 159 P. 465; Taylor v. Superior Ct., 93 Cal.App. 445, 269 P. 727; Morte v. Justice's Court, 139 Cal.App. 605, 34 P.2d 748; MacPherson v. Superior Ct., 22 Cal.App.2d 425, 71 P.2d 91.

Other cases cited by respondents where, on the motion to quash, or to dismiss, or other special appearance, relief was sought "which could be given only to a party in a pending case, or which itself would be a regular proceeding in the case" are: Childs v. Lanterman, 103 Cal. 387, 37 P. 382, 42 Am.St.Rep. 121 (motion to set aside findings and judgment and to strike out answer); Zobel v. Zobel, 151 Cal. 98, 90 P. 191 (appearance in court of defendant's attorney to request continuance of motion to strike out pleadings); Nisbet v. Clio Mining Co., 2 Cal.App. 436, 83 P. 1077 (motion to retax costs and to strike items from cost bill); Maclay Co. v. Meads, 14 Cal.App. 363, 112 P. 195, 113 P. 364, supra

(objection to judgment as unsupported by complaint); Shelley v. Casa De Oro, Ltd., 133 Cal.App. 720, 24 P.2d 900 (motion on ground that judgment was not supported by findings); Burrows v. Burrows, 10 Cal. App.2d 749, 52 P.2d 606 (motion to strike parts of interlocutory decree); Nelson v. Superior Ct., 75 Cal.App.2d 372, 171 P.2d 52 (motion to vacate order appointing receiver).

Respondents also cite Wall v. Superior Court, 48 Cal.App. 564, 192 P. 134, which went to the length of holding that a demurrer on the ground that the court had no jurisdiction of the *person* amounted to a general appearance. None of the three cases which it cites so holds. That case simply failed to discriminate between two different grounds of demurrer; it has never been cited (according to Shepard) in any reported case, and it is out of line with all the cases heretofore discussed.

[2] The third ground of the motion to quash is certainly neither a general nor a special demurrer; nor a demurrer for lack of jurisdiction of the subject matter; nor does it seek any relief which could be had only in a pending case, hence there is no merit in the claim that it constituted a general appearance.

The real question presented is whether the showing on the motion to quash warranted the holding that Proctor and Schwartz, Incorporated, was doing business in California, which was the ultimate inquiry before the trial court. Respondents in their brief merely state the point, assert that the corporation was doing business, and let it go at that, without discussing the facts shown in the complaint and affidavits or citing any authority supporting the affirmative side of the issue. The petitioner invited a full discussion of this, the main question, when its counsel asserted in their brief that on the motion the burden rested on the plaintiff to prove that the corporation was transacting business in California, and that such burden had not been sustained, citing Hollywood Garment Corp. v. J. Beckerman, Inc., 61 Cal.App.2d 658, 143 P.2d 738. Instead of facing that issue and meeting it head-on, respondents have briefed the case only on the question just disposed of, namely, whether the appearance was special or general.

In West Publishing Co. v. Superior Court, 20 Cal.2d 720, 726, 128 P.2d 777, 780, our Supreme Court says: "Whatever the form of a particular statute authorizing service of process upon the agent of a foreign corporation which has not complied with the qualifying laws of a state, it is a fundamental requisite under the federal Constitution that the corporation shall be 'doing business' in the jurisdiction where the service is made to sustain its validity. [Citations.]"

[3] It is settled in this state that when it appears that a defendant is a foreign corporation, and the validity of the service of process is challenged, the burden is upon the plaintiff to prove that such defendant was doing business in the state. Jameson v. Simonds Saw Co., 2 Cal.App. 582, 585-586, 84 P. 289, followed in Carpenter v. Bradford, 23 Cal.App. 560, 562-563, 138 P. 946 and Fuller v. Lindenbaum, 29 Cal.App.2d 227, 232, 84 P.2d 155; see, also, Hollywood Garment Corp. v. J. Beckerman, Inc., supra, 61 Cal.App.2d 658, 660, 143 P.2d 738.

The verified complaint in the Turner case and the affidavit of Edmund J. Holl, attorney for Turner (filed in support of the motion for service on the Secretary of State), allege that Proctor and Schwartz, Incorporated, was at all times therein mentioned "engaged in the business of manufacturing, selling and installing certain types of machinery * * * in the State of Pennsylvania, and other states * * * including the State of California." Both the complaint and the affidavit then show, by the language they use, that the doing of business by the corporation was confined to the single transaction alleged in the complaint. This is made clear by the pleader's use of the words "in that" in the following allegation: "That on the 6th day of August, 1948, and for some time prior thereto, the exact period of time which to this plaintiff is unknown, said defendant Proctor and Schwartz, Incorporated, was engaged in doing business in the State of Cal-

ifornia, * * * *in that* it had entered into a contract with a certain firm known as the Consolidated Chemical Industries, Inc., whose main office is located at 111 Sutter Street" in San Francisco "which contract involved the selling, delivering and installation in the factory of said Consolidated * * * located * * * in the County of San Mateo * * * certain chemical manufacturing machinery devices and equipment, among which was certain apparatus known as a glue dryer machine; that said installation required expert services, which said defendant * * * upon accepting said contract, and thereby availing itself of the privilege of doing business in the State of California, agreed to and did furnish, in the person of James R. Kraus, its servant, agent and employee, who had exclusive supervision, direction and control, as an engineer, of installation of said machinery chemical devices and equipment, as aforesaid, under the employment of said defendant * * *" (Emphasis added.)

The affidavit of Attorney Holl, which adopts the allegations of the complaint, fails to show any transaction beyond that alleged in the complaint, and it repeats the language of the complaint to which attention has just been drawn when it deposes that the corporation "was engaged in doing an intrastate business * * * *in that* it had entered into a contract or contracts with * * * Consolidated * * *" (emphasis added) and continuing on with substantially the same allegation as that contained in the complaint just quoted. The Holl affidavit shows that Proctor and Schwartz, Incorporated, "after doing business in the State * * * thereafter withdrew from said State". That circumstance was one of the grounds on which service on the Secretary of State was based. § 6504, Corporations Code.

In support of its motion to quash, the corporation filed an affidavit made by W. E. Sedgwick, one of its attorneys, in which he deposes that Proctor and Schwartz, Incorporated, is a Pennsylvania corporation, and that at all times therein mentioned, including the date of the accident and the date of the service, the corporation did not maintain, and had not maintained, any office, place of business, showrooms, or warehouses, in California, or any agent, officer, or any other person therein upon whom service of summons could be made; that on July 14, 1947, the corporation countersigned at Philadelphia, a contract effective that date between itself and Consolidated, which provided that it would furnish Consolidated, as purchaser, certain machinery for an agreed price f. o. b. car, company's plant, Philadelphia. The affidavit states, further, that at no times mentioned in the affidavit did the corporation maintain a sales force, or any salesmen, in California, and at no times therein mentioned could any employee or representative of said corporation in California collect money; that the purchase price for all machinery sold in California was received by the corporation in Philadelphia; that it maintained no bank account in California; that all statements and invoices sent to the purchaser in California were sent from Philadelphia; that no credit was extended to a purchaser in California on behalf of the corporation by any person in California and that it borrowed no money in California. The affidavit concludes: "That affiant is informed and believes, and therefore states, that at all times herein mentioned said corporation was not engaged in doing business in * * * California and was not engaged in doing an intra-state business in * * * California; that it did not enter into any contracts in * * * California and that it did not enter into any contract of sale and did not deliver and install machinery in the factory of said Consolidated Chemical Industries, Inc., in the County of San Mateo, State of California, or otherwise."

The Sedgwick affidavit quotes in part the contract between Proctor and Consolidated as follows: "The purchaser shall supply sufficient good mechanics, under competent supervision to erect the machinery in a reasonable length of time. The company will lend one of its employees to the purchaser to assist in such erection, the company making no charge at [for?] the time of such loaned employee, but the purchaser shall pay the traveling expenses

from Philadelphia, * * * and return, his board and incidental expenses" and then adds that pursuant thereto one Crouse, an employee of the corporation, whose contract of hire was made in Philadelphia, was sent out to the Consolidated's plant in San Mateo County to assist in the erection of the machinery and who was on said premises in said capacity on the date of the accident and was the only employee of the corporation performing services for it in California at that time and in connection with the contract.

The corporation also filed an affidavit of T. J. Wilson, the San Francisco machinery broker who negotiated the contract of sale between Proctor and Consolidated, which affidavit shows that Wilson was not an officer, agent, or employee of Proctor, and received no salary, but operated merely on a commission basis. It shows, also, that he represents other eastern manufacturing concerns as well.

The case of York Mfg. Co. v. Colley, 247 U.S. 21, 38 S.Ct. 430, 62 L.Ed. 963, 11 A.L.R. 611, controls this case. There York Mfg. Co., a Pennsylvania corporation, entered into a contract with Colley, a resident of Texas, to sell and install in Texas an ice plant, and wherein the seller agreed to furnish an engineer to assemble and erect the machinery and make a practical efficiency test before complete delivery. The services of the engineer in supervising the installation were to be paid for by the purchaser at the rate of $6 per day. When the seller sued in Texas for the contract price of the plant, the defendant-purchaser set up the defense that the seller—because of its activities in supervising the installation through its engineer—was doing business in Texas and since it had not obtained a permit to do so it could not sue in that state. The Texas courts so held, but the Supreme Court of the United States reversed, holding that the services of the engineer in Texas were relevant and appropriate to the interstate contract of sale of the ice plant, and were inherently part of it, hence such services did not constitute the doing of business in Texas within the meaning of that state's requirement of a license.

[4] The presence of Crouse in Consolidated's plant was in pursuance of the contract, which contract unquestionably constituted a transaction in interstate commerce, Charlton Silk Co. v. Jones, 190 Cal. 341, 342, 212 P. 203; W. W. Kimball Co. v. Read, 43 Cal.App. 342, 345, 185 P. 192; Indian Refining Co. v. Royal Oil Co., Inc., 102 Cal.App. 710, 715, 716, 283 P. 856.

[5] If in York Mfg. Co. v. Colley the services of the engineer who was sent from Pennsylvania to Texas admittedly to *supervise* the erection of the ice plant, did not constitute the doing of business by the corporation in Texas, then certainly the services of Crouse who, according to the contract was "lent" to Consolidated to "assist" its own employees in the installation, cannot be held to constitute the doing of business by the corporation in California.

At first blush there would seem to be a conflict between the allegations of the complaint (and the Holl affidavit) that Crouse had the *supervision* of the installation, and those of the Sedgwick affidavit, quoting the contract itself, that he was only *lent* by Proctor to *assist* Consolidated's employees in the installation. There is no real conflict, however, since under either theory Crouse's services were, under the rule of York Mfg. Co. v. Colley, inherently part of, and incidental to, the interstate contract.

As stated at the outset, the petitioner seeks a writ of prohibition or, alternatively, review or mandate. We are satisfied for the reasons and on the authorities cited herein that the petitioner was not at any time doing business within this state, and that the motion to quash the service of summons on the Secretary of State should have been granted. The error in denying that motion can be adequately corrected by a writ of mandate.

Accordingly a peremptory writ of mandate should issue, directing the Superior Court to vacate and set aside its order denying said motion to quash, and in lieu thereof to enter its order granting said motion. It is so ordered.

NOURSE, P. J., and DOOLING, J., concur.

99 Cal.App.2d 356

JORDAN et al. v. BOARD OF SUPERVISORS OF TULARE COUNTY et al.

Civ. 4070.

District Court of Appeal, Fourth District, California.

Sept. 8, 1950.

Hearing Denied Nov. 2, 1950.

Action by J. E. Jordan and others against the Board of Supervisors of the County of Tulare and others, for an injunction to prevent the construction of a county court house outside the city limits of Visalia. The Superior Court of Tulare County, Robert B. Lambert, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that where Visalia was an unincorporated area with no definite boundaries when selected as the county seat, subsequent incorporation of a city of Visalia did not affect the location of the county seat, and the building of a new court house on property adjacent to, but outside the corporate limits was not a removal of the county seat and did not require an election as provided by the State Constitution in cases of removal.

Judgment affirmed.

1. Counties ⇐28

Where statutes merely recognized county seats of respective counties of state and another statute provided the county seat of Tulare was Visalia, and statutes did not use word "city", the statutes did not indicate that county seat of Visalia was within the corporate limits of the city of Visalia. Government Code, §§ 23600, 23654; Pol.Code, § 3975b.

2. Counties ⇐28

Platting, and fixed boundaries, were not necessary to selection of county seat and selection of Visalia was legal and operative when well-known place which was only such place in county was designated, although its boundaries were unfixed and indefinite.

3. Counties ⇐30

Where county seat is legally located in unplatted area with unfixed boundaries, subsequent incorporation of territory and municipal action changing boundaries of corporation would not affect location of county seat.

4. Counties ⇐28

It is not necessary that a county seat should be located within territory occupied by an incorporated city.

5. Counties ⇐37, 107

In absence of limitations, board of county commissioners has exclusive power over county property and may remove and designate new sites for county buildings within limits prescribed for county seat, as they existed at time of location and establishment of county seat at that place.

6. Counties ⇐37

Where Visalia was unincorporated and had no definite boundaries, when selected as county seat, finding of trial court that tract of land adjacent to but outside incorporated city of Visalia proposed for new county courthouse, was at Visalia, was not erroneous as matter of law.

7. Counties ⇐30, 32

Where Visalia was unincorporated with no definite boundaries, when designated as county seat, subsequent proceedings incorporating city of Visalia, did not affect county seat location, and building of proposed new courthouse on tract adjacent to but outside corporate limits was not a "removal of county seat" within provision of state constitution, that no county seat shall be removed unless two-thirds of that county's qualified electors vote in favor of removal. Const. art. 11, § 2.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Removal of County Seat".

H. A. Savage, Fresno, for appellants.

R. N. Nickerson and Leroy McCormick, Visalia, for respondents.

MUSSELL, Justice.

Action for injunction to prevent the construction of a county court house on property adjacent to the corporate limits of the city of Visalia.

Plaintiffs, as taxpayers of Tulare county, brought this action to enjoin the board of supervisors of Tulare county from erecting and constructing a new county court house on a tract of land outside of the present corporate limits of the city of Visalia and to restrain the county auditor and treasurer from expending any county funds in so doing. The action was tried before the court without a jury and plaintiffs appeal from the judgment rendered against them.

The county of Tulare was organized under the provisions of Chapter 153 of the Statutes of 1852 and section 2 of that statute established the seat of justice of the county temporarily at Woodsville. In 1853 the legislature enacted Chapter 46 of the Statutes of 1853 which provided in part that at the next general election the permanent location of the seat of justice of Tulare county should be submitted to the voters. At the next general election, held on September 7, 1853, there were 44 votes cast for Visalia and 41 for Woodsville. At the time of this election, Visalia had no definite designated boundaries and the area embraced by it was unincorporated.

On December 9, 1853, the supervisors took possession of a quarter section of land at Visalia and appointed it the seat of justice of the county of Tulare. In August of 1857 the supervisors selected this quarter section as a site for the county seat and caused the land to be laid out and divided into town lots. This is the quarter section upon which the present court house, erected in 1857, is now located.

On September 28, 1948, a contract was executed between the Hyde Development Company and the county of Tulare for the construction of a new county court house on a site approximately one and one-half miles west of the present court house on property adjacent to the present city limits of the city of Visalia. This contract was cancelled by agreement of the parties on May 5, 1950, and the question of its legality has become moot. However, it is conceded that unless restrained, the county of Tulare will proceed to build a court house on the new site (which has been deeded to the county) without submitting the proposition to the electors at a general election as provided in Article XI, section 2, of the State Constitution. This section provides that "No county seat shall be removed unless two-thirds of the qualified electors of the county, voting on the proposition at a general election, shall vote in favor of such removal * * *."

The question before us is whether the provisions of the State Constitution relative to the removal of a county seat are applicable in the instant case.

[1] The plaintiffs first contend that the legislature in 1907 designated the city of Visalia as the county seat of the county of Tulare by enacting section 3975b of the Political Code, and that in 1947, by enacting sections 23600 and 23654 of the Government Code, the legislature again designated the city of Visalia as the county seat. However, section 3975b of the Political Code merely states that "The county seats of the respective counties of the state, as now fixed by law, are hereby recognized as, and declared to be, the county seats of the respective counties." Section 23600 of the Government Code provides that "The county seats of the respective counties of the State, as fixed by law and designated in this article, are declared to be the county seats of the respective counties." And section 23654 of the same code provides that "The county seat of Tulare is Visalia." The word "city" is not used in any of the three quoted sections and there is nothing in the language used indicating that the county seat of Visalia is within the corporate limits of the city of Visalia.

[2, 3] When "Visalia" was selected by the voters of Tulare county as the county seat, its boundaries were unfixed and indefinite and it was not necesary to its selection that it should have been platted or have fixed and definite boundaries. The selection was legal and operative when it designated a place which was well known and which was the only such place in the county. 20 C.J.S., Counties, § 55, p. 810. When the county seat was thus located, it could not be changed by the proceedings incorporating

the territory or by subsequent municipal action changing the boundaries of the incorporated city.

[4] As was said in State ex rel. Kellogg, Attorney General, v. County Commissioners of Atchison County, 44 Kan. 186, 24 P. 87, 88:

"When a county-seat is located, its exact location is fixed, and it cannot be changed by the subsequent mutations of the municipal corporation within whose territory it may happen to be located. * * *"

"It is not necessary, however, in any case, that a county-seat should be located within or upon territory occupied by an incorporated city, or within the territory of a city at all. * * *"

[5] In the absence of limitations on such power, a board of county commissioners, or a county court, having exclusive power over the property of the county may remove and designate new sites for county buildings, within the limits prescribed for the county seat, that is, the boundaries of the town as they exist at the time of location and establishment of the county seat at that place. 15 C.J. 444, Sec. 91, 20 C.J.S., Counties, § 73.

In Matkin v. Marengo County, 137 Ala. 155, 34 So. 171, it was held that the terms "courthouse site" and "county site", as used in the statute, should be construed to signify a seat of government of the county, and hence that such statute did not apply to or require an election for the removal of the courthouse of the county from one lot of ground to another within the boundaries designated as the county seat.

In Board of Revenue of Covington County v. Merrill, 193 Ala. 521, 68 So. 971, 977, it was held that the board of revenue could lawfully remove the court house from its site in the public square of Andalusia to another lot within the town, within the meaning of a constitutional provision providing that no court house or county site should be removed except by a majority vote of the qualified electors of the county and that the provision did not forbid the erection of a new court house on a different site or lot in the same county seat or town.

Murdoch v. Klamath County Court, 62 Or. 483, 126 P. 6, 7, is an Oregon case in which the action was brought to restrain the erection of a court house upon a parcel of land outside of Linkville, Oregon. Linkville was established as the county seat in 1884 and five years later was incorporated and its boundaries were particularly described. In 1893, by an act to incorporate the town of Klamath Falls and to repeal the act incorporating the town of Linkville, the name of the county seat was changed and the boundary lines perfected. Since the last-mentioned date, Klamath Falls has been the name of the county seat of Klamath County and the city limits now extend far beyond the first corporate boundaries. The county proposed to erect a new court house upon a tract of land within an addition to Klamath Falls, outside of the limits of the original town plat of Linkville. The statutes of Oregon provided that whenever the inhabitants of any county of the state desired to remove the county seat of the county from the place where it was fixed by law, or otherwise, an election for that purpose should be called by the county court and held by the electors of the county. The court held that the new site was not outside of the legal bounds of the county seat; that the phrase "at the town of Linkville" was equivalent to near or in proximity to that place.

[6] In the instant case the trial court found that the tract of land upon which the new court house is proposed to be erected was at Visalia and we cannot say, as a matter of law, that the court's finding in this respect is erroneous.

The word "at" was defined in Clark County Fiscal Court v. Powell County Fiscal Court, 223 Ky. 10, 2 S.W.2d 1039, 1041, as follows: "The primary idea in the word 'at' is 'nearness' or 'proximity,' and it is commonly used as the equivalent of 'near' or 'about.' Fayette County Board of Education v. Tompkins, 212 Ky. 751, 280 S.W. 114." In that case a state statute required the establishment of a county high school at the county seat and the court held that when the location was in reasonable proximity to the corporate limits of the

county seat, the intention and purpose of the legislature was complied with and the requirement as to the location was fulfilled; that the word "at", in referring to place, primarily means "near to" that place and not necessarily within.

[7] Since Visalia at the time of its selection as a county seat was not incorporated and had no definite or specific boundaries, the action of the electorate in designating Visalia as the county seat fixed its location at the place known as "Visalia". The new building site can reasonably be said to be "at" Visalia and the proceedings by which the corporate limits of the city of Visalia were fixed and by which they may be changed from time to time do not change the location of the county seat. The erection and construction of a new court house on the site selected is not, in our opinion, a removal of the county seat within the meaning of the language used in Article XI, Section 2 of the State Constitution.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



99 Cal.App.2d 428

PEOPLE v. CHAPMAN.

Cr. 2201.

District Court of Appeal. Third District. California.

Sept. 16, 1950.

Marian Dell Chapman was convicted of burglary. From an order of the Superior Court, Stanislaus County, B. C. Hawkins, J., denying defendant's petition for the issuance of a writ of error coram nobis, defendant appealed. The District Court of Appeal, Adams, P. J., held that the evidence sustained finding of trial court that defendant's plea of guilty was not induced by threats, coercion, or intimidation by her husband or by promises of leniency by responsible officials.

Affirmed.

1. Criminal law ⇐997

The issue of petitioner's guilt or innocence could not be tried in a proceeding for a writ of error coram nobis.

2. Criminal law ⇐997

Evidence sustained finding of trial court that petitioner's plea of guilty was not induced by threats, coercion or intimidation by her husband or by promises of leniency by responsible officials, and therefore trial court did not abuse its discretion in denying application for writ of error coram nobis.

Marian Chapman, Tehachapi, for appellant.

Fred N. Howser, Attorney General, by Gail A. Strader, Deputy Attorney General, for respondent.

ADAMS, Presiding Justice.

This is an appeal from an order of the Superior Court of Stanislaus County, denying to this appellant the issuance of a writ of error coram nobis.

In the petition there filed it was set forth that on or about June 14, 1948, petitioner was charged with burglary, that she entered a plea of guilty, and on July 7, 1948 was sentenced to the California Institution for Women. Petitioner then alleged that her plea of guilty was induced solely by reason of threats, coercion, wrongful persuasion, duress and intimidation of her husband, Jack Chapman; that she did not, in fact, commit the offense charged in the information but entered her plea of guilty at the request and command of her said husband, and in an effort to prevent his being prosecuted, and that had she not been so acting she would have had a trial by jury and been acquitted.

A hearing on said petition was had at which testimony was taken, petitioner being represented by counsel. She testified that shortly after her arrest and while

she was, for about one hour, detained in the county jail at Sonora, her husband occupied an adjoining cell, and that they conversed out the windows of their respective cells; that her husband then advised her to plead guilty as that would make it easier for him; that he assured her that she would receive probation; that she was afraid of her husband (though he was then serving a term in the penitentiary), and also that she was under the impression when she pleaded guilty that she was only admitting that she had been in her husband's car during his commission of the burglary. She also urged that in return for her guilty plea she had been promised probation by the county sheriff. This was not alleged in her petition on file, and was denied by the official mentioned.

Regarding petitioner's fear of her husband she admitted that they had been married for about twenty years, and that during their marriage he had been convicted of several crimes. The date of petitioner's conversation with her husband was May 18th, and she said that she *then* decided to plead guilty. She was then taken to Modesto and jailed there. Her plea of guilty was entered June 14th, at which time she was represented by counsel; and in the interim her husband had been taken to San Quentin so she did not see him again. She petitioned for probation which was denied, and she was sentenced July 7, 1948. No appeal was taken from the judgment.

This proceeding was filed October 10, 1949.

[1] During the hearing petitioner sought to show that she was not guilty of the crime charged, but the trial court held that the issue of her guilt or innocence could not be tried in this proceeding. In that respect its ruling was correct. People v. Shorts, 32 Cal.2d 502, 513, 197 P.2d 330; People v. Adamson, 34 Cal.2d 320, 326–327, 328, 210 P.2d 13; People v. Tuthill, 32 Cal.2d 819, 821–822, 198 P.2d 505; People v. Schuman, 98 Cal.App.2d 140, 219 P.2d 36; People v. Malone, 96 Cal. App.2d 270, 215 P.2d 109; People v. Chapman, 96 Cal.App.2d 668, 216 P.2d 112; People v. Coates, 95 Cal.App.2d 78, 212 P.2d 263; In re Rogers, 91 Cal.App.2d 394, 205 P.2d 667.

[2] As for the issue of whether her plea of guilty was induced by threats, coercion or intimidation by her husband or by promises of leniency by responsible officials, assuming but not deciding that such issue was properly triable in this proceeding, the evidence adduced presented to the trial court for its determination issues of fact, alone, which it resolved against her; and the only question for this court is whether its conclusion is supported by the evidence. We are satisfied that it is, and that there was no abuse of discretion in denying the application for the writ. People v. Tidwell, 75 Cal.App. 2d 476, 171 P.2d 565.

The report of the probation officer, which is made a part of the record here, recited that for several years Jack Chapman had been in and out of several penitentiaries; that on several occasions petitioner had accompanied her husband and other co-defendants while burglaries were committed by them; that she used articles which had been stolen from various parties, and that a large amount of loot was located in the hotel which was operated by petitioner and her husband. Also a letter which she wrote to a friend while she was in jail showed that she put the blame for her husband's conviction upon her young daughter, and stated that if released she intended to use her efforts to assist her husband and avenge herself upon her daughter. Also she admitted to the sheriff that she had been with her husband and one Nelson when they committed several burglaries and carried off stolen goods, such as a sewing machine, clothing, a vacuum cleaner, a radio and costume jewelry. She was also in possession of a watch stolen by her husband; and at the time this petition was filed she had already stood trial in Alameda County for burglaries there, at which time Chapman was convicted and the jury disagreed as to her. People v. Chapman, 93 Cal.App.2d 365, 209 P.2d 121. And her husband had also been convicted of an offense in Tuolumne County, at the commission of which she

testified she was present in his car with him. People v. Chapman, 91 Cal.App.2d 854, 206 P.2d 4.

Far from indicating that petitioner was afraid of her husband, the record indicates that she was a willing participant in his various crimes.

The order is affirmed.

VAN DYKE and PEEK, JJ., concur.



HENDERSHOTT et al. v. SHIPMAN et al.

Civ. 17415.

District Court of Appeal, Second District, Division 3, California.

Sept. 18, 1950.

Rehearing Denied Oct. 11, 1950.

Hearing Granted Nov. 16, 1950.*

Loyal L. Hendershott and another brought action against Benjamin W. Shipman and another to quiet title to real property. A judgment refusing to quiet title to the property in plaintiffs but adjudging that plaintiffs were owners of a certificate of sale and that certificate was a valid and subsisting lien upon the property was entered by the Superior Court of Los Angeles County, A. W. Ashburn, J., and the defendants appealed. The District Court of Appeal, Wood, J., held that where plaintiffs were claiming title to realty through a city treasurer's deed given after a sale under Street Improvement Act, and it was found that treasurer's deed was void, judgment should not have included a provision that certificate of sale issued to plaintiff was a valid lien against the property, in absence of any request by defendants for affirmative relief.

Modified and affirmed.

1. Municipal corporations ⇐579

The certificate of sale of real property issued by treasurer of City of Los Angeles, following foreclosure of street improvement bond by treasurer pursuant to Improvement Act, which was subject to right of redemption by property owners, could not have been a proper basis for an action by plaintiffs to quiet title to the property. Streets and Highways Code, § 6550.

2. Quieting title ⇐10(1)

In action to quiet title, plaintiff must recover upon strength of his own title and not upon weakness of defendant's claim.

3. Municipal corporations ⇐579

In action to quiet title, where plaintiffs were claiming title to realty through city treasurer's deed given after a sale under Street Improvement Act, upon finding that treasurer's deed was void, judgment should not have included a provision that plaintiffs were owners of a certificate of sale and that certificate was a valid and subsisting lien upon the property, in view of fact that defendants were not seeking any affirmative relief. Streets and Highways Code, §§ 6442, 6508, 6531, 6550, 6572.

Charles Murstein, Los Angeles, for appellants.

John F. Bender and Gizella M. Allen, Los Angeles, for respondents.

WOOD, Justice.

Action to quiet title to real property. In the complaint it is alleged that plaintiffs are the owners and entitled to possession of certain real property in Los Angeles; and that defendants claim some right, title or interest in the property adverse to plaintiffs but the defendants have no right, title or interest in any part thereof.

The defendants in their answer deny generally and specifically the allegations of the complaint to the effect that plaintiffs are the owners and entitled to the possession of the property; they admit that they claim the right as owners in fee of the property; they deny that they have no right or title or interest in the property, but on the contrary they allege that the plaintiffs have no right, title or interest in any part thereof. As a further defense they allege that the claims of plaintiffs to the property are without right and the said claims are invalid and void; that any proceedings

* Subsequent opinion 231 P.2d 481.

upon which plaintiffs' claims are based are invalid and void and are barred by the statutes of limitations. They pray that plaintiffs take nothing by the complaint; that the complaint be dismissed; that the defendants be awarded costs, and such other relief as the court deems proper.

The court found that it is not true that plaintiffs are the owners of the property and it is not true that plaintiffs are entitled to possession thereof; that plaintiffs are the owners of certificate of sale No. 3322 issued by the treasurer of the City of Los Angeles on May 31, 1946, following the foreclosure of a street improvement bond which was issued on August 31, 1928, by said treasurer pursuant to the Improvement Act of 1911; that the treasurer's deed which was issued by said treasurer on July 7, 1947, was issued without there first having been filed with the treasurer an affidavit showing service upon the owner of the property of any notice in respect thereto; that at no time was any affidavit filed with the treasurer stating that a redemption notice which stated any of the matters specified in section 6550 of the Streets and Highways Code was at any time served upon the owner of the property or an agent of the owner; that defendant Mr. Shipman is the owner of the property.

The court adjudged that the plaintiffs are owners of said certificate of sale; that "said Certificate, and the amount due thereon, is a valid and subsisting lien upon" said real property, but plaintiffs are not entitled to a judgment quieting their title to the property; that said treasurer's deed is void; that the defendants Mr. and Mrs. Shipman recover their costs.

Defendants appeal from the judgment and from that portion of the judgment which adjudges that plaintiffs are owners of the certificate of sale, and that "said Certificate, and the amount due thereon, is a valid and subsisting lien upon" said real property. The appeal is upon the judgment roll.

[1, 2] Appellants contend that it was error to include in the judgment the provision that plaintiffs are the owners of the certificate of sale and that "said Certificate, and the amount due thereon, is a valid and subsisting lien upon" the property. It appears that appellants (defendants) did not seek affirmative relief by cross-complaint or otherwise. The issue herein was whether plaintiffs were entitled to a judgment quieting their alleged title to the property. They based their claim of title upon the treasurer's deed. The court found that plaintiffs are not the owners of the property and adjudged that the treasurer's deed is void. There was no issue herein as to the condition of appellant's title. The certificate of sale, which was issued subject to the right of redemption by the appellants, could not have been a proper basis for an action by plaintiffs to quiet title to the property. "In an action to quiet title, the plaintiff must recover upon the strength of his own title and not upon the weakness of the defendant's claim." Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 825, 129 P.2d 383, 389. In Warden v. Harker, 212 Cal. 775, 300 P. 965, 966, the plaintiff claimed title through a treasurer's deed given after a sale under the provisions of the Street Improvement Act. The defendant therein contested the title of plaintiff on the ground that the sale proceedings and the deed were invalid. The court therein so found and rendered judgment for defendant, but the plaintiff contended on appeal that the court erred in failing to find that plaintiff had a lien upon the property for the amount of the assessment which he had paid at the time of sale. In that case the court said: "Plaintiff in his complaint alleged that he was the owner of the property; and he did not amend to claim a lien, nor did he make the point in presenting his case. At all times he stood on his claim of title, and refused the tender made by defendant both before and during the trial, of the amount expended by plaintiff, which sum now forms the basis of his contention on this appeal. In addition, it seems obvious that, where the whole proceedings are invalid, no lien attaches to the property sold." In District Bond Co. v. Pollack, 19 Cal.2d 304, 121 P.2d 7, the District Bond Company sought to foreclose a street improvement bond. The respondent therein, in a complaint in

intervention, sought to quiet his alleged title to the property. The appellant, who was named as a defendant in intervention, denied respondent's ownership of the property and asked that title be quieted in his favor as against respondent. The trial court therein decreed that title to the property should be quieted in appellant's favor and that respondent should have a lien against the property for a certain sum which he had expended in payment of a sewer bond and taxes. The appellant contended on appeal that it was error to include in the judgment the provision that respondent had a lien against the property. The reviewing court said, 19 Cal.2d at page 307, 121 P.2d at page 9: "Appellant contends that the relief afforded respondent was outside the issues raised by the pleadings. Appellant, however, in his answer affirmatively requested the trial court to quiet title to the property in his favor. [Citing cases.] A party who requests equitable relief must satisfy the equitable claims interposed by the opposing party." In Roma v. Elbert, Ltd., 73 Cal.App.2d 338, 166 P.2d 294, plaintiffs sought to quiet their title to real property but the judgment quieted the defendant's title against the claims of plaintiffs and did not require defendant to pay plaintiffs a certain sum which plaintiffs had paid for taxes. On appeal by plaintiffs it was held that the defendant should have been required to reimburse plaintiffs (appellants) for the amount paid by them for taxes. The court said, 73 Cal.App.2d at page 341, 166 P.2d at page 296: "Respondent [defendant] might have rested on the invalidity of appellants' title and defeated the action without the necessity of repaying the taxes. [Citing case.] It was not content to resist appellants' action but in its answer respondent denied their title and affirmatively alleged its own title as having been acquired by reason of the separate foreclosure of two street improvement bonds. The answer prayed for a decree that respondent was the owner of the property and that appellants had no right, title or interest therein. Evidence was offered in support of said allegations, following which the court made findings in accordance therewith and rendered a judgment quieting respondent's title against all claims of appellants. * * * Where equitable relief is sought by a property owner against a purchaser at a tax sale the party seeking relief must do equity, and the repayment of the amount of the taxes paid by the purchaser at the tax sale does no more than to satisfy the equitable requirement. This rule obtains where the property owner as plaintiff initiates an action seeking relief against the tax deed [citing cases], or where the holder of a tax deed is plaintiff and the defendant denies the validity of the tax title and seeks affirmative relief against the same." As above stated, in the present case defendant did not ask for affirmative relief. There was no allegation in the pleadings regarding a lien or any payments by plaintiffs or anyone upon an assessment, or for interest, penalties, or expenses. There was no finding that plaintiff or anyone had paid any amount in connection with the street bond assessment. The provision of the judgment that the certificate of sale and the amount due thereon constituted a valid lien upon the property was an adjudication that the amount stated in the certificate was in fact the amount due upon the bond as principal, interest, penalties and expenses. As above stated, there was no issue in this quiet title action as to whether the title of appellants was clear or encumbered.

It might be argued, however, that, under the provisions of section 6572 of the Streets and Highways Code, it was proper to include in the judgment a provision that the certificate of sale and the amount due thereon constituted a lien upon the property. That section provides: "If any sale of lands for delinquency in the payment of principal or interest of any bond is held illegal or invalid, or any deed issued to the purchaser at any such sale is held illegal or invalid for any reason whatsoever, the lands described in the bond shall not be released from the lien of the assessment but shall be and remain subject to further proceedings for the enforcement of the assessment, and the further proceedings may include additional sales or the issuance of new deeds. In any event, how-

ever, the lien of the assessment shall continue only until a valid sale is had and a valid deed issued, or until the expiration of two years after such sale or deed is held illegal or invalid, whichever is sooner." It is to be noted that said section states that "the lien of the assessment" shall continue after a deed is held to be void. It does not state that the certificate of sale or the amount stated therein is a lien which shall continue after the deed is held to be void. The lien of the assessment, mentioned in the section, is not necessarily the certificate of sale and the amount stated therein—or the amount stated therein. It might be shown, in a trial of the issue as to whether the amount stated in the certificate was the amount due on the bond, that the amount stated in the certificate is not correct. A redemption of the property, under the lien stated in the judgment, namely, the certificate of sale and the amount due thereon, may be made by paying "the following, together with interest at the rate of 1 per cent a month from the date of sale": purchase money and costs, the moneys paid for taxes, assessments or liens, and the fee for recording the certificate of sale. See Streets and Highways Code, sec. 6531. Prior to a sale the amount required to remove the "lien of the assessment", referred to in said section 6572, and cancel the bond, is the unpaid principal, the interest thereon compounded semiannually at the rate named in the bond, the penalty on delinquent instalments, and the cost of publication. See Streets and Highways Code, sec. 6508. The penalty on delinquent instalments prior to sale is 1 per cent a month of the total amount of delinquent instalments and interest. Streets and Highways Code, sec. 6442. It therefore appears that the amount required to remove the lien mentioned in the judgment is more than the amount required to remove "the lien of the assessment" prior to the sale.

Furthermore, it is to be noted that said section 6572, as amended in 1945, provides that: "In any event, however, the *lien of the assessment* shall continue only until a valid sale is had and a valid deed issued, or until the expiration of *two years* after such sale or deed is held illegal or invalid, whichever is sooner." It is also to be noted that there is no limit of time stated in the judgment as to the duration of the lien. Even if a provision regarding a lien should have been included in the judgment, the provision should have limited the duration of the lien to said period of two years.

[3] The judgment should not have included the provision regarding a lien or the provision that the plaintiffs are owners of the certificate of sale. The judgment should be modified by striking out those provisions. It is ordered that the judgment be and it is modified as follows: (1) By striking from the second paragraph thereof the following, "plaintiffs are the owners of Certificate of Sale No. 3322, issued by the City Treasurer of the City of Los Angeles, on May 31, 1946, following the foreclosure of Street Improvement Bond No. 22, Series 1, for the improvement of Columbus Avenue (and portions of other streets), which said bond was issued on August 31, 1928, by the City Treasurer of the City of Los Angeles, pursuant to the provisions of the Improvement Act of 1911. That said Certificate, and the amount due thereon, is a valid and subsisting lien upon the real property as described in said certificate, and as more particularly described as follows:

"Lot 239 of Tract No. 2800, as per map recorded in Book 28, Pages 53 and 54 of Maps, Records of Los Angeles County, but that"; and (2) By adding at the end of the second paragraph thereof, after the word "property," the following: "particularly described as follows: Lot 239 of Tract No. 2800, as per map recorded in Book 28, Pages 53 and 54 of Maps, Records of Los Angeles County, California."

As so modified the judgment is affirmed. Appellants to recover costs on appeal.

SHINN, P. J., and VALLÉE, J., concur.

99 Cal.App.2d 425

MARTINEZ v. MARTINEZ et al.

Civ. 4213.

District Court of Appeal, Fourth District, California.

Sept. 15, 1950.

Action by Leonard Martinez, and Leonard Martinez doing business as Vernon Ship Supplies, against Julian Martinez, and Julian Martinez doing business as Julian Ship Provisions, and others, to reform a contract by adding agreement that defendant would refrain from engaging in similar business in San Diego County and to enjoin defendant from engaging in such business. The Superior Court, San Diego County, Robert B. Burch, J., entered order denying defendant's motion for change of venue from San Diego County to Los Angeles County, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that defendant was entitled to have place for trial of action transferred from San Diego County to Los Angeles County.

Order reversed.

1. Venue ⇐46

In action by purchaser of San Diego business against vendor to reform contract by adding agreement that defendant would refrain from engaging in similar business in San Diego County and to enjoin vendor from engaging in such business, where vendor's residence was in Long Beach, chattel mortgage was acknowledged in Long Beach, note provided that all payments were to be made in Long Beach, and purchaser did not deny that written contract was executed in Long Beach, vendor was entitled to have place of trial of action transferred from San Diego County to Los Angeles County. Code Civ. Proc. § 395.

2. Venue ⇐7

Under statutory exception providing that county in which obligation was incurred by a defendant would be deemed to be county in which it was to be performed unless there was special contract in writing to contrary, action to reform contract, allegedly executed in Los Angeles County, by adding agreement that vendor of San Diego business would refrain from engaging in similar business in San Diego and to enjoin vendor from engaging in such business, did not come within exception. Code Civ. Proc. § 395.

3. Venue ⇐16½

When cause of action for relief in personam is joined with another cause of action which is local in character, the defendant is entitled to have the action transferred to county of his residence.

4. Reformation of Instruments ⇐30

An action to reform contract, and for an injunction in accordance with such relief, is proceeding in equity and is essentially a personal action.

Geo. W. Trammell, Long Beach, for appellant.

Alfred Einstein, V. Lustig, National City, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying a motion for change of venue.

The complaint alleged the sale to the plaintiff by the defendant of a ship supply business located in San Diego, under a written contract which was set forth in full; that it was the agreement, intent and purpose of the parties that the defendant was not to re-engage in a similar business in San Diego County; that by mutual mistake a clause to that effect was not included in the agreement; that by mutual mistake, or by the mistake of the plaintiff and the fraud of the defendant, the agreement did not embody the actual agreement as theretofore made; and that the written agreement does provide for the sale of all of the vendor's interest in said business "including the good will." In a second cause of action, it was alleged that the phrase "including the good will" meant that the defendant would not engage in a similar business in San Diego County; that the defendant knew that the plaintiff would not have bought the business without an agreement to that effect; that such

a clause was omitted from the contract either by mutual mistake or through the fraud of the defendant; and that the defendant, in October, 1949, re-engaged in a similar business at another location in San Diego and has since solicited plaintiff's customers. The prayer is that the written agreement be reformed to express the true intention of the parties as set out in the complaint, and that the defendant be enjoined from continuing in the ship supply business in San Diego. The agreement attached to the complaint provides for the sale of personal property only, this business with certain fixtures and including the good will, and for the payment of the purchase price in monthly instalments.

The defendant demurred, and moved to have the action transferred to the superior court of Los Angeles County. His affidavit in support of the motion alleges that his residence is and was at the time of the commencement of the action in Long Beach; that the written agreement attached to the complaint was executed in Long Beach; and that a note and chattel mortgage securing the payments to be made were also executed in Long Beach at the same time the agreement was executed. Copies of this note and chattel mortgage were attached and by reference made a part of the affidavit. The note provides that the amounts due are to be paid to the defendant at a certain address in Long Beach. The chattel mortgage makes no reference to the place at which it was executed, but it was acknowledged before a notary public in Los Angeles County on the same day the note and mortgage are dated. The plaintiff filed an affidavit in opposition to the motion which, so far as material here, merely states that the property referred to in the note and chattel mortgage is situated at a certain address in the city of San Diego. The court denied the motion for change of venue, and this appeal followed.

The complaint does not allege that the contract was executed in San Diego County, and the contract itself does not disclose where it was executed. The defendant's statement that it was executed in Long Beach was not denied. There is no showing to the contrary, and upon the contract as written nothing further was to be done by the vendor. The note and mortgage were executed at the same time, the mortgage being acknowledged in Long Beach, and the note providing that all payments were to be made in Long Beach. The fact that the defendant resided in Long Beach was not disputed and is not questioned.

[1] On the face of the complaint and the contract as executed, the proper place for the trial of the action was Los Angeles County, under section 395 of the Code of Civil Procedure. With respect to the matter of reforming the contract, the main question here is whether this action comes within one of the exceptions mentioned in that section. This exception provides that when a defendant "has contracted to perform an obligation in a particular county" that county is the proper place for trial "of an action founded on such obligation," and that the county in which "such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

In this case it does not yet appear that the defendant has contracted to perform an obligation in San Diego County, that being the basic fact which the plaintiff is seeking to establish through this action. So far as now appears, the action is not founded on an obligation which the defendant has contracted to perform in San Diego County. Nor does it now appear that any such obligation was incurred in San Diego County. So far as now appears any obligation assumed by the defendant was incurred in Los Angeles County.

[2] As disclosed by the complaint and as matters now stand, this was a personal and transitory action to change the terms of a contract by adding an obligation which, if added, would relate to a performance in San Diego County. The primary purpose of the action was to determine whether or not such an obligation exists at all, and the enforcement of the obligation which may be created is incidental. If it be found that the plaintiff

is not entitled to reformation, he would not be entitled to any of the relief prayed for. So far as the reformation issue is concerned the action does not come within the exception in question. Turlock Theater Co. v. Laws, 12 Cal.2d 573, 86 P.2d 345, 120 A.L.R. 786.

[3, 4] The injunction phase of the action is incidental to its primary purpose and is inapplicable until and unless that purpose is accomplished. Any issue in that connection is not sufficient to bring the action within the exception above mentioned. When a cause of action for relief in personam is joined with another cause of action which is local in character, the defendant is entitled to have the action transferred to the county of his residence. Turlock Theater Co. v. Laws, 12 Cal.2d 573, 86 P.2d 345, 120 A.L.R. 786; Goosen v. Clifton, 75 Cal.App.2d 44, 170 P.2d 104. An action to reform a contract, and for an injunction in accordance with such relief, is a proceeding in equity and is essentially a personal action. Bardwell v. Turner, 219 Cal. 288, 25 P.2d 978.

The order appealed from is reversed.

GRIFFIN and MUSSELL, JJ., concur.



99 Cal.App.2d 338

HOLLYWOOD STATE BANK v. COOK et al.

Civ. 3991.

District Court of Appeal, Fourth District, California.

Sept. 6, 1950.

Rehearing Denied Sept. 27, 1950.

Hearing Denied Nov. 2, 1950.

The Hollywood State Bank brought action against D. D. Cook, administrator of the estate of Cal A. Cook, deceased, and others, to foreclose two chattel mortgages. From an adverse judgment of the Superior Court of San Diego County, C. M. Monroe, J., the bank appealed. The District Court of Appeal, Mussell, J., held that where two chattel mortgages and unrecorded collateral security agreements did not refer to each other, and the mortgages did not indicate an intent to secure future loans, the collateral agreements did not enlarge the terms of the mortgages as security for future advances and the bank acquired no liens as against general creditors by virtue of the agreements.

Judgment affirmed.

1. Chattel mortgages ⇐83

Purpose of statute requiring recordation of chattel mortgages is to prevent secret liens and interests in personal property. Civ. Code, § 2957.

2. Chattel mortgages ⇐196

Even if unrecorded collateral security agreements were regarded as extending chattel mortgages to secure future loans, agreements, not being recorded, would be void as against creditors of mortgagor. Civ. Code, § 2957.

3. Chattel mortgages ⇐84, 197(1)

Chattel mortgage to secure future advances is valid between mortgagor and mortgagee even though not recorded, but void as to creditors of mortgagor who have acquired a lien thereon and who may take advantage of failure to record. Civ. Code, § 2957.

4. Chattel mortgages ⇐110

Chattel mortgage does not protect mortgagee as to future advances unless it appears from the mortgage itself that it is given to secure future advances, and unless maximum is expressed. Civ. Code, § 2957.

5. Chattel mortgages ⇐110, 197(1)

Where each of two chattel mortgages to bank described particular note it secured and stated it was security for such note, and neither mortgage indicated intent to secure future advances or other loans or referred to unrecorded collateral security agreements, and security agreements were not entitled "mortgages", security agreements did not enlarge terms of chattel mortgages to cover future advances and mortgagee acquired no lien as against general creditors by virtue of security agreements. Civ. Code, § 2957.

Walter G. Danielson, Los Angeles for appellant.

James Don Keller, District Attorney, and Duane J. Carnes, Deputy District Attorney, San Diego, for respondent San Diego County.

Theron Lamar Caudle, Assistant Attorney General and Ellis N. Slack, Helen Goodner and Virginia H. Adams, Special Assistants, Ernest A. Tolin, United States Attorney, and E. H. Mitchell and Bernard B. Laven, Assistants, all of Los Angeles, for respondent, United States.

MUSSELL, Justice.

This is an appeal by plaintiff from an adverse judgment in an action to foreclose two chattel mortgages given by Cal A. Cook covering certain machinery located in San Diego. These mortgages secured two notes given in February and May, 1946, and were duly recorded.

At the time each of these mortgages was executed, Cook also executed a "collateral security agreement" providing in part: "In consideration of any financial accommodations given, or to be given, or continued to the undersigned by Hollywood State Bank (hereinafter called the Bank) and as collateral security for the payment of any indebtedness, obligation or liability of the undersigned to said bank now or hereafter existing * * * the undersigned does hereby assign, transfer to, and deposit with the said bank all property this day delivered by the undersigned to the bank, or which may now be held by the bank, or which may hereafter be delivered by the undersigned to the bank during the existence of this agreement * * * the power of sale and other powers hereinafter given shall apply to all collaterals of any kind, nature or description, including * * * negotiable instruments * * * at any time during the existence of this agreement in possession or control of said bank * * * belonging to, for the account of or subject to the order of the undersigned."

Between October 16, 1946 and April 2, 1947, Cook borrowed additional moneys from the bank, signing five notes therefor, totaling about $47,000.

The United States government acquired various tax liens on the property of Cook amounting to $7,920.75, the first assessment being levied on November 6, 1946, and notice being recorded three days later. Subsequent to April 2, 1947, it acquired additional tax liens, totaling $13,552.66. County taxes also accrued amounting to $2,778.06 for 1947–1948 and $1,711.05 for 1948–1949. None of the county or government taxes have been paid.

At the time of his death, Cook was indebted to plaintiff in a large amount. By stipulation of the parties, the property covered by these mortgages was sold by the administrator for $18,158.75, from which the plaintiff was paid $5,549.60, being the full balance specifically covered by the mortgages. The remaining $12,609.15 is held by the administrator pending the outcome of this action. It is admitted that the estate is further indebted to the plaintiff in the amount of $41,071.93 on the five notes issued from and after October, 1946.

There is no substantial dispute as to the facts. The court found that the plaintiff had been paid in full to the extent of its secured claims and that the remaining debts were not secured by these mortgages.

The plaintiff contends that these mortgages, together with the "collateral security agreements", were intended as and constitute security for all indebtedness of decedent to plaintiff at the time the mortgages were executed or which was thereafter created.

The principal questions here presented are whether the mortgages can be held to be security for future advances, and if so, whether the plaintiff has the prior lien with respect to the federal and county taxes.

Each of the two chattel mortgages involved described the particular promissory note it secured and stated that it was security for that note. Neither mortgage indicated that it was security for any future advances or for any other loan. Neither mortgage referred to the collateral security agreements and neither of these agreements made any reference to the chattel mortgages. The collateral agreements were not recorded and were not entitled "mort-

gages" and did not, in our opinion, enlarge the terms of the chattel mortgages.

Section 2957 of the Civil Code provides in part that:

"A mortgage of personal property * * is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless: * * *

"4. The mortgage * * * is recorded in the office of the recorder of the county where the mortgagor resides at the time the mortgage is executed, and also in the county where the property mortgaged is located. * * *

"5. Each such mortgage is clearly entitled on the face thereof, apart from and preceding all other terms of the mortgage, to be a mortgage of * * * chattels * * *."

[1] The purpose of the statute in requiring recordation of chattel mortgages is to prevent secret liens upon and interests in personal property. Ruggles v. Cannedy, 127 Cal. 290, 297, 53 P. 911, 59 P. 827, 46 L.R.A. 371.

[2] If the collateral security agreements were to be regarded to extend the mortgages to secure future loans, those agreements, not being recorded, would be void as against creditors of the mortgagor. Wolpert v. Gripton, 213 Cal. 474, 480, 2 P.2d 767.

The correctness of the trial court's conclusion that the chattel mortgages secured only the two notes which were paid in full is further supported by evidence that the bank treated the first three loans as "coll. secured" and the remaining four notes as "unsecured". Moreover, the evidence shows that other security was given by the decedent to the bank, to wit: an assignment to the bank of the contract on account of which all of the loans were made. It also appears that the bank withheld from the assigned account amounts which were credited to decedent's notes.

Plaintiff cites the case of Rutherford v. Edward L. Eyre & Co., 174 Or. 162, 148 P.2d 530, 152 A.L.R. 1172, in support of its claim that the chattel mortgages were to secure loans other than those described therein. However, that case is distinguishable from the case at bar in that in the Rutherford case the chattel mortgages stated that they were for future advances. The amount of the contemporaneous loan was set forth as was the maximum amount to be loaned (a larger amount than the contemporaneous loan). The contemporaneous agreement referred to in the mortgage stated that the mortgage was security for future loans.

Likewise, in Weiser Loan & Trust Co. v. Comerford, 41 Idaho 172, 238 P. 515, cited by plaintiff, the agreement signed contemporaneously with the chattel mortgage stated that it was executed in conjunction with the mortgage and left no doubt as to the intent of the parties that the chattel mortgage was made to secure future loans by a contemporaneous agreement, which agreement was not acknowledged.

[3] In Lemon v. Wolff, 121 Cal. 272, 53 P. 801, and Wolpert v. Gripton, supra, it is held that a mortgage which does not comply with the requirements of section 2957 of the Civil Code is void as to creditors of the mortgagor who have acquired a lien on mortgaged property. In Lemon v. Wolff, supra, it was held that a mortgage to secure future advances is valid as between the mortgagor and mortgagee even though not recorded and that only creditors of the mortgagor may take advantage of the failure to comply with the recording statute.

In Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102, also cited by plaintiff, it was contended that a mortgage in the amount of approximately $3,000, given as security for a present loan of $1,704 was void. The court rejected this contention, holding that the obvious intention in that case was to secure future advances in the amount of the difference between $3,000 and $1,704.

[4] Plaintiff argues that section 2975 of the Civil Code protects a mortgagee as to future advances up to the maximum amount stated therein. However, the wording of the section indicates that it must appear

from the mortgage itself that it is given to secure future advances, and that an "expressed maximum" must also appear.

It is conceded that the chattel mortgages were recorded prior to the tax liens, but they did not cover future advances, and the future advances were made after the government recorded its liens.

[5] We are impelled to the conclusion that the chattel mortgages in question were not security for future advances and that the bank acquired no lien as against general creditors by virtue of them. Since we have arrived at this conclusion, it is not necessary to consider the other questions raised on this appeal.

The judgment is affirmed.

BARNARD, P.J., and GRIFFIN, J., concur.



99 Cal.App.2d 391

SIPE v. HOLLINGSWORTH & CO. et al.

Civ. No. 17541.

District Court of Appeal, Second District, Division 1, California.

Sept. 13, 1950.

Partition action by Frank R. Sipe against W. I. Hollingsworth & Co., a corporation, and others, and John C. Rotchford and Marie E. Rotchford. The Superior Court of Los Angeles County, Daniel N. Stevens, J., entered a judgment of petition and ordered a sale and the defendants Rotchford appealed. The District Court of Appeal, Drapeau, J., held that a plaintiff to whom was given by payee for collection a street improvement bond which was issued as lien on realty had sufficient title to bring partition action against defendants whose record title to such realty came from purchaser at tax sale.

Judgment affirmed.

1. Bills and notes ⇐524

Possession of commercial paper, with endorsement, makes a prima facie case of delivery by the endorser to the holder, and of ownership of the latter. Code Civ.Proc. § 1963, subds. 11, 12.

2. Evidence ⇐87

A disputable presumption raises a conflict sufficient to support a finding in accordance therewith. Code Civ.Proc. § 2061, subd. 2.

3. Partition ⇐16

A plaintiff to whom was given by payee for collection a street improvement bond which was issued as lien on realty had sufficient title to bring partition action against defendants whose record title to such realty came from purchaser at the tax sale. Code Civ.Proc. § 1963, subds. 11, 12; § 2061, subd. 2.

John C. Rotchford and Hiram T. Kellogg, Los Angeles, for appellants.

Robt. E. Rosskopf, John F. Bender, and Gizella M. Loshoncy, all of Los Angeles, for respondent.

DRAPEAU, Justice.

After trial in the Superior Court plaintiff was found owner of a street improvement bond lien for $912.98 upon real property belonging to defendants Rotchford. Defendants Rotchfords' record title came from a purchaser at a tax sale. An interlocutory decree of partition and order of sale followed, directing that the property be sold, and the proceeds applied to expenses of sale, payment of the lien, and the balance to defendants Rotchford. From this judgment defendants Rotchford appeal.

Defendants claim that plaintiff failed to prove title in the bond sufficient to bring the action; and that the proceeding in partition was unlawful.

Upon the trial it was conceded that possession of the bond by plaintiff was prima facie proof of ownership. Defendants withdrew their objection to the introduction in evidence of the bond, and it was received in evidence. Moreover, plaintiff testified that the bond was given to him for collection by the payee.

[1] Possession of commercial paper, with endorsement, makes a *prima facie* case of delivery by the endorser to the holder, and of ownership of the latter. Code Civ.Proc. sec. 1963, subds. 11 and 12; Linder Hardware Co. v. Pacific Sugar Corp., 17 Cal.App. 81, 118 P. 785, 789; Moore v. Craig, 5 Cal.App.2d 283, 42 P.2d 647.

[2] A disputable presumption will raise a conflict sufficient to support a finding in accordance therewith. Code Civ.Proc. sec. 2061, subd. 2; Grantham v. Ordway, 40 Cal.App. 758, 182 P. 73.

[3] Defendants' second contention is refuted by the case of Elbert, Ltd. v. Nolan, 32 Cal.2d 610, 197 P.2d 537.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



99 Cal.App.2d 388

BROTEMARKLE v. SNYDER et al.

Civ. 17450.

District Court of Appeal, Second District, Division 1, California.

Sept. 13, 1950.

Winfield M. Brotemarkle brought action against Robert A. Snyder and Elinor V. Snyder for injuries sustained by plaintiff when defendants' dog unleashed and unattended dashed into plaintiff's motor scooter and caused plaintiff to be thrown to the pavement. An order dismissing the action was entered by the Superior Court of Los Angeles County, Arnold Praeger, J., and the plaintiff appealed. The District Court of Appeal, Drapeau, J., held that complaint which alleged that plaintiff was thrown from his motor scooter when defendants' dog, unleashed and unattended, dashed into the motor scooter and violation of city ordinance requiring every owner of dog to keep animal exclusively upon his own premises unless under control of a competent person and restrained by chain and leash was sufficient to state cause of action.

Order reversed and cause remanded with directions.

1. Pleading ⇐214(1)

On demurrer, all of the allegations of a complaint are deemed to be true.

2. Negligence ⇐108(2)

Negligence is pleaded by alleging violation of a duty imposed by statute.

3. Animals ⇐74(2)

For purpose of pleading negligence, city ordinance requiring every owner of dog to keep the animal exclusively upon his own premises unless under control of a competent person and restrained by a chain or leash is not to be restricted to injuries from dog bites only.

4. Automobiles ⇐238(4)

A complaint, which alleged that plaintiff was thrown from motor scooter which he was riding when defendants' dog unleashed and unattended dashed into plaintiff's motor scooter, and violation of city ordinance requiring every owner of a dog to keep animal exclusively upon his own premises unless under control of a competent person and restrained by chain or leash, was sufficient to state cause of action.

George W. Downing, Jr., Los Angeles, for appellant.

Gibson, Dunn & Crutcher, By Richard E. Davis, Los Angeles, for respondents.

DRAPEAU, Justice.

Plaintiff was riding a motor scooter near the intersection of two streets in Los Angeles. A dog "unleashed and unattended * * * dashed into and collided" with plaintiff's motor scooter. Plaintiff was thrown to the pavement, suffered painful and serious injuries. His hospital bill was nearly a thousand dollars.

Complaint was filed in the Superior Court against the owners of the dog, alleging the collision and the injuries, and

violation of a city ordinance which requires every person, owner of a dog, to keep the animal "exclusively upon his own premises." The ordinance further provides that a dog may be off such premises if under the control of a competent person and restrained by a chain or leash.

Demurrer to the complaint was sustained. No amended complaint was filed within the time allowed by the court. Under the provisions of Section 581(3) of the Code of Civil Procedure, the action was dismissed.

Plaintiff contends that pleading the accident, plus violation of the ordinance, states a cause of action. Defendants assert that the ordinance was adopted for the limited purpose of guarding the public against being bitten by dogs—not against collisions between dogs and vehicles; therefore, plaintiff does not plead himself within the class protected by the ordinance.

In the case of Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, at page 590, 177 P.2d 279 at page 284, appears a fair statement of defendants' position: "But there is, of course, a further question in connection with the issue of negligence. Although a violation of a statute is not excusable under the particular circumstances of the case, liability is also dependent upon proof that a duty was owed to persons in the class of the plaintiff * * *."

The early case of Siemers v. Eisen, 54 Cal. 418, has been cited and approved in California jurisprudence ever since 1880. See Hopper v. Bulaich, 27 Cal.2d 431, 164 P.2d 483; Satterlee v. Orange Glenn School Dist., supra.

In the Eisen case, a horse, harnessed to a light buggy, ran away, and injured a pedestrain. A city ordinance required that all horses standing in the streets must be tied to hitching posts. The horse was left standing in the street and was not tied up. The court held that failure to perform a duty imposed by statute was negligence *per se*.

"But" say defendants, "cases involving animals other than dogs are not controlling here. Anybody knows that if a horse is not tied up, he may run away and hurt somebody; or if a cow, or a bull, roams at large on city streets, trouble is sure to follow. And a good way to wreck an automobile is to encounter a hog loose on a traveled road. With dogs it is different. Dogs have run at large from time immemorial, and except for biting, never, except in extraordinary cases, have hurt anybody."

[1, 2] The argument is interesting, and persuasive. It would seem that one who rides a scooter must bear the hazards incident to that mode of locomotion. But here we have a question of pleading. On demurrer all of the allegations of a complaint are deemed to be true; and negligence is pleaded by alleging violation of a duty imposed by statute. Restatement, Torts, sec. 286.

[3, 4] The ordinance forbids the owner to allow his dog to be at large, except upon a leash. In our great, metropolitan areas, it is no longer possible to enjoy many things which were part and parcel of human life in earlier times, and still are in suburban and rural communities. Whatever may be said about the affection which mankind has for a faithful companion, modern city conditions no longer permit dogs to run at large. For the purpose of pleading negligence, the ordinance is not to be restricted to injuries from dog bites only. Hicks v. Sullivan, 122 Cal.App. 635, 10 P.2d 516. Therefore, the complaint, alleging the accident and violation of the dog-leash ordinance, states a cause of action.

In Eigner v. Race, 54 Cal.App.2d 506, 129 P.2d 444, a Great Dane dog was on a leash held by a small girl. In a friendly, bumbling way, he bumped into a woman and knocked her down. Judgment of nonsuit was affirmed on the theory that plaintiff's injuries were caused by an unavoidable accident. But in that case it was stated that violation of the dog-leash ordinance of the City of Beverly Hills was evidence of negligence.

The order is reversed, and the cause remanded, with direction to the Superior

Court to overrule the demurrer, and allow defendants a reasonable time within which to answer the complaint herein if they be so advised.

WHITE, P. J., and DORAN, J., concur.



99 Cal.App.2d 370

MAJORS et ux. v. BUTLER.

Civ. 3999.

District Court of Appeal, Fourth District, California.

Sept. 11, 1950.

Rehearing Denied Oct. 9, 1950.

Hearing Denied Nov. 9, 1950.

Action by Clyde Majors and wife against Mittie L. Butler to quiet title to realty sold to defendant. The Superior Court of San Diego County, Arthur L. Mundo, J., entered judgment in favor of plaintiffs, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that the action presented questions of fact as to whether vendors were negligent in failing to diligently prosecute action to quiet their title to realty as against earlier contracts for sale thereof to another and whether such negligence created a situation without which loss of purchase money deposited in escrow with title company which was later adjudged a bankrupt would not have occurred, and that the finding that escrow holder was purchaser's agent and that therefore purchaser must bear the loss was not necessarily controlling.

Judgment reversed.

1. Quieting title ⇐44(3)

In action to quiet title to realty as against purchaser, evidence that, though vendors had deposited deed to realty in escrow, their title was subject to an old contract to sell the realty to another which had been recorded but not released, was insufficient to sustain finding that vendors had placed in escrow sufficient deeds to convey title within meaning of escrow agreement requiring a good title.

2. Quieting title ⇐47(2)

In action to quiet title to realty as against purchaser after escrow holder had been adjudged a bankrupt, finding that purchaser had filed in bankruptcy proceeding and never withdrawn a claim for the amount of purchase money deposited in escrow did not fully reflect the fact that such claim was conditional and expressly made contingent on an adverse outcome of quiet title action.

3. Quieting title ⇐44(3)

In action to quiet title to realty as against purchaser after escrow holder of deed and purchase money had been adjudged a bankrupt, evidence did not sustain finding that purchase money could not be traced and was nonexistent at time of bankruptcy, though escrow holder had commingled the purchase money in its general account.

4. Quieting title ⇐44(3)

Evidence did not justify an inference that any act of purchaser, not knowing of bankruptcy of escrow holder, in thereafter obtaining from escrow holder deed to realty was sufficiently culpable to bar her from equitable relief in action by vendors to quiet title to the realty as against purchaser.

5. Escrows ⇐8(1)

Escrow holder is the agent of both parties until the conditions of the escrow are complied with and up to that time any loss of the money caused by such agent must be borne by the one who still owned it, unless the act or negligence of one of the parties is the basic cause of the loss or is a factor without which the loss would not have happened.

6. Principal and agent ⇐131

A principal, though not himself at fault, is bound by the acts of his agent.

7. Quieting title ⇐47(2)

Action by vendors to quiet title to realty as against purchaser after escrow holder had been adjudged a bankrupt presented questions of fact, which might be controlling, as to whether vendors were negligent in failing to diligently prosecute action to quiet their title as against earlier

contract for sale of realty to another and whether such negligence created a situation without which loss of purchase money deposited in escrow would not have occurred, and finding that escrow holder was purchaser's agent and therefore loss must fall on purchaser was not necessarily controlling.

8. Quieting title ⇐44(3)

Evidence that vendors, after instituting action to quiet title to realty as against earlier contract for sale thereof to another, did nothing to prosecute such action for a period of almost 15 months preceding bankruptcy of escrow holder, in absence of reasonable excuse for such delay, was sufficient to show that vendors were negligent in failing to comply with escrow agreement to furnish within 30 days or at earliest possible date thereafter anything necessary to show good title, and should therefore bear loss of purchase money resulting from bankruptcy of escrow holder, if such negligence created a condition without which such loss would not have occurred.

9. Escrows ⇐5

Under escrow instructions providing that, if a policy of title insurance could not be issued within 30 days, escrow should be completed at the earliest possible date thereafter, unless written demand for return of deposits was made with joint consent in writing of both the vendors and purchaser, vendors had only a reasonable time in which to clear their title to realty, and failure of purchaser to demand return of purchase money deposited in escrow did not extend such time indefinitely, since such demand would have been ineffective without written consent of vendors.

10. Quieting title ⇐49

Purchaser's rights should not be completely terminated by judgment quieting vendor's title to realty as against purchaser without first affording purchaser an opportunity to make up any shortage in purchase money resulting from bankruptcy of escrow holder.

Ruel Liggett, Burton D. Wood, San Diego, for appellant.

Hunter M. Muir, San Diego, Henry F. Walker, Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment quieting the plaintiffs' title and denying any relief to the defendant. The plaintiffs listed a house with a realtor who sold it to the defendant for $4500. On July 12, 1946, an escrow was opened in the office of a title company, the plaintiffs depositing a deed and the defendant $4500. The instructions provided that the company was to use these provided it was able to issue within 30 days a policy showing title vested in the defendant; that the realtor's commission was then to be paid; and that the plaintiffs agreed to furnish any other "instruments" necessary to show good title. They further provided that if such a policy could not be issued within 30 days the escrow was to be completed "at the earliest possible date thereafter," unless written demand for a return of deposits was made; and that no "demand shall be of any effect without joint consent in writing" of both sellers and buyer.

With the acquiescence of the plaintiffs the defendant took possession of the property which she has since occupied and improved as a home. Shortly after the escrow was opened the title company discovered that an old contract to sell the property to one Ellis had been recorded but never released. It informed the plaintiffs, who brought an action to quiet their title on October 22, 1946, publication of summons being commenced on November 2, 1946. The record discloses nothing further in that action until after the present action was filed. A substitution of attorneys was made on April 9, 1948, and a decree quieting their title against Ellis was entered on August 13, 1948.

This title company was adjudged a bankrupt and a trustee appointed on January 7, 1948. On January 8, 1948, while the doors were open and the trustee's agent in charge, the realtor took Mrs. Butler to the office where she signed a change in her instructions by which she would accept title subject to the old Ellis contract, and the "chief searcher" recorded the deed to her.

On January 21, 1948, at the request of the trustee's agent, she signed a quitclaim deed and a letter, dictated by him, stating that it was delivered to place the escrow in status quo, without waiving any of her rights, and was to be used only if it should later be decided that the deed to her had been improperly recorded.

This action was filed on March 12, 1948. The complaint alleged the creation of the escrow; that the money was to be paid over when a title guarantee could be issued; that none was ever issued; that the title company was adjudged a bankrupt and a trustee placed in charge; that the next day the defendant obtained the deed and caused it to be recorded; that her possession of the deed through her agents was unauthorized, of no legal effect, and without consideration; that the escrow holder is insolvent and all of the $4500 deposited with it "is nonexistent"; and that the defendant has never had any interest or right in said land. There was no allegation that the plaintiffs had done their part, except for placing a deed in escrow.

So far as material here, the answer admitted the creation of the escrow, the bankruptcy and the obtaining of the deed; alleged that the $4500 had been fully paid by placing it in escrow at plaintiffs' direction and for their use; and denied that the $4500 so deposited is nonexistent. It was further alleged that the title to the property was not merchantable because of the recorded Ellis contract; and that any loss or damage resulting from the bankruptcy was caused by the negligence of the plaintiffs in failing to prosecute their action against Ellis with diligence, and thus failing to furnish a title in accordance with their agreement.

The action was tried on July 25, 1949, while the bankruptcy was still pending. In addition to the general facts as to the creation of this escrow, and the bankruptcy, the court found that on July 12, 1946, the plaintiffs delivered to the escrow holder "sufficient deeds of conveyance" to convey title to the defendant; that the escrow was never closed and no title policy was ever issued; that the defendant filed a claim for $4500 in the bankruptcy proceeding, which she has never withdrawn; that she illegally obtained the deed on January 8, 1948, and its recordation conveyed no right or title to her; that the escrow holder had commingled the $4500 in its general account; that these funds could not be traced and were "nonexistent in said escrow" at the time of bankruptcy; and that the loss must fall on the defendant since the escrow holder was her agent. No finding was made on the issue raised as to plaintiffs' negligence.

[1, 2] Some of the findings are either unsupported or fail to reflect the facts shown by the evidence. The finding that the plaintiffs placed in escrow "sufficient deeds * * * to convey title" is without support if it was intended to mean a good title, as required by the agreement. The defendant did file a claim in the bankruptcy proceeding, at the last minute, but it was conditional and expressly made contingent on an adverse outcome of the present action. A title policy was never issued because the plaintiffs had not cleared their title.

[3] While the escrow holder had placed the $4500 in its general account, the evidence does not sustain the finding that these funds could not be traced or that they were nonexistent at the time of the bankruptcy. The only evidence is that of the trustee's agent, who had been in charge since January 7, 1948. He testified that such an item could be traced. He also testified that the bank balance was $21,300 on January 7; that the "escrow liability" was then greatly in excess of that amount; and that the last four deposits made probably exceeded that amount. He refused to say the last deposits were escrow money, saying they included all receipts. There is no evidence that these last deposits were escrow money or had not been checked out, and none as to whether other escrow owners were in a position to assert their claims as against the rights of the defendant. So far as the evidence shows, all or some of the money deposited by the defendant may have been available. Keeney v. Bank of Italy, 33 Cal.App. 515, 165 P. 735; Armstrong v. Schoenborn, 130 Cal.App. 501, 20 P.2d 79.

[4] While the finding that a deed was illegally obtained may be correct, the evidence in no way justifies any inference that any act of Mrs. Butler in that connection was sufficiently culpable to bar her from equitable relief. It appears without conflict that on January 8 an employee in the title office, then in charge of the trustee, suggested to the realtor that something should be done to close the escrow; that the realtor persuaded Mrs. Butler to change her instructions; that he did this solely because he was the broker; that he did not then know of the bankruptcy, and believed that the escrow could then be closed and the money paid; that Mrs. Butler merely cooperated with him, knowing nothing of the circumstances; and that she executed a quitclaim deed when informed by the trustee's agent that the transaction was questionable. The evidence indicates that an employee of the trustee acted and delivered the deed in an "attempt to close" the escrow, and that someone later became alarmed. The trustee's agent, who was in charge, testified that the office was closed on January 5 and 6; that up to that time escrows were opened and closed and money paid in the regular way; and that the office was open on January 8 "not to take any new escrows—we ceased to accept new business—but the trustee did continue to attempt to close the business he acquired in the bankruptcy."

The plaintiffs, who were seeking equitable relief, were in effect permitted to withdraw from this escrow contrary to its express terms, when the defendant had fully complied, when they had not done so, and when the escrow could have been completed in ample time had they complied with their part of the agreement, and to do this without a clear showing that the money was entirely lost. The findings clearly indicate that the case was decided solely on the ground that the escrow holder was still the agent of the defendant since a title policy had not been issued.

[5, 6] The general rule that the escrow holder is the agent of both parties until the conditions of the escrow are complied with, and that up to that time any loss of the money caused by such agent must be borne by the one who still owned it, is well established. Hildebrand v. Beck, 196 Cal. 141, 236 P. 301, 39 A.L.R. 1076; Shreeves v. Pearson, 194 Cal. 699, 230 P. 448. This general rule is based upon the doctrine that a principal, although not himself at fault, is bound by the acts of his agent. The reason for the rule ceases, and it should not be solely relied on, when the act or negligence of one of the parties is the basic cause of the loss, or is a factor without which the loss would not have happened. In Crum v. City of Los Angeles, 110 Cal. App. 508, 294 P. 430, such a situation appeared and was held to bring the case within the code provision, Sec. 3543, Civil Code, that: "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

[7] In this case the escrow holder was also the agent of the plaintiffs, and while they are not responsible under the agency rule, they would be under the other rule if by their own negligence they "created a situation which made it possible for the later loss to occur" and without which it would not have happened. The issue of negligence, raised by the pleadings, presented an important question of fact which called for a finding on that issue, and the agency finding on which the judgment rests was not necessarily controlling.

[8, 9] There is ample evidence that these plaintiffs were negligent in failing to comply with their agreement to furnish anything necessary to show good title, and to do this within 30 days or "at the earliest possible date thereafter." The time was not indefinitely extended because the defendant did not demand a return of her deposit, as they argue. Her hands were tied and she could make no such demand without their written consent. The only extension was to "the earliest possible date." While this doubtedless gave plaintiffs a reasonable time within which to clear their title, it would not justify such an unreasonable delay as seems to have occurred. Plaintiffs' quiet title action against Ellis could have been completed in a few months, apparently. While it was successfully completed within a short time after it

was given attention, nothing was done during a period of nearly 15 months preceding the bankruptcy. No reasonable excuse for this delay appears. The mistaken idea that the time for closing the escrow was indefinitely extended, would not be sufficient to excuse the delay. The issue as to plaintiffs' negligence, and its causal effect, was one which could well be controlling and which should have been fully considered, and then decided.

[10] In any event, under these circumstances, the defendant should not in equity be penalized for being unwilling to again pay the full purchase price, before the full facts are known and her rights determined. Assuming that a finding adverse to her on the negligence issue might be made, an interlocutory decree should be entered permitting her to make up any shortage, if she desires, before her rights are completely terminated at the request of the plaintiffs who, whether responsibly negligent or not, are seeking full equitable relief without ever having complied with their agreement.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER and SPENCE, JJ., dissenting.



99 Cal.App.2d 431

FOLEY v. RIVERSIDE IRON & STEEL CORPORATION et al.

Civ. No. 17171.

District Court of Appeal, Second District, Division 1, California.

Sept. 18, 1950.

Rehearing Denied Oct. 16, 1950.

Hearing Denied Nov. 16, 1950.

E. T. Foley brought an action against Riverside Iron & Steel Corporation, Vinnell, Dunton, and others, for a declaratory judgment as to the proper division of the proceeds of the sale of a leasehold interest in certain mining property. Under a cross-complaint filed by the Riverside Corporation, Kaiser, the vendee of the leasehold, was made a party to the action. Vinnell, Dunton and other defendants filed counterclaims and cross-complaints. The Superior Court, Los Angeles County, William J. Palmer, J., held that the sale was valid and was not contrary to agreement or made in breach of duty, that the leasehold interest did not have a value in excess of the sum received, and that the price paid by Kaiser was fair and adequate and the best obtainable under the circumstances, and defendants appealed. The District Court of Appeal, Doran, J., held that the solution arrived at by the trial court was reasonable and supported by the evidence.

Affirmed.

1. Trusts ⇐110

In declaratory judgment action brought by vendor to determine rights in proceeds of sale of leasehold interest in mining property, evidence sustained trial court's finding that vendor had not violated his fiduciary duties by failing to consult with his assignor who had retained interest in leasehold under trust agreement.

2. Appeal and error ⇐1011(1)

Where trial court's findings are supported by substantial evidence, fact that there was some conflict in evidence affords no ground for reversal.

3. Trusts ⇐110

In declaratory judgment action brought by vendor to determine rights of parties in proceeds of sale of leasehold interest in mining property, evidence sustained trial court's findings that such sale was valid and not contrary to trust agreement previously entered into by parties, that leasehold interest did not have value in excess of sum received, and that price paid by vendee was fair and adequate and best obtainable under circumstances.

4. Trusts ⇐107

In declaratory judgment action brought by vendor to determine rights in proceeds of sale of leasehold interest in mining property, where assignor, who had retained interest in leasehold under trust agreement entered into subsequent to assignment to vendor, filed cross-complaint to have sale invalidated insofar as such sale related to his interest in leasehold and to declare trust in reference thereto, said assignor assumed

burden of proving that vendor had breached contractual and fiduciary duties owing to assignor.

George R. Schmidt, Los Angeles, Alley, Cole, Grimes & Friedman, Herbert Dannett, Roger Hinds, and F. C. Mebane, Jr., New York City, of counsel, for appellants.

Cosgrove, Cramer, Diether & Rindge, Los Angeles, for respondent.

Thelen, Marrin, Johnson & Bridges, San Francisco, and Philip Grey Smith, Los Angeles, for respondent Kaiser Co., Inc.

Guthrie, Darling & Shattuck, Los Angeles, for respondents H. S. West and W. L. Long.

Gerald Bridges, Los Angeles, for respondents A. S. Vinnell and C. W. Dunton, d. b. a. Minerals Materials Co.

DORAN, Justice.

The controversy herein relates to a tract of land in Riverside County containing iron ore deposits, commonly referred to as the Iron Chief property. In April, 1940, the Southern Pacific Company, owner of the fee, executed a complicated lease and sale agreement of this property for a ten year term to Bralowe Corporation which had been organized by appellant Harlan H. Bradt and defendants West and Long. Bralowe immediately assigned the agreement to Riverside Iron and Steel Corporation of which Bradt owned all the stock. In the agreement Bralowe had undertaken to prosecute mining operations, paying the lessor stated royalties with a guaranteed minimum. It was further provided that after ten years, if the agreement had not been previously terminated, "The lessor would sell and the lessee would purchase said mining property for a purchase price of $1,500,000.00, all sums theretofore paid by the lessee as royalties to be credited on account of said purchase price". The assignee, Riverside, assumed all the lessee's obligations.

Thereafter, Riverside and Harlan H. Bradt, owner of all Riverside stock, approached the respondent Foley, seeking financial assistance and to interest Foley in the project, and on November 11, 1942 the parties entered into option contract, which was amended on February 19, 1943. This option contract, as amended, granted Foley the privilege of purchasing the interest of Riverside-Bradt in the lease and sale agreement executed to Bralowe by the Southern Pacific, for a consideration of $109,983.24. Riverside-Bradt accepted as consideration for granting this privilege, the sum of $15,000. Foley elected to exercise the option, paying Southern Pacific $24,983.24 as agreed, and paying Riverside-Bradt an additional $10,000, whereupon Riverside-Bradt in writing transferred to Foley all interest in the lease and sale agreement. For the purpose of protecting Foley in the event that Southern Pacific refused to consent to the assignment, Bradt indorsed and delivered to Foley certificates for all the Riverside stock, namely 1,000 shares. In February, 1944, Southern Pacific, for a consideration of $1,000,000 conveyed to Kaiser the fee in the Iron Chief property subject to the lease and sale agreement hereinbefore mentioned.

On July 11, 1944 Riverside-Bradt and Foley entered into a so-called "Clarification Agreement" under which Foley agreed to protect the leased property against forfeiture, retaining, however, the right to reconvey the leasehold to Riverside-Bradt and be absolved from obligation by serving a six months notice of withdrawal. It was provided that "Foley shall have a 75% interest and Riverside and Bradt shall have a 25% interest" in net profits derived from operation of the property, "in the proceeds of a sale or other disposition of the entire leasehold", and in the fee to the property "should the leased property be acquired pursuant to the Lease and Sale Agreement".

The clarification agreement obligated Foley to furnish Bradt with copies of operation reports, operating agreements and agreements for sale of ore, "and whenever feasible the same shall be mailed to Bradt prior to the execution of said agreements or leases". However, Foley was to have exclusive control and direction of the leased premises including the sole right to determine the terms and conditions of all such agreements, as is conceded in appellant's

brief. Furthermore, the agreement expressly provided that *"After consultation with Bradt and hearing fully Bradt's views, Foley shall have the sole right of determining when and at what price the leasehold shall be sold or leased"*. (Italics added.) The present controversy to a large extent involves a consideration of the italicized provision and the question whether Foley complied therewith in selling the leasehold to Kaiser.

Concurrently with the execution of the clarification agreement, Foley addressed to Riverside-Bradt a so-called "Trust Letter" reading as follows: "In consideration of the agreement between us this day, and in lieu of the 25% interest going to you as therein provided, I agree upon your written request, to hold a 25% undivided interest in the leasehold estate and Lease and Sale Agreement heretofore assigned to me in trust for you, whenever the consent of the lessor under the Lease and Sale Agreement is obtained. I do not hereby assume any obligation to procure consent; I do not waive any right to withdrawal under the option contract."

On March 10, 1944, Foley retained the defendants Vinnell and Dunton doing business as Mineral Materials Company, to mine the property on a cost-plus basis which agreement was approved in writing by Riverside-Bradt. Mining operations were commenced on March 15, 1944 and were discontinued May 25, 1944, and as a result of this operation Vinnell and Dunton became counterclaimants in the present controversy. The cross-complainants West and Long assert certain claims arising out of agreements made with Riverside-Bradt in reference to promoting the Iron Chief.

After some negotiation, a written memorandum was executed on December 11, 1945, setting forth the terms on which Foley would sell to Kaiser the lease and sale agreement for a consideration of $1,132,811.35. The period for accepting this agreement of sale was, on February 21, 1946, extended for a thirty day period, and on April 10, 1946 Kaiser advised Foley of the former's acceptance. An escrow was thereafter opened, and the sale to Kaiser consummated.

Bradt-Riverside later repudiated the sale of the leasehold to Kaiser, contending that Foley had violated the terms of the various agreements in reference thereto. Agreements between Riverside-Bradt and West and Long were likewise repudiated. Foley instituted the present action for declaratory relief for the purpose of determining the proper division of the $1,132,811.35 received from Kaiser. Under a cross-complaint filed by Riverside-Bradt just prior to trial, Kaiser was made a party to the action. Foley's complaint sets forth that out of the amount received from Kaiser appellant Riverside-Bradt is entitled to receive $75,000 as reimbursement under the agreement, and a further sum of $198,325.66, or a total of $273,325.66 together with the pledged stock in Riverside; that defendants Vinnell and Dunton are entitled to $59,710.96; that plaintiff is entitled to the balance, which amounts are tendered into court.

The trial court found that the sale of the leasehold by Foley to Kaiser was not made without the knowledge of Riverside-Bradt as alleged by appellant; that such sale was valid and was not contrary to agreement or in breach of duty; that the lessee's interest in the Iron Chief did not have a value in excess of the sum received, and that the price paid by Kaiser was fair and adequate and the best obtainable under the circumstances. Riverside-Bradt was found to be entitled to $198,418.82, plus reimbursement of $75,000; that out of said sums defendant Long was entitled to $81,898.48, defendant West was entitled to $76,898.48. It was further found that Vinnell and Dunton were entitled to $84,919.74.

Appellant's contentions, in brief, are that Foley, as fiduciary, violated the fiduciary duties owing to Riverside, by failing to diligently mine and prospect the Iron Chief property; by selling the Iron Chief lease to Kaiser at an inadequate price; by failing to disclose material facts and by misrepresenting valuation of the property, and by concealing and suppressing from Kaiser the existence of the so-called Trust Letter. It is also claimed that Foley failed to consult with Bradt and hear fully the latter's views concerning the proposed sale to Kaiser, as stipulated in the agreement; and that Kai-

ser took with both actual and constructive knowledge of Riverside-Bradt's equitable interest and of the fiduciary relationship existing between Foley and Riverside-Bradt. Error is also predicated on an alleged exclusion of evidence relating to value.

[1] As stated in the respondent Foley's brief, "Whether Foley complied with or violated Paragraph (8) of the Clarification Agreement was a prominent issue" in the case. This paragraph gave Foley the sole right of determining when and at what price the leasehold should be sold and leased, "After consultation with Bradt and hearing fully Bradt's views". The record discloses evidence which, if believed, supports the trial court's finding that "with the knowledge, acquiescence and approval of defendants, Riverside and Harlan H. Bradt", Foley entered into negotiations "* * * with a view to a possible sale to Kaiser of the entire leasehold estate", and "that after consultation with defendant Harlan H. Bradt, and hearing fully the latter's views with respect thereto", Foley arranged the sale to Kaiser.

The evidence discloses, as noted in the Foley brief, "that no one was more familiar with the Iron Chief property", in all phases of operation than was Bradt. It was Bradt who originally negotiated the lease from Southern Pacific, and after making the agreement with Foley, Bradt acted in the capacity of advisor concerning the Iron Chief and was paid $11,000 and expenses for such services. There is also evidence that Bradt and Foley communicated orally and by letter in reference to Kaiser negotiations, and that in a telegram of February 25, 1945 (Exhibit F-47), Bradt advised Foley that "sitting tight seems best procedure for present".

There is evidence that Foley first endeavored to interest Kaiser in purchasing ore from the Iron Chief, but without success. On January 26, 1944 Kaiser secured title to the fee of the Iron Chief property, and thereafter Foley and Kaiser were in conference in an endeavor to work out a sale of the lease to Kaiser. On December 10, 1945, Foley telephoned to Bradt who was in Montreal, that Kaiser had offered $1,000,000 for the leasehold contingent on getting the money from the R.F.C. Bradt stated that the offer sounded interesting but thought the price was less than the mine was intrinsically worth, to which latter statement Foley observed that it was not a question of instrinsic value but of how much could be obtained. Bradt wished to discuss the matter with others. Foley stated that Kaiser desired to have an answer the following day.

At this point there is a direct conflict of testimony as to which party was to call the other the next day; Bradt insisting that Foley was to call again, and Foley testifying that the Kaiser deal was held up all the next day waiting for Bradt to call but that no call was received. Apropos this matter, Bradt was asked at the trial, "Did you tell Mr. Foley that he had no right to make a sale under those agreements?" to which Bradt replied, "I don't think so."

Foley did not again hear from Bradt until December 16, 1945, when Bradt telephoned and was advised by Foley that a tentative agreement had been made with Kaiser at a figure some $130,000 above the million originally offered. Bradt then stated that the division of 75% to Foley and 25% to Bradt as specified in the contract was not satisfactory, according to Foley's testimony, "and he said that he was going to write me a letter telling me he didn't approve of the sale on that basis, and that he was also going down to Washington * * * and see if he couldn't upset the deal." Bradt did not write such a letter, however, and did not again communicate until "at the close of the escrow, and a flock of telegrams and letters came in from Mr. Bradt and Burke and Burke, professing surprise at the sale".

[2] Notwithstanding the voluminous briefs filed herein and a stenographic record of more than 2,800 pages of evidence, appellant's position largely resolves itself into the simple contention that the trial court should have believed the evidence of appellant rather than that introduced by respondents. That there was some conflict in testimony relating to Foley's conduct and in reference to negotiations between Foley, Bradt and others, cannot be denied. This fact,

however, under the usual rules governing appellate review, affords no ground for reversal where the findings are supported by substantial evidence. As hereinbefore indicated, the record discloses such evidence.

[3] The trial court was confronted with a mass of evidence dealing with all phases of a somewhat complicated factual situation. The parties presented to the court, in extenso, all matters in any manner connected with the controversy. These items of evidence included not only the various agreements and documents directly involved, but also the negotiations leading up to the execution thereof, and many collateral facts more or less illuminating and explaining the different transactions. Out of all this maze of evidence and contentions, the trial court appears to have arrived at a final solution which in the state of the record, cannot in any sense be deemed unreasonable or unsupported.

In examining the record it immediately becomes evident that both Foley and Bradt were experienced experts in the mining field, and that they understandingly entered into contractual relations designed to benefit each party. It is likewise apparent that Bradt, who now complains of the eventual sale to Kaiser and the amount realized therefrom, was at all times in a position to know what was going on in reference to the transaction in all its phases; it is a reasonable conclusion from the evidence, despite Bradt's contrary testimony, that Bradt was so informed. That the transaction did not, perhaps, result in producing as much money as had been hoped for, is beside the point. Doubtless both parties likewise understood that their efforts might even result in a complete loss rather than in the expected profit.

[4] In respect to the cross-complaint of Riverside-Bradt, seeking to invalidate the sale to Kaiser so far as said sale related to the interest of Riverside-Bradt, and to declare a trust in reference thereto, the cross-complainants obviously assumed the burden of proof. In order to succeed in such cross action Riverside-Bradt was required to prove that Foley had breached contractual and fiduciary duties owing to cross-complainants.

The trial court expressly found that there had been no such breach of duty; that the sale to Kaiser was valid, and that the consideration paid was fair and adequate. This merely involved a question of fact and a consideration of the credibility of the witnesses produced by the respective parties. Even if the appellate court were of the belief that a different result should have been reached on the evidence, reversal would not be warranted so long as support for the trial court's findings is found in the record. No reversible error either in respect to the exclusion of evidence or otherwise, has been made manifest.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



99 Cal.App.2d 361

TYREE v. EPSTEIN.

Civ. 17484.

District Court of Appeal, Second District, Division 3, California.

Sept. 11, 1950.

Wirth Tyree sued Herman E. Epstein to recover damages for malpractice and for defendant's alleged fraud in concealing the extent of plaintiff's injuries. The defendant demurred and moved to strike portions of the complaint. The Superior Court, Los Angeles County, William B. McKesson, J., sustained the demurrer without leave to amend, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that evidentiary matter should not be considered on demurrer.

Reversed with directions.

1. Pleading ⇐218(1), 360(4)

In action to recover damages for malpractice and fraud, where patient alleged

discovery of alleged malpractice and fraud on certain date and physician filed affidavit claiming that in his previous negligence action against city plaintiff had alleged earlier discovery date, conflicting statements as to time of discovery presented question of fact and not of law and could not be disposed of by court on demurrer and motion to strike.

2. Pleading ⇐216(1)

Statutory and traditional procedure for testing sufficiency of complaint on demurrer does not encompass consideration of evidentiary matters by court.

3. Pleading ⇐216(1), 360(4)

In action to recover damages for malpractice and fraud, where physician attached hospital report of operation to affidavit supporting demurrer and motion to strike, trial court could not consider report in determining sufficiency of allegations of complaint to state cause of action.

William Jerome Pollack, Los Angeles, for appellant.

A. Stewart Maddox, Jr., Los Angeles, for respondent.

SHINN, Presiding Justice.

[1] Plaintiff filed his complaint for damages alleging that he had sustained injuries in an automobile accident July 22, 1947, for which the City of Los Angeles was liable and that he had recovered a judgment against the City for $22,500 which has not been paid; that following his accident he was attended in the Los Angeles County General Hospital by Herman E. Epstein, a licensed physician and surgeon, defendant in the present action; that the defendant was guilty of specified acts of malpractice; that he fraudulently concealed from plaintiff the extent of plaintiff's injuries, representing them to be merely temporary and that he also concealed the alleged acts of malpractice. Defendant demurred to the complaint and made a motion to strike certain portions thereof. One of the grounds of the demurrer was that the action was barred by the statute of limitations. The motion to strike was addressed to the allegations of the complaint with relation to discovery of the alleged malpractice and fraud. The ground of the motion was that the allegations were false. The motion was based upon the affidavit of defendant's attorney which purported to set forth allegations contained in plaintiff's complaint against the City with relation to his knowledge of his injuries which were claimed to be in conflict with the allegations of his complaint in the present action with reference to discovery. The affidavit further stated on information and belief that plaintiff had given his deposition in the suit against the City in which he testified concerning his injuries and submitted his injured arm for examination. In addition there was attached to the affidavit the hospital report of the operation on plaintiff's arm which was performed February 14, 1948, in which it appeared that defendant Epstein had assisted to some extent. The demurrer and motion were argued. The demurrer was sustained without leave to amend and the motion was ordered off calendar. The record indicates that only those portions of the affidavit which related to the hospital records and the alleged contradictory allegations in the complaint in the former action were considered by the court. After the demurrer was sustained without leave to amend judgment was entered in favor of defendant. It recites that it was stipulated that the specified portions of the affidavit of defendant's attorney should be deemed added to plaintiff's complaint as an amendment in ruling upon the motion and the demurrer. The briefs on the appeal are devoted in large extent to a discussion of the significance of the additional facts which were thus brought to the court's attention. As far as we can determine the matter discussed is of strictly evidentiary character and wholly inappropriate for the consideration of the trial court or this court. In the present case plaintiff alleged discovery on a certain date, whereas it is claimed that his allegations in the former case show an earlier discovery. It may be that the trial court weighed one statement against the other, decided in favor of the

earlier discovery, and in this manner found a reason for sustaining the demurrer upon the ground that the statute of limitations had run. We cannot hazard a guess upon this point. But if there were conflicting statements as to the time of discovery the question presented was one of fact and not of law. It is argued with apparent plausibility that there was no irreconcilable conflict between the two allegations, and we think it is manifest that the earlier allegations were not conclusive as to the date of discovery but were subject to explanation which, under the procedure here adopted, was not afforded to plaintiff. However this may be, plaintiff's rights should not have been determined on the basis of his former declarations, which were clearly susceptible of explanation.

More perplexing, however, is the injection into the case of a copy of the hospital report pertaining to plaintiff's operation. It reads as follows:

"County of Los Angeles Department of Charities
Los Angeles County
General Hospital
Report of Operation.

Operator: Dr. Dueker
Surgical Service of: Dr. Patterson
Dictated by: Dr. Dueker
Date of Operation: February 14, 1948
Preoperative Diagnosis: Complete left radial nerve palsy at site of previous fractured humerus, which had been reduced openly and plated.
Postoperative Diagnosis: Traumatic transsection of the left radial nerve at fracture site in middle third of the humerus.
Findings:
Operation: Exploration of left radial nerve.
Procedure: Under brachial block anesthesia with pontocaine, the patient was placed supine and the left arm prepared in the usual manner and draped, using sterile stockinette. The old linear incision on the lateral aspect of the arm was resected. The radial nerve was isolated and found to be intact, at the lower pole of this wound and lying between the origin of the brachioradialis and radialis muscles. The nerve was bluntly dissected upwards into a dense scar formation, exposing the old fracture site. The proximal end of the nerve was located as it left the radial groove in the humerus and dissected free to its entanglement in the scar tissue. The proximal neuroma and distal glioma were resected back to good fasciculi. The nerve was freed in its distal tunnel to the elbow, which allowed approximation of the two ends. The nerve was sutured with fine wire on an atraumatic needle, and a bed of muscle plus a single layer of oxycel prepared for the suture site. Dr. Epstein of the Orthopedic Department inspected the region and decided that the plate need not be be removed. The would was closed with No. 00 chromic sutures in deep tissue and interrupted black silk in the skin. The arm was placed in a circular cast in 90 degrees flexion. Patient returned to ward in good condition.
Is case clean?
Condition: 2/16/48
Risk: 2/17/48
Prognosis: rb
Copy to:

Surname of Patient	First Name	Middle Name	P. F. No.	Ward
Tyree	Wirth		1037-738	5800."

[2, 3] Having read this report and being of the opinion, as counsel argue, that it is necessary to have an understanding of it and of its relation to and influence upon the sufficiency of the allegations of the amended complaint to state a cause of action, we have concluded to pursue the matter no further. There

is statutory and traditional procedure for testing the sufficiency of a complaint on demurrer. It does not encompass the consideration by the court of evidentiary matters such as were here injected into the hearing, nor matters which would require the court to possess or employ expert knowledge within the realm of medical science in order to comprehend the significance of the pleaded facts. Procedural innovations, consisting as they usually do of attempted short cuts, seldom result in improvements over the standard procedure which our courts have followed from the beginning. The present case is no exception.

The judgment is reversed; plaintiff should be allowed to amend his complaint if he desires to do so and the sufficiency of it to state a cause of action should be considered anew.

WOOD and VALLÉE, JJ., concur.



99 Cal.App.2d 384

DAVIDSON v. LONG BEACH PLEASURE PIER CO. et al.

Civ. 17399.

District Court of Appeal, Second District, Division 1, California.

Sept. 12, 1950.

Action by Elizabeth Davidson, a minor, by her guardian ad litem, Naomi Bullard, against the Long Beach Pleasure Pier Company, a California corporation, and others, for injuries sustained when plaintiff was allegedly thrown from an amusement device called a tilt-a-whirl. The Superior Court, Los Angeles County, Harry R. Archbald and William B. McKesson, JJ., entered judgment notwithstanding the verdict in favor of the defendants and from the judgment and from an order granting motion for judgment notwithstanding a verdict and from an order striking memorandum of costs and disbursements, the plaintiff appealed. The District Court of Appeal, Drapeau, J., held that evidence was sufficient to sustain the verdict for plaintiff and the entry of judgment for defendant notwithstanding the verdict was error.

Judgment reversed and Superior Court directed to enter judgment for plaintiff for $10,185 in accordance with verdict of jury, together with costs in trial court and District Court of Appeal.

1. Judgment ⇐199(3.10)

A judgment notwithstanding the verdict may be granted only, when disregarding conflicting evidence and giving to plaintiff's evidence all value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.

2. Appeal and error ⇐1014
Judgment ⇐199(3.3)

In determining a motion for judgment notwithstanding the verdict, neither appellate nor trial court is authorized to weigh evidence or judge of the credibility of witnesses.

3. Theaters and shows ⇐6(1)

The proprietor of a public place of amusement is required to maintain in a reasonably safe condition every contrivance used in its premises, and to properly inspect and supervise the same.

4. Theaters and shows ⇐6(8)

Where plaintiff was thrown from an amusement device known as a tilt-a-whirl, and jury found that car on device used by plaintiff was not in reasonably safe condition and was not properly inspected or supervised, defendant company was liable.

5. Theaters and shows ⇐6(8)

In addition to duties of maintenance, inspection and supervision, with which operator of amusement device known as a tilt-a-whirl was charged, it was his further duty to use reasonable care to see that patrons were not injured while device was running.

6. Master and servant ⇐304

Owner of amusement device known as a tilt-a-whirl, who employed operator to run device, was liable for operator's want of reasonable care in every respect.

7. Theaters and shows ⇐6(23, 39)

Where plaintiff was thrown from defendant's amusement device called a tilt-a-whirl, because of allegedly negligent operation thereof, res ipsa loquitur doctrine was applicable, and in personal injury action refusal of trial court to instruct jury on the doctrine was error.

8. Negligence ⇐121(2)

Where a thing which causes injury is shown to be under management of defendant and accident is such as in ordinary course of things does not happen if those who had the management used proper care, res ipsa loquitur applies.

Pollock & Pollock, Edward I. Pollock and David Pollock, all of Los Angeles, for appellant.

Calvin L. Helgoe, John K. Ford, Los Angeles, for respondents.

DRAPEAU, Justice.

Three teenage girls, plaintiff, her sister, and their friend from Utah, were enjoying one of the Christmas holidays on the strand at Long Beach. They rode on a roller coaster. They went into the House of the Laughing Lady. And then two of them, the plaintiff and the girl from Utah, got tangled up with an amusement device called a tilt-a-whirl.

The tilt-a-whirl was located on an ocean pier belonging to defendant Long Beach Pleasure Pier Company; it was owned by defendant E. C. Velare; and, at the time the girls rode on it, it was operated by the defendant Carmen Tomei. Long Beach Pleasure Pier Company permitted the operation of the tilt-a-whirl on a verbal lease with Mr. Velare, for a rental of 25% of the receipts.

A tilt-a-whirl is a merry-go-round with a college education. It is a circular platform, which revolves like a merry-go-round. But instead of going round and round on a horizontal plane, it goes up and down at the same time it goes round and round. Some of the witnesses said that it undulates. The faster the table revolves the more rapidly it undulates.

Seven two-wheeled, two-passenger cars are affixed with swivels at the front end thereof to this revolving, undulating table. As the table goes round and round and up and down, the cars gyrate on the swivels, right or left, or left or right, haphazardly, like spinning, bobbing corks on a turbulent whirling pool.

The backs of the cars are high enough to shield and to hold the whole body of a rider. Under normal operations the backs of the cars absorb strange gravity pulls and keep passengers from flying off at a tangent.

When a rider seats himself in the car, a U-shaped safety bar is let down to a horizontal position over his lap. The safety bar is attached to the front of the car at the bottom by two cast iron discs rubbing against each other which act as a clutch. While the bar is down, the car runs freely. If the bar is raised, it sets brakes on the wheels and stops the car.

When the girls got into the car they were to ride on this occasion, the bar was lowered over their laps, and they were told to hang onto it. Mr. Tomei started a gasoline engine which provided the power. The engine was adjacent to a narrow walk-way surrounding the platform. The table commenced to revolve and undulate and the cars to gyrate.

Then Mr. Tomei "gunned the engine," increasing the revolutions of the table, the gyrations of the cars, and the up-and-down motion of the whole contraption. This is said to give an extra thrill to riders, especially if it is done just as a car is at the crest of a hill as the table revolves.

Unfortunately, the bar in front of plaintiff flew up. She was thrown out of the car and against a steel post.

She was seriously and painfully injured. She had a comminuted fracture of the right femur. This was set and in traction for six weeks. Then her leg was placed in

a plaster cast for another six weeks. After twelve weeks in the hospital, she was allowed to go home, and spent two weeks more in bed.

Her final recovery has been good, but there will always be a bulge on her leg and a stiffness of her leg. And she cannot run, or dance, or play tennis, as she used to.

Action for damages against the three defendants named, and others who have gone out of the case, was commenced by guardian *ad litem*, resulting in a jury's verdict for plaintiff of $10,185. Judgment notwithstanding the verdict was granted in favor of the defendants. From this judgment plaintiff appeals.

An expert witness for defendants testified that in his opinion the accident could only have happened by the girl standing up in the car. He admitted, however, that a sudden jerk, or jolt, would have thrown her out of the car.

The operator did not see the girl actually thrown out. He said he cautioned her twice to keep her hands on the bar, as the car passed him. And that he stopped the table on its third revolution, but before it stopped and while the girl was on the opposite side of the table she fell out.

Plaintiff, her sister who did not ride, her girl friend who was with her, and a sailor standing by, all testified that the safety bar flew up and the girl was thrown out. The sailor also testified that the operator of the tilt-a-whirl "gunned it" just before the accident.

Plaintiff said: "* * * the car gave a sudden jerk, and the handle went forward and I was thrown out." The girl with plaintiff said that while the car was going extremely fast the bar flew open and plaintiff was thrown out over the top of the bar. This witness saved herself by grabbing hold of the side of the car.

[1] It is difficult to see upon what theory the judgment notwithstanding the verdict was granted. The evidence as stated is substantial, and an inference of negligence follows. Upon that inference the verdict of the jury is based. As stated in Estate of Flood, 217 Cal. 763, 768, 21 P. 2d 579, 580, a judgment notwithstanding the verdict "'* * * may be granted "only when, *disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence,* the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given."'"

[2] In determining the motion for judgment notwithstanding the verdict, we cannot weigh, nor was the trial court authorized to weigh, the evidence or judge of the credibility of witnesses. Estate of Arnold, 16 Cal.2d 573, 576-577, 582, 107 P. 2d 25; Shannon v. Thomas, 57 Cal.App.2d 187, 192-193, 134 P.2d 522.

[3, 4] The proprietor of a public place of amusement is required to maintain in a reasonably safe condition, every contrivance used in its premises, and to properly inspect and supervise the same. Chardon v. Alameda Park Co., 1 Cal.App.2d 18, 36 P.2d 136; Whyte v. Idora Park Co., 29 Cal.App. 342, 155 P. 1018; Engstrom v. Huntley, 345 Pa. 10, 26 A.2d 461 (involving a tilt-a-whirl). The jury found that the car used by plaintiff was not in a reasonably safe condition and was not properly inspected or supervised. Upon this finding the defendant pier company is liable. Restatement, Torts, sec. 344.

[5] In addition to the duties of maintenance, inspection, and supervision, with which the operator was likewise charged, it was his further duty to use reasonable care to see that the girls were not injured while the tilt-a-whirl was running. Potts v. Crafts, 5 Cal.App.2d 83, 42 P.2d 87.

[6] And it is elementary law that Mr. Valere, who employed Mr. Tomei, and who owned the instrumentality, was liable for the latter's want of reasonable care in every respect.

[7, 8] The trial court refused to instruct the jury upon the doctrine of *res ipsa loquitur*. This was error. When a thing which causes injury is shown to be under the management of the defendant

and the accident is such as in the ordinary course of things does not happen if those who had the management used proper care, *res ipsa loquitur* applies. Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258; Metz v. Southern Pacific Co., 51 Cal.App.2d 260, 124 P.2d 670.

The judgment is reversed, and the Superior Court is directed to make and enter judgment for plaintiff for $10,185, in accordance with the verdict of the jury, together with costs in the trial court and in this court.

WHITE, P. J., and DORAN, J., concur.



99 Cal.App.2d 453

FREDERIKSEN v. COSTNER et al.

Civ. 17478.

District Court of Appeal, Second District, Division 3, California.

Sept. 18, 1950.

Oliver S. Frederiksen brought action against Albert Ross Costner and others, doing business as Costner Bros. Egg Company, a copartnership, to recover damages for alleged wrongful death of plaintiff's three year old child when struck by defendant's truck. A judgment of nonsuit was entered by the Superior Court of Los Angeles County, Edward N. Brand, J., and the plaintiff appealed. The District Court of Appeal, Vallée, J., held that evidence presented question for jury as to whether truck driver, having once observed three year old child playing within a few feet of his truck while it was still motionless, was negligent in starting the truck without any further effort to ascertain conduct and whereabouts of the child.

Reversed.

1. Automobiles ⇐160(1), 162(1)

A greater degree of care is required of a driver of a vehicle where he knows a small child is at play than in a case where a person of mature discretion is involved.

2. Automobiles ⇐162(1)

If evidence shows that driver has knowledge of presence of children, he may be held to be responsible for their safety, although it appears that he did not see injured child in time to prevent the injury.

3. Automobiles ⇐245(4)

Evidence was sufficient to present question for jury as to whether truck driver, having once observed three year old child playing within a few feet of his truck while it was still motionless, was negligent in starting truck without making further effort to ascertain the conduct and whereabouts of the child, so as to be liable for death of child when struck by truck.

Murchison & Myers, John B. Myers, Claude B. Cumming and V. Edward Drake, Los Angeles, for appellant.

Hon & Jarrett, Gaines Hon and Joseph W. Jarrett, all of Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of nonsuit in an action for damages for the alleged wrongful death of a child named Cheryl, three years and two months old at the time of her death. Plaintiff is the father of Cheryl. The motion for judgment of nonsuit was granted on the ground there was no evidence from which an inference of negligence reasonably could be drawn.

The evidence is stated in accord with the rules applicable to a motion for a judgment of nonsuit which need not be repeated.

Defendants, as partners conducted a wholesale egg business in a structure which consisted of a building (the egg house) and a dock. A small office adjoined the egg house. On March 28, 1948, defendant Albert Costner parked a GMC ton-and-a-half truck owned by himself and Ford Costner at the dock. The truck was backed up to the dock, its front facing south. Plaintiff park-

ed his car to the east of the truck and next to it, its front headed to the dock. The dock was elevated, with steps to the west of the parked truck leading from the street to the top of the dock.

Plaintiff was at the property to buy four cases of eggs. As he left his car, he carried Cheryl, who was 38 inches tall in her bare feet, toward the office. Cheryl wore rain boots with about an inch heel. Plaintiff and Cheryl went up the steps to the dock. Albert Costner was on the dock. He talked to Cheryl. Plaintiff, Ford Costner and Cheryl went into the egg house for eggs. When they returned outside Cheryl played on the dock. Albert Costner was on the platform talking to Cheryl, "keeping her entertained" while she played. Albert loaded eggs onto the truck and then proceeded to its cab. When he got into the cab there was a note hanging from the ignition key, which he read. He pulled the note off, crumpled it, dropped it, turned on the motor and started forward. As he did so he heard screaming and stopped. The truck traveled between 25 and 30 feet from the time it started until it stopped. When it stopped, Cheryl was lying to the rear of the left dual wheels on the driver's side.

Plaintiff was in his car arranging the third case of eggs when he heard the truck door slam. He immediately backed out between the truck and his car, observed that Cheryl was not in sight and yelled in a loud voice, "Hey, I got a little girl some place." He swung to the ground to see if Cheryl was on the other side of the truck. Before he could see under the truck, it started forward and as it did he saw Cheryl running in front of it. She was two to four feet in front of the truck to the left of the front hood. Her left arm was caught by the front bumper; the front wheel and both rear dual wheels ran over her.

Albert Costner testified that after he loaded the truck with a few cases of eggs, he put the rear gate in, went to the office, got a sales book and immediately went to the truck to drive it away.

"Q. Did you make any observation at all as to where the little girl was at the time you left the office? A. I believe she was on the dock. She couldn't have been in front of me or I would have had to go around her.

"Q. Do you have a present memory of her on the dock close to the steps? A. No, sir. I didn't observe exactly where she was. * * *

"Q. Did you give any further thought at all to the location of the girl from the time that you left the office until you got to the truck? A. No, sir. * * * I don't recall whether I noticed her definitely as I went up around the truck or not.

"Q. And you are not able to tell us with any certainty as to how close she was to the steps at the time you last noticed her? A. No, sir.

"Q. Are you able to tell us whether she was standing still, running or walking, what she was doing? A. No, I wouldn't be able to tell that.

"Q. Did you notice whether or not she had anything in her hand? A. Well, as she came up she had Easter eggs in her hands. * * *

"Q. Did you talk to her at all? A. Yes.

"Q. Where were you when you talked to her? A. On the dock.

"Q. Where on the dock were you, Mr. Costner? A. Right by the steps.

"Q. Would you say, then, that during all the time that you saw the child you were near the steps? A. No, I had loaded some eggs. I had put the gate on my truck.

"Q. Was she by the steps all this time? A. I was not watching her.

"Q. You did talk to her? A. Yes.

"Q. Did you play with her or anything like that? A. Oh, I just talked to her like anyone would to a child.

"Q. And you say at this time she was at the steps; is that correct? A. She was on the dock by the steps. * * *

"Q. Is it true, Mr. Costner, that as you left the office and passed the little girl and started for your truck that you said good bye to her and waved at her and made some

movement toward her? A. I wouldn't tell that."

He also testified that it was about 10 feet from the steps to the truck; he passed Cheryl on the dock as he left his truck to go into the office; he got in the truck from the left side, and at that time Cheryl was up in back of the truck; the cab windows were up and the cab closed; they could have been opened; the weather was clear; when he started from the office to the truck he knew plaintiff was loading cases between the truck and his car; he knew then that from time to time customers came to the place with children; he had seen young children around there a number of times.

A witness, Kuretich, testified that Albert Costner told him "he left the office and walked out to where the little girl was on the platform near the stairs and talked to her and then walked around in front of the truck and got into the truck and drove off."

Ford Costner testified that after putting the cases of eggs on the dock for plaintiff, he went to the office; when the motor of the truck started, he glanced up and Cheryl was just disappearing in front of the fender of the truck; this was when the motor started, not when the truck started; she was running; the left front fender struck her.

[1, 2] The conduct of small children is unpredictable and their propensity to run in any direction is a matter of common knowledge. A greater degree of care is required of a driver of a vehicle where he knows a small child is at play than in a case where a person of mature discretion is involved. Parra v. Cleaver, 110 Cal. App. 168, 171, 294 P. 6. As was said in Lampton v. Davis Standard Bread Co., 48 Cal.App. 116, 118, 191 P. 710, 711, "[t]he proximity of the place where Graham was driving to the adjacent school grounds, and the hour, at which children might, with certainty, be expected to be using the street, imposed upon him a greater degree of caution than he might be required to use under ordinary circumstances. That which would be but ordinary negligence in reference to a grown person may be gross negligence as respects a child." In Conroy v. Perez, 64 Cal.App.2d 217, page 224, 148 P.2d 680, page 684, it was said: "[I]f the evidence shows that a driver has knowledge of the presence of children he may be held to have been responsible [for their safety] although it appears that he did not see the injured child in time to prevent the injury. See 2 Cal.Jur. Ten Yr.Supp. p. 454."

In Cambou v. Marty, 98 Cal.App. 598, 277 P. 365, the defendant parked his car in gear on an incline near plaintiffs' house. When he got back into his car he hurriedly started it down the incline without looking to see if a child were nearby, although he knew that the plaintiffs had children who were accustomed to playing in the yard and could have seen the child if he had looked. It was held that a finding that defandant was negligent in running over plaintiffs' son was supported by the evidence. The facts here present a much stronger case. The same also may be said with respect to the facts in Parra v. Cleaver, 110 Cal.App. 168, 294 P. 6, in which a finding of negligence was held to be supported by the evidence.

The author of the annotation "Liability for injury to child playing on or in proximity to automobile" in 44 A.L.R. 434, says, p. 434: "The tendency of the later cases would seem to indicate that the courts are requiring a higher degree of care on the part of the operators of automobiles towards children playing on or in proximity to their automobiles than was announced in the original annotation [1 A.L.R. 1385], particularly in those cases in which the driver had notice of the children's presence on or about the machine." See also Gackstetter v. Market Street Ry. Co., 130 Cal.App. 316, 20 P.2d 93; Gorzeman v. Artz, 13 Cal.App.2d 660, 57 P.2d 550; Harrison v. Gamatero, 52 Cal.App.2d 178, 183, 184, 125 P.2d 904; Graf v. Harvey, 79 Cal.App.2d 64, 179 P.2d 348; Waid v. Smith, 87 Cal.App.2d 32, 195 P.2d 862.

Albert Costner knew of Cheryl's presence on the premises near the truck. He talked to, and played with, her. The jury reasonably could have concluded from the testimony of Kuretich that just before Al-

bert got into the truck to drive away, he played with her near the steps, about 10 feet from the truck and immediately got into the cab. The jury could also have reasonably concluded that Albert, without making any observation at all to see where Cheryl was, started the truck forward; that he read the note hanging from the ignition key, turned on the motor and started forward without looking ahead or about him, and that if he had done so he would have seen Cheryl.

[3] Whether Albert Costner, having once observed the child within a few feet of his truck while it was still motionless, was negligent in starting the truck without making any further effort to ascertain the conduct and whereabouts of Cheryl, was a question of fact. Springer v. Sodestrom, 54 Cal.App.2d 704, 709, 129 P.2d 499. It cannot be said, as a matter of law, that he exercised the degree of care which a reasonable person would have exercised under similar circumstances to protect Cheryl from harm. The case presents a question of fact which should have been left to the jury.

Reversed.

SHINN, P. J., and WOOD, J., concur.



99 Cal.App.2d 439

PEOPLE v. BOYCE.

Cr. 4477, 4478.

District Court of Appeal, Second District, Division 1, California.

Sept. 18, 1950.

Hearing Denied Oct. 16, 1950.

Ruth Boyce was convicted for grand theft, and she moved for a new trial and for arrest of judgment. From the judgment of conviction and the order of the Superior Court of Los Angeles County, John J. Ford, J., denying the motion, and from an order revoking probation and judgment sentencing defendant to the California Institution for Women on a prior conviction for issuing checks without sufficient funds, defendant appealed. The District Court of Appeal, White, P. J., held that the order denying defendant's motion in arrest of judgment was nonappealable, that the order revoking probation was made before judgment and was therefore nonappealable, and that evidence was sufficient to sustain conviction for grand theft of a diamond ring.

Affirmed.

1. Criminal law ⇐1023(12)

Order denying defendant's motion in arrest of judgment was nonappealable.

2. Criminal law ⇐1023(10)

Where prior to pronouncement of judgment proceedings were suspended and defendant was placed on probation, order revoking probation was made before judgment and therefore was not appealable. Pen.Code, § 1237, subd. 3.

3. Criminal law ⇐1144(13)

Following a guilty verdict, appellate court must view the evidence in the light most favorable to the prosecution.

4. Criminal law ⇐1159(2)

Where court cannot justly conclude that the entire testimony of the witness is per se unbelievable, court cannot disturb the findings of the triers of facts. Code Civ.Proc. §§ 1847, 2061.

5. Criminal law ⇐1159(3)

Neither variances, inconsistencies nor contradictions in the proof of a crime are of avail on appeal.

6. Criminal law ⇐260(11)

The finding of guilt by the trial court will not be disturbed by the reviewing court unless it can reasonably be held as matter of law that there was no evidence against the accused.

7. Larceny ⇐65

Evidence was sufficient to sustain conviction for grand theft of a diamond ring.

8. Criminal law ⇐569

In prosecution for grand theft, evidence did not establish existence of any conspiracy to deprive defendant of her liberty, nor that efforts were made to extort

money from her to dismiss charges against her, coupled with threat that failure to comply with demands would result in her being convicted, though innocent, and sent to penitentiary.

9. Criminal law ⇐641(1)

Where trial judge, notwithstanding defendant's statement that she would be happy to represent herself, directed her own counsel and the public defender to sit with the defendant and to consult with her to the extent that she desired, defendant was not denied the assistance of counsel.

10. Witnesses ⇐2(1)

Where defendant presented 37 witnesses in her behalf, and attention of court was not directed to any witness whose presence she desired and as to whom process of court to compel attendance was denied defendant, defendant's claim that her witnesses were not subpoenaed was not supported.

11. Criminal law ⇐569

In prosecution for grand theft, claim that district attorney's office deprived defendant of certain documents needed for her defense was not supported by evidence.

12. Criminal law ⇐655(1)

In prosecution for grand theft, defendant's contention that trial judge was guilty of prejudicial misconduct in denying her motions to have jury placed in custody of sheriff during trial, to have separate trial of three counts, and for mistrial, and in permitting prosecution to ask defendant whether she had theretofore been convicted of felony and to ask leading questions, was not supported by record.

13. Criminal law ⇐27

Where defendant had been convicted of issuing checks without sufficient funds, but prior to pronouncement of judgment proceedings had been suspended and she had been placed on probation, and following her subsequent conviction for grand theft, court entered order revoking her probation, and pronounced judgment sentencing her to California Institution for Women, defendant's conviction for issuing checks without sufficient funds amounted to felony conviction. Pen.Code, §§ 17, 476a.

Ruth Boyce, in propria persona.

Fred N. Howser, Attorney General, Norman H. Sokolow, Deputy Attorney General, for respondent.

WHITE, Presiding Justice.

We are here confronted with two appeals (Superior Court case numbered 127562—numbered in this court 4477—hereinafter referred to as case "A", and Superior Court case numbered 116216—numbered in this court 4478—hereinafter referred to as case "B").

As to case "A" defendant was accused in an information filed by the District Attorney of Los Angeles County containing three counts of the crime of grand theft. It was also alleged therein that defendant had suffered a prior conviction upon a charge of issuing checks without sufficient funds, a felony. Penal Code, Sec. 476a. Defendant duly entered her plea of not guilty and not guilty by reason of insanity. She denied the prior conviction charged against her. The cause proceeded to trial before a jury, resulting in a verdict of guilty as to the offense charged in Count I of the information and not guilty of the crimes charged in Counts II and III. Following a subsequent trial on the plea of not guilty by reason of insanity, the jury returned a verdict finding the defendant was sane at the time the offense charged in Count I was committed. The allegation of a prior conviction was found to be true. Defendant's motion for a new trial and for arrest of judgment was denied. From the judgment of conviction, the order denying her motion for new trial and for arrest of judgment, defendant appeals.

In case "B" the record reflects that defendant had previously been convicted on two counts of issuing checks without sufficient funds. Prior to pronouncement of judgment proceedings were suspended and defendant was placed on probation. In this

case the order denying her motion for a new trial was affirmed and the purported appeal from the judgment was dismissed by Division II of this court. People v. Boyce, 87 Cal.App.2d 828, 197 P.2d 842. Subsequent to her conviction under Count I of the information in case "A", defendant was charged with a violation of the terms of probation granted her in the instant case "B". After hearing had before the court on a charge of violation of probation, the court entered its order revoking probation and judgment was pronounced sentencing defendant to the California Institution for Women, said sentence to be served concurrently with the sentence in case "A". From the order revoking probation and the judgment thereupon pronounced defendant appeals.

[1] The attempted appeal in case "A" from the order denying defendant's motion in arrest of judgment must be dismissed because such an order is nonappealable. People v. Okada, 14 Cal.App.2d 660, 664, 58 P.2d 967; People v. Rodgers, 94 Cal.App.2d 166, 168, 210 P.2d 71.

We shall first give consideration to the appeal taken in case "B". The notice of such appeal reads: "Please Take Notice that the defendant, Ruth Boyce, in the above entitled matter, hereby appeals to the District Court of Appeal, State of California, from the order and judgment revoking probation therein entered by the Superior Court on the 12th day of December, 1949."

[2] While subdivision 3 of Section 1237 of the Penal Code provides for an appeal "From any *order made after judgment,* affecting the substantial rights of the party" (emphasis added), the order here in question revoking probation was made before judgment and is therefore, not appealable and must be dismissed. The validity of appellant's conviction in case "B" was reviewed and upheld upon her appeal from the order denying her motion for a new trial therein. People v. Boyce, supra.

[3] Coming now to the appeal taken in case "A", viewing the evidence in the light most favorable to the prosecution as we are required to do following a guilty verdict (People v. Carothers, 77 Cal.App.2d 252, 253, 175 P.2d 30), the record discloses that Olivia Herzberg, a "personal worker" in the ministry, took appellant into her home upon the latter's release from the Los Angeles County Jail on December 20, 1948, after service by appellant of a term of imprisonment therein pursuant to and as a condition of probation granted in case "B". Miss Herzberg had in her possession several rings. At the trial of appellant a certain ring was introduced into evidence as People's Exhibit 4. Miss Herzberg testified that she recognized this exhibit as one of her diamond rings.

On December 21, 1948 appellant asked Miss Herzberg if she could wear Exhibit 4, to which the latter replied that she was averse to permitting anyone to wear her ring. Upon appellant's assurance that she would be careful of the ring and wear it only in Miss Herzberg's presence, the latter consented. Appellant wore the ring (Exhibit 4) or had it in her possession until December 24 when the complainant requested its return. Thereafter it remained in the possession of Miss Herzberg until January 3, 1949. On this date appellant asked for, received the ring and wore it during lunch, after which time the complaining witness requested its return and again placed it in her ring box. Thereafter Miss Herzberg, according to her testimony, at no time gave appellant permission to take the ring into her possession. On January 4, 1949, appellant made a trip to San Francisco. Concededly, appellant removed the ring (Exhibit 4) from the owner's ring box and took it with her to San Francisco. On January 15, 1949 appellant wrote the complainant from San Francisco, advising that she had lost the ring down the basin in her hotel and offering to make restitution for the loss in the sum of $500—but her promise in this regard was never fulfilled. The ring in question was valued at $700.

On January 11, 1949, the ring in question was pawned at a loan office in San Francisco by appellant, who received $135 in the transaction. A representative of the San Francisco loan office where the ring was pledged, and who qualified as a jewelry ap-

praiser with 24 years' experience, appraised Exhibit 4 as worth $500. Miss Herzberg next saw the ring when it was produced in court at the preliminary examination. To regain its possession she paid a representative of the San Francisco loan office $135 loaned the appellant when she pledged the ring as security for such loan to her.

Mrs. Charlotte Johnson testified that she sold the ring (Exhibit 4) to Miss Herzberg in May or June, 1947, and that prior thereto she had it for some 24 years. Miss Herzberg paid the equivalent of $275; $200 in cash and services estimated by Mrs. Johnson at $75. Mrs. Johnson's husband had the ring made and it cost about $475.

Appellant testified that she and Miss Herzberg traded rings; that Exhibit 4 was the one so traded; that the ring which was lost was a different one. That when she moved away from Miss Herzberg's reisdence she left a 3-stone ring as security for the one lost. The complainant however denied that she then had any of appellant's rings and denied that the latter left with her a 3-stone ring when she moved out as security for the one allegedly lost.

[4] In her brief entitled "Appellant's Transcript on Appeal", appellant urges that the evidence was insufficient to support the verdict of guilty as to Count I of the information. It is her contention that the testimony of the complaining witness was in many respects untrue. While claimed variances, inconsistencies or contradictions in the testimony of a witness may afford opportunity for a persuasive argument to the jury against the reliability of such witness, we cannot disturb the findings of the triers of fact unless we can justly conclude that the entire testimony of the witness is *per se* unbelievable. No such situation is here presented. Because reviewing judges are obviously in no position to determine the credit which should be accorded to witnesses or to weigh their testimony, our State Constitution provides that appellate tribunals are not authorized to review evidence except where on its face, it may justly be held that it is so lacking in substantiality as to be insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. And in accordance with the spirit and intent of the constitutional mandate, the legislature has ordained that the jury are the exclusive judges of the credibility of witnesses, Code Civ. Proc., Sec. 1847, and are the judges of the value and effect of evidence addressed to them, except in those instances where it is declared by the law that it shall be conclusive proof of the fact to which it relates, Code Civ. Proc., Sec. 2061. It was therefore the right of the jury to accept the testimony of the people's witnesses and to disbelieve the testimony of appellant and any other witnesses as to the circumstances surrounding the disappearance of the ring here in question, if they conscientiously felt warranted in so doing after a full and fair consideration thereof.

[5, 6] As pointed out to appellant in her former appeal in case "B" (People v. Boyce, supra, 87 Cal.App.2d page 830, 197 P.2d page 843,) her "denials of relevant portions of the testimony of the state's witnesses were disposed of by the findings of the trial court which are conclusive when supported by substantial evidence. Neither variances, inconsistencies nor contradictions in the proof of a crime are of avail on appeal. * * * (Citing cases.) The finding of guilt by the trial court will not be disturbed by the reviewing court unless it can reasonably be held as a matter of law that there was no evidence against the accused. * * * (Citing cases.)"

[7] Guided by the foregoing rules it must here be held that by substantial evidence the prosecution established an unlawful taking without permission from the complaining witness of her personal property valued at more than $200, and an attempt by appellant to appropriate the proceeds obtained therefrom to her own use.

[8] Appellant next urges that there existed a conspiracy on the part of certain persons to send her to the penitentiary, deprive her of counsel, and that those who would aid her by their testimony were threatened and coerced. While investi-

gating officers and deputies in the office of the District Attorney interviewed witnesses, there is no showing that they threatened any person unless they testified against appellant. While there is much surmise and conjecture indulged in by appellant concerning the claimed animosity of certain officials and others against her, there is a total lack of evidence to show the existence of any conspiracy to deprive appellant of her liberty. The same is true of appellant's contention that efforts were made to extort money from her to dismiss the charges against her, coupled with the threat that a failure to comply with these demands would result in her being convicted though innocent, and sent to the penitentiary.

[9, 10] Appellant's contention that she was denied the assistance of counsel is absolutely refuted by the record, which shows that the trial judge, notwithstanding appellant's statement that she "would be happy" to represent herself, nevertheless, directed her own counsel and the public defender to "sit with the defendant and to consult with her to the extent that she desires." Insofar as appellant's claim that her witnesses were not subpoenaed is concerned, the record shows that she presented 37 witnesses in her behalf, and our attention is not directed to any witness whose presence she desired and as to whom the process of the court to compel attendance was denied her.

[11] Equally without proof is appellant's contention that the district attorney's office deprived her of certain documents needed for her defense.

[12] Appellant's contention that the trial judge was guilty of prejudicial misconduct in denying her motion to have the jury placed in the custody of the sheriff during the trial, denying her motion for separate trial of the three counts of the information in case "A", denial of her motion for a mistrial, permitting appellant to be interrogated while on the witness stand as to whether she had theretofore been convicted of a felony, permitting counsel for the prosecution to ask leading questions, and several other matters urged, are wholly without merit. The foregoing charges find no support whatever in the record.

[13] Appellant's attack upon the legality of the proceedings had on the motion for a new trial in case "A" and in connection with the revocation of her probation in case "B" are also without support in the record. The proceedings on revocation of probation were had in strict conformity with Section 1203.2 of the Penal Code. Appellant's assertion that her conviction in case "B" amounted only to a misdemeanor conviction cannot be sustained. While the applicable section of the Penal Code, Section 17, provides that where a crime is punishable by imprisonment in the State Prison, or also by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment other than imprisonment in the State Prison is pronounced, unless the court commits the accused to the California Youth Authority, in the instant proceeding no judgment other than imprisonment in a State Prison (California Institution for Women) was pronounced.

For the foregoing reasons, in Superior Court case numbered 127562, herein referred to as case "A", the attempted appeal from the order denying defendant's motion for arrest of judgment is dismissed. The judgment and order denying defendant's motion for a new trial in said case is affirmed.

In Superior Court case numbered 116216, herein referred to as case "B", the purported appeal from the order revoking probation is dismissed and the judgment pronounced therein is affirmed.

DORAN and DRAPEAU, JJ., concur.

99 Cal.App.2d 468

PEOPLE v. CULLEN.

Cr. 686.

District Court of Appeal, Fourth District, California.

Sept. 18, 1950.

Hearing Denied Oct. 16, 1950.

Ray Cullen was convicted in the Superior Court of Riverside County, John G. Gabbert, J., of forging payee's name upon back of Government check and passing check with intent to cheat and defraud the payee, and he appealed. The District Court of Appeal, Griffin, J., held that evidence sufficiently established corpus delicti of the offense.

Judgment affirmed.

1. Forgery ⇐35

Upon charge of forgery of a check the prosecution has burden of proving the corpus delicti and must show both that person whose name is alleged to have been forged is a real person and that his name was signed to check without his authority, Pen. Code, § 470.

2. Criminal law ⇐406(1), 517(4)

To authorize reception and consideration by jury of evidence of extrajudicial confession or admission of a defendant, it is not required that prosecution establish a corpus delicti by proof of a clear and convincing character, slight proof being all that is required.

3. Forgery ⇐42

Fact that payee's name endorsed on check, although not a true replica of payee's signature, was disguised and clearly distinguishable from defendant's natural handwriting, was a circumstance that jury was entitled to consider in determining question of defendant's authority to endorse payee's name on check. Pen.Code, § 470.

4. Criminal law ⇐406(1)

In prosecution on charge of forging payee's name upon back of a Government check and passing check with intent to defraud payee, evidence sufficiently established corpus delicti, so that various statements and admissions of defendant were admissible not only for purpose of impeachment but to furnish further evidence of fact that defendant was not in fact authorized to endorse payee's name to the check. Pen.Code, § 470.

5. Criminal law ⇐351(10)

False declarations made by an accused for purpose of misleading or warding off suspicion, though not conclusive of guilt, may strengthen the inference arising from the facts.

6. Criminal law ⇐1159(3)

In prosecution on charge of forging payee's name upon back of Government check and passing check with intent to defraud payee, where various statements and admissions of defendant were introduced in evidence for purpose of proving that defendant was not authorized to endorse payee's name to check, fact that defendant testified at the trial that he was so authorized merely created a conflict in evidence for determination of trier of facts, and trial court's finding on such issue could not be disturbed on appeal. Pen.Code, § 470.

7. Criminal law ⇐554

In prosecution on charge of forging payee's name upon back of Government check and passing check with intent to defraud payee, where payee was not seen alive after check had been cashed by defendant, trial court was not bound by defendant's self-serving statement that he turned the money over to payee after cashing check. Pen.Code, § 470.

8. Criminal law ⇐351(10)

False statements made by one who has been confronted with an accusation of the commission by him of a criminal offense constitute proper evidence of consciousness of guilt.

9. Criminal law ⇐568

The intent to do a wrongful act is provable by extraneous circumstances, that is, by some physical act or acts which with sufficient clearness disclose the operation of the mind with respect to the wrongful act.

10. Forgery ⇐44(1)

A person, without authority, signing name of another to a check was itself con-

clusive evidence that his intent was to defraud the person whose name he signed. Pen.Code, § 470.

J. David Hennigan, Riverside, for appellant.

Fred N. Howser, Atty. Gen., Elizabeth Miller, Dep. Atty. Gen., for respondent.

GRIFFIN, Justice.

It is charged in the first count of the information that defendant Ray Cullen did on January 3, 1949, knowingly, falsely and fraudulently forge the name of Daniel T. Boyer upon the back of a $120 government check and passed it with intent to cheat and defraud said Boyer. Defendant was also charged in a second and third count with violating sec. 2 of Dangerous Weapons Control Law, Stats. 1923, chap. 339, pp. 695, 696, Gen.Laws, Act 1970, and with a prior felony conviction of counterfeiting, as well as a prior felony conviction of assault with a deadly weapon. Defendant admitted the prior convictions, and counts two and three were separated from count one for the purpose of trial on the first count. A jury trial was waived. A plea of not guilty was entered as to the first count. The court proceeded to trial upon that count and it found defendant guilty of forgery as charged. Defendant was committed to state prison on count one. Judgment ran concurrently with the judgment theretofore pronounced on counts two and three. Defendant appealed and only questions the sufficiency of the evidence to justify his conviction on the forgery count.

The evidence shows that defendant lived near Blythe, in a cabin on the bank of the Colorado River with his wife Mary. They were married in August, 1948, and on December 9 of that year Mr. Boyer, stepfather of Mary, came to live with them. Boyer was a veteran, about 80 years of age, and was drawing a pension of $120 a month. On January 3, 1949, defendant presented a pension check in said amount, dated December 31, 1948, and made payable to Daniel T. Boyer, to a bank in Blythe, where defendant was known and had an account. The back of the check carried the endorsed names "Daniel T. Boyer" and under it "Ray Cullen" when it was presented for payment and cashed. Boyer was not seen alive after January 4, 1949. In the early afternoon of that day defendant stated that Boyer had gone out on the Colorado River in a boat that morning and that the empty boat was later found. Various relatives of Mrs. Cullen went to defendant's house on the night of January 4, in response to telephone calls that Mrs. Cullen and Mr. Boyer had mysteriously disappeared. One witness asked defendant if Mr. Boyer had received his pension check. Defendant replied that it came on January 1st but Boyer was too sick to go and cash it so he took Boyer with him to town on January 3d and cashed his check; that he tried to help Boyer step from the curb but Boyer insisted he needed no help. On January 6 defendant told certain relatives that he had taken Boyer to town and that he (Boyer) cashed the check and put the money in his wallet. Later in the same day he stated that Boyer had been too ill to go to the bank so he, defendant, took the check in, got the cash for him, and turned the money over to Boyer. Later the same night, defendant told the police officers that when Boyer gave him the check to cash, it was already endorsed by Boyer and that the endorsement was not made in his presence. The police officer later told defendant he believed he had signed Boyer's name as the endorser. Defendant said he had not but that it was signed in his presence. He asked defendant to write some words for him so he could compare the handwriting but defendant refused. On February 27 defendant told Mrs. Cullen's sister that he had not taken Boyer in to cash the check but that he (defendant) had taken the check in and cashed it himself. In March, defendant told another witness that he had taken Boyer to the bank to get the check cashed. This witness then reminded defendant that he had previously told her that he had cashed the check and that Boyer was not taken to the bank. Defendant stated that he was mistaken as to the previous occasion. Defendant then told her that on January 3, he had "baptized"

Mary Cullen, his wife; that "she was ready to go". The witness then asked if he had "baptized" Mr. Boyer, too, and he remarked: "You can't baptize anybody that is dead." She then asked him how he could have taken Boyer to get the check cashed on January 3, in the morning, if he was dead, and he told her he could not tell her any more because if he did he would incriminate himself. In another conversation defendant told her that either Mrs. Cullen or Mr. Boyer had endorsed the check and he did not know which one.

During the course of the investigation, a police officer asked the defendant why the endorsement on the check was so different from Mr. Boyer's regular signature. He stated that Mr. Boyer had cut his finger and could not write too well with a bandage on it. The officer then stated that he did not believe it and that the defendant would have been better off if he had said he had signed Mr. Boyer's name with his permission; that the defendant said he would not say that because it was not so; that Mr. Boyer sat at the desk in the house and signed the check himself, and that he had taken it to the bank to get it cashed for him, turning over the proceeds to Boyer when he returned to the house. Defendant later told a witness that it was not true that his wife and Boyer went out in a boat on the river on January 4th, but that Boyer had met his death in a different manner. In another conversation, claimed to have been made under duress, defendant said Boyer died on January 4 from a gunshot wound.

It was stipulated at the trial that Boyer had not been seen since January 4, and that it may be presumed that he was dead and therefore unable to testify at the trial. Six previous monthly pension checks had been endorsed by Boyer in his own handwriting and exemplars of his handwriting were received in evidence. An examiner of questioned documents testified that Boyer did not write his name on the check in question; that it was written by defendant; that the capital letters in the name "Daniel T. Boyer" were disguised and the slant of the writing was changed from the normal slant which appeared in defendant's signature, and there were many other variations in an endeavor to disguise that signature; that although it did not resemble Boyer's signature, there was little, if any, disguise of Ray Cullen's signature.

At the conclusion of the people's case the defendant moved for an acquittal on the ground that there was no proof of the *corpus delicti*. The motion was denied. Defendant then took the stand as a witness and testified that the check arrived in the mail on the morning of January 3; that, at his home, he signed Boyer's name to the check at the request of Boyer, who was ill; that he signed his own name to the check at the bank, and after cashing it he returned home and gave the money to Boyer, who gave $20 to Mrs. Cullen, and that Boyer placed the remainder in his wallet.

Although defendant admitted making some false statements to the witnesses described, he denied telling certain other stories related by them. On cross-examination he gave conflicting testimony about the check transaction. He stated that he was at the bank when he signed Boyer's name and at his home when he signed his own name to it; that his wife and not Boyer told him to go and cash the check.

On appeal defendant now argues first, that under sec. 470 of the Penal Code, defining forgery, there are three elements necessary to establish the crime; (a) Signing the name of another; (b) with intent to defraud; and (c) without authority to do so. It is then argued that since the prosecution had not met the burden of showing lack of authority of defendant to sign Boyer's name there was no *corpus delicti* established; that under the presumption of innocence rule defendant was presumed to have had Boyer's authority to sign his name until that presumption was overcome by competent evidence; and that defendant's motion for a verdict of acquittal upon the close of the people's evidence should have been granted, citing such cases as People v. Mitchell, 92 Cal. 590, 28 P. 597, 788; People v. Whiteman, 114 Cal. 338, 46 P. 99; People v. Lundin, 117 Cal. 124, 48 P. 1024; People v. Maioli, 135 Cal.App. 205, 26 P.2d 871; People v. Hidalgo, 128 Cal.App. 703,

18 P.2d 391; People v. Wade, 57 Cal.App. 2d 36, 133 P.2d 646; People v. McWilliams, 117 Cal.App. 732, 4 P.2d 601; People v. Stoddard, 85 Cal.App.2d 130, 192 P.2d 472; and 12 Cal.Jur. p. 666, sec. 16.

[1] The rule elicited from the cases cited is that upon a charge of forgery of a check the prosecution has the burden of proving the *corpus delicti* and must show both that the person whose name is alleged to have been forged is a real person, that his name was signed to the check without his authority, and that to prove an accused person signed the name of another to an instrument and that he passed such instrument as genuine does not prove the commission of a crime. It must still be shown that it was a false instrument and this is not proven until it is shown that the person who signed the other's name did so without authority, and until this proof is met it is not shown to be a false instrument and the defendant is not put to his proof at all.

[2] Conceding the rule thus established, the first question is whether or not there was sufficient evidence, independent of the admissions of defendant, to establish the *corpus delicti*. It is conceded by the defendant that he did in fact endorse Boyer's name on the back of the check for the purpose of cashing it. His only contention is that the people failed to show he did not have authority so to do. The rule is that to authorize the reception and consideration by the jury of evidence of an extrajudicial confession or admission of a defendant, it is not required that the prosecution establish the *corpus delicti* by proof of a clear and convincing character, as is required to support a conviction. Slight proof is all that is required. Slight evidence is sufficient where an attempt to prove a negative is being made. People v. Macbeth, 104 Cal.App. 690, 693, 286 P. 448. In People v. McWilliams, supra, it was held that under a charge of issuing a fictitious check the city directory was sufficient evidence to show there was no such individual as the person whose name was signed to the check. People v. Terrill, 133 Cal. 120, 65 P. 303, was a forgery case, charging the issuance of a fictitious city warrant, wherein the people were called upon to prove that no such person as the one named as payor of the check existed, and the court held that a showing that the only other person in the employ of the city bearing that name on a city warrant did not write nor authorize to be written his name was sufficient negative proof that the signature was unauthorized. See, also, 12 Cal.Jur. sec. 16, p. 666. It is not necessary to be proven by evidence of the owner or maker of an instrument that authority was not given. In the absence of such owner or maker as a witness, lack of authorization may be proven circumstantially. People v. Stoddard, 85 Cal.App.2d 130, 192 P.2d 472; People v. Cline, 79 Cal.App.2d 11, 179 P.2d 89.

[3] Here, for six months previous, Boyer was able to and did endorse his own signature to his pension checks. Defendant's varied stories as to why Boyer did not sign the check on this occasion raises considerable suspicion as to whether Boyer was in fact alive at the time defendant claims he was authorized by Boyer to sign the check for him. (According to defendant's counsel, stated in open court, defendant has subsequently been convicted of the murder of Boyer and that case is now pending on appeal.) The fact that Boyer's name, although not a true replica of Boyer's signature, was disguised and was clearly distinguishable from defendant's natural handwriting, was a circumstance that the jury was entitled to consider in determining the question of authority. Nothing was said by defendant to the bank clerk about Boyer's purported signature, as to whether defendant signed his name under some claimed authority or whether Boyer himself signed it. Apparently the disguise was for the purpose of leading the bank clerk to believe that Boyer did in fact endorse it rather than suffer an examination by the bank clerk as to defendant's authority to endorse it for him. There seems to be no other logical inference concerning the authority to be drawn from the fact of such disguise.

The case of Kiekhoefer v. United States Nat. Bank, 2 Cal.2d 98, 39 P.2d 807, 96 A.L.R. 1244, cited by defendant to show

that no significance may be here attached to the evidence of disguise in the handwriting, is readily distinguishable. That case merely held that an agent who *had authority* to sign the name of his principal to an endorsement, did not commit forgery by signing it in imitation of the maker's signature. In the instant case there is no evidence that the defendant had any authority to sign the name of Boyer to the check except the impeached testimony of the defendant. Under the circumstances it is obvious that the disguise has significance as evidence of lack of authority.

[4-6] We conclude that the *corpus delicti* was sufficiently established. There was a sufficient inference of lack of authority which the trier of fact was entitled to draw from the circumstances established. Unless such inferences do violence to reason an appellate tribunal is not permitted to interfere. People v. Stoddard, 85 Cal.App. 2d 130, 137, 192 P.2d 472. Under this conclusion the various statements and admissions of defendant were admissible not only for the purpose of impeachment but to furnish further evidence of the fact that defendant was not in fact authorized to endorse Boyer's name to the check. He first claimed that Boyer himself signed the endorsement. When he refused to write an exemplar, defendant was told by an officer that he did not believe Boyer had signed the check because the handwriting indicated that defendant himself signed Boyer's name to it. The officer then told him it would have been better for defendant to have said said that Boyer authorized him to sign the check. Defendant replied that he would not say that because it was not so, and if he told any more it would incriminate him. This last statement, if true, was in effect a clear admission by the defendant that he was not authorized to endorse Boyer's name to the check. False declarations made by an accused for the purpose of misleading or warding off suspicion, though not conclusive of guilt, may nevertheless strengthen the inference arising from the facts. People v. Peete, 54 Cal.App. 333, 202 P. 51. Defendant was impeached as a witness by proof of prior convictions of felonies and prior inconsistent statements. The fact that defendant subsequently testified at the trial that he was so authorized merely created a conflict in the evidence for the determination of the trier of facts, and under the well-known rule the finding of the trial court cannot be disturbed on appeal. Mitchell v. Excelsior Water & Mineral Co., 41 Cal.App. 240, 246, 182 P. 326.

In addition, the attorney general also argues in support of this finding, that the so-called rule of convenience or necessity applies in a forgery case under the circumstances here related, and accordingly, where the subject matter of a negative averment in the information, or a fact relied upon by the defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, the general rule is that the burden of proof of such averment or fact is upon him, citing People v. Agnew, 16 Cal.2d 655, 663, 107 P.2d 601; People v. Cline, 79 Cal.App. 2d 11, 14, 179 P.2d 89; and People v. Caldwell, 55 Cal.App.2d 238, 251, 130 P.2d 495.

Defendant contends otherwise and cites such authorities as People v. Frey, 165 Cal. 140, 131 P. 127; People v. Quarez, 196 Cal. 404, 238 P. 363; and 8 Cal.Jur. p. 167, sec. 248; and cases there cited.

In view of the previous determination it will be unnecessary to discuss this contention.

[7-10] The only remaining argument is that there was no evidence of defendant's intent to defraud. The claim is that since defendant testified he turned over to Boyer the $120 received, no one was defrauded by the transaction. Under the circumstances of this case the court was not bound by the self-serving statement of the defendant that he did turn the money over to Mr. Boyer. People v. Freer, 104 Cal. App. 39, 44, 285 P. 386. Defendant made several conflicting statements as to the disposition of the money. In one instance he stated that Boyer himself went to the bank with defendant and cashed the check. In another statement he related that he cashed the check and turned the money over to Boyer at his home, and in still another he stated he turned the money over to Boyer and that Boyer in turn gave Mrs. Cullen a

twenty-dollar bill from the proceeds for Boyer's board. The mysterious disappearance of the two persons about that time might well give rise to the inference that the defendant never did turn over to Boyer the proceeds of the forged check. False statements made by one who has been confronted with an accusation of the commission by him of a criminal offense have been repeatedly held to constitute proper evidence of consciousness of guilt. People v. Sampsell, 104 Cal.App. 431, 286 P. 434. Since there was sufficient evidence to show defendant wrongfully forged Boyer's name to the check, without authority, the trial court had the right to infer, from the circumstances established, that defendant intended to defraud someone. The intent to do a wrongful act is always provable by extraneous circumstances, i. e., by some physical act or acts which, with sufficient clearness, disclose the operation of the mind with respect to the wrongful act, and a person, without authority, signing the name of another to a check is itself evidence, quite conclusive, that his intent was to prejudice or damage that person. People v. Collins, 60 Cal.App. 263, 268, 212 P. 701.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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SECOND SERIES

35 Cal.2d 870

ESCOBEDO v. STATE DEPARTMENT OF MOTOR VEHICLES, et al.

L. A. 20902.

Supreme Court of California, in Bank.

Sept. 13, 1950.

Original proceeding by Pedro Escobedo against the State, Department of Motor Vehicles, and another for a writ of mandate directing reissuance or reinstatement of petitioner's motor vehicle operator's license. The Supreme Court, Schauer, J., held that financial responsibility statute effective July 1, 1948, does not violate due process of law provisions of Federal or State Constitutions, does not delegate judicial power to an administrative body in violation of State Constitution and does not create an arbitrary discrimination in violation of equal protection of laws clause of Federal Constitution or uniform operation of laws provision of State Constitution.

Alternative writ of mandate discharged and petition for peremptory writ denied.

Carter and Edmunds, JJ., dissented.

1. Automobiles ⇐144

Suspension of operator's license for failure to deposit security for payment of damages resulting from a motor vehicle accident was mandatory under statute effective July 1, 1948, and hence operator was not necessarily entitled to a hearing before motor vehicle department determined the amount of security required and notified him that license would be suspended unless he deposited such sum. Vehicle Code, §§ 315, 419–420.9, St.1947, pp. 1329, 2738.

2. Highways ⇐168

Highways are for the use of traveling public all of whom have the right to use them in a reasonable and proper manner and subject to proper regulations as to the manner of use.

3. Highways ⇐168
Municipal corporations ⇐703(1)

Every citizen has an inalienable right to the use of highways and city streets for purposes of travel and transportation either for business or pleasure, subject to legislative control or such reasonable regulations as to the traffic thereon or the manner of using them as the legislature may deem wise or proper to adopt.

4. Highways ⇐165

The use of highways is subject to reasonable regulation for the public good and any appropriate means adopted by the state to insure competence and care on the part of its licensees and to protect others using highways is consonant with due process of law. U.S.C.A.Const. Amend. 14, § 1; Const. art. 1, § 13.

5. Automobiles ⇐24

The state, in exercise of its police power, may constitutionally require deposit of security by owners of all vehicles as a condition to licensing them. U.S.C.A. Const. Amend. 14, § 1; Const. art. 1, § 13.

6. Automobiles ⇐132
Constitutional law ⇐287

Statute effective July 1, 1948, providing for suspension of operator's license for failure to deposit security for payment of damages resulting from a motor vehicle accident without prior hearing but subject to subsequent judicial review does not violate due process of law clauses of federal or state Constitution, since requiring a prior hearing would substantially burden and delay if not defeat the operation of statute. Vehicle Code, § 317; §§ 419, 420(b, c), 420.2, 420.7, St.1947, pp. 2738, 2739, 2740, 2742; U.S.C.A.Const. Amend. 14, § 1; Const. art. 1, § 13.

7. Declaratory judgment ⇐213
Mandamus ⇐87

Judicial review of suspension of operator's license by department of motor vehicles for failure to deposit security for payment of damages resulting from motor vehicle accident may be had by application to superior court for writ of mandate or by action for declaratory relief. Vehicle Code, §§ 419–420.9, St.1947, p. 2738; Code Civ.Proc. §§ 1085, 1086.

8. Automobiles ⇐132
Constitutional law ⇐62

The statute effective July 1, 1948, providing for suspension of operator's license for failure to deposit security for payment of damages resulting from a motor vehicle accident is not unconstitutional as delegating judicial power to an administrative body, since provision for requiring security in a sum sufficient to satisfy any judgment as may be recovered against operator provides a reasonable, sufficiently certain standard to be followed by department of motor vehicles in determining the amount of security required. Vehicle Code, §§ 419–420.9, St.1947, p. 2738; Const. art. 3, § 1; art. 6, § 1.

9. Evidence ⇐42

The facts and legal principles governing the recovery of judgments for damages are a matter of public knowledge.

10. Automobiles ⇐132
Constitutional law ⇐230(1)
Statutes ⇐77(1)

The statute effective July 1, 1948, providing for suspension of operator's license for failure to deposit security for payment of damages resulting from motor vehicle accident does not subject nonculpable operators to arbitrary discrimination in violation of equal protection of the laws clause of federal Constitution or uniform operation of laws provision of state constitution, since security is required only of those against whom, in the opinion of motor vehicle department, a judgment may be recovered. Vehicle Code, §§ 419–420.9, St.1947, p. 2738; U.S.C.A.Const. Amend. 14, § 1; Const. art. 1, § 11 .

11. Automobiles ⇐132
Constitutional law ⇐230(1)
Statutes ⇐77(1)

The statute effective July 1, 1948, providing for suspension of operator's license for failure to deposit security for payment of damages resulting from motor vehicle accident does not arbitrarily discriminate against those who are unable to carry insurance or post security in violation of equal protection of the laws clause of federal Constitution or uniform operation of laws provision of state constitution. Vehicle Code, §§ 419–420.9, St.1947, p. 2738; U.S.C.A.Const. Amend. 14, § 1; Const. art. 1, § 11.

12. Constitutional law ⇐209

The "equality" of the constitution is the equality of right and not of enjoyment.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Equality".

13. Automobiles ⇐132

That suspension of operator's license for failure to deposit security for payment of damages resulting from motor vehicle accident deprives operator of his means of livelihood for himself and family and makes him less financially responsible does not affect the validity of statute providing for such suspension. Vehicle Code, §§ 419–420.9, St.1947, p. 2738.

14. Automobiles ⇐132
Constitutional law ⇐230(1)
Statutes ⇐77(1)

The statute effective July 1, 1948, providing for suspension of operator's license for failure to deposit security for payment of damages resulting from motor vehicle accident does not create an arbitrary discrimination in violation of equal protection of the laws clause of federal Constitution or uniform operation of laws provision of state constitution by permitting a person in whose name more than 25 motor vehicles are registered to qualify as self-insurers, since such classification on basis of probable financial ability to respond in damages is reasonable. Vehicle Code, §§ 419–420.9, 420(b) (4), 420.7, St.1947, pp. 2738, 2739, 2742; U.S.C.A.Const. Amend. 14, § 1; Const. art. 1, § 11.

David C. Marcus, Los Angeles, for petitioner.

Fred N. Howser, Attorney General, Walter L. Bowers, Assistant Attorney General, and E. G. Funke, Deputy Attorney General, for respondents.

SCHAUER, Justice.

Petitioner asks that this court by mandate direct respondents, the Department of Motor Vehicles and the Director of Motor Vehicles of this state, to "re-issue, return or reinstate Petitioner's operator's license and/or driving privileges to operate a motor vehicle in this State." In September, 1948, respondents, without according petitioner a hearing, suspended his operator's license under the then provisions of sections 419 through 420.9 of the Vehicle Code (Stats. 1947, ch. 1235). These provisions constituted chapter 3 of division VII of the Code, entitled "Security Following Accident"; they became operative July 1, 1948.[1] It is petitioner's position that the application of this law to him denied him due process and equal protection (U. S. Const., Amdt. XIV, § 1; Cal. Const., art. I, §§ 11, 13) and vested judicial power in "a purely ministerial 'department'" in violation of the state Constitution (art. III, § 1; art. VI, § 1). We have concluded that petitioner's contentions should not be sustained and that upon the showing made the suspension of his license is legally tenable.

On July 1, 1948, petitioner held a valid license to drive a motor vehicle in California; on that date he operated a vehicle which was involved in a collision with another such vehicle at an intersection of public highways in this state. In August, 1948, petitioner received from respondents a written notice stating that because of the July 1 accident and because petitioner had "failed to otherwise meet the security requirements of Section 420 of the Vehicle Code," he was required to deposit with respondent department, on or before September 11, 1948, security in the sum of $2,800. The notice further stated that petitioner's "driving privilege and all licenses evidencing such privilege is [sic] hereby suspended as of" September 11, 1948, unless the deposit was made prior to that date, and that the suspension would "remain in effect until evidence satisfactory to the Department has been filed indicating that the security requirements of Section 420.2 of the Vehicle code have been met." Petitioner is a gardener by occupation and "requires the use of his automobile" and his license to operate it in order to "transport himself and his tools between his different places of employment * * * and to earn a livelihood for himself and his family [dependent wife and 9 minor children]." He does not have $2,800 "or any like sum" to post as security, is unable to and did not post the security demanded by respondents and, pursuant to the provisions of section 420 of the Vehicle Code, his operator's license was and now is suspended. The Highway Patrol has notified petitioner "that they intend to arrest and prosecute" him under the provisions of subdivisions (a) and (d) of section 338 of the Vehicle Code, which forbid possession of, and failure to surrender to the department on lawful demand, a suspended license.

The applicable provisions of chapter 3 of division VII of the Vehicle Code (Stats. 1947, ch. 1235) which were in effect at the time of petitioner's accident and the suspension of his license are as follows:

Section 419 required that the operator of a motor vehicle involved in an accident in this state which resulted in personal injury, death or property damage exceeding $100 report the matter in writing to the Department of Motor Vehicles within 10 days after the accident. Section 420 (subd. (a)) provided that "The department shall, within 60 days after the receipt of a report of [such] a motor vehicle accident * * * suspend the license of each operator * * * involved in such accident * * * unless such operator shall deposit security in a

1. Effective July 7, 1949, the chapter was completely recast although its general plan remains the same) by amendment of section 419, repeal of sections 420 through 420.9, and addition of new sections 420 through 423.1 (Stats.1949, ch. 834).

sum which shall be sufficient in the judgment of the department to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against such operator. Notice of such suspension shall be sent by the department to such operator not less than 10 days prior to the effective date of such suspension and shall state the amount required as security." The deposit of security and suspension of license requirements did not apply if the operator or owner of the vehicle had an automobile or other public liability policy or bond covering $5,000 for injury or death of one person, $10,000 for injury or death of more than one person, and $1,000 property damage (Veh. Code § 420, subds. (b), (c), or to a person who had more than 25 vehicles registered in his name and qualified as a self-insurer (Veh. Code, § 420, subd. (b), par. (4), § 420.7); other situations in which the requirements did not apply are not here material. Suspension of license was to continue until security was deposited, or one year had passed without filing of an action for damages arising out of the accident, or until release from or satisfaction of liability, or final adjudication of non-liability. (Veh. Code, § 420.2.)

Specifically, petitioner urges that the above quoted or summarized sections of the Vehicle Code were unconstitutional in the following respects:

1. The statute violated the due process provisions of the federal Constitution (Amendment XIV, § 1) and the state Constitution (art. I, § 13) in that no provision was made for hearing before the department, or for recourse to the courts, before suspension of a license.

2. Judical power was delegated to an administrative body in violation of the state Constitution (art. III, § 1; art. VI, § 1), in that no sufficient standard was provided to guide the department in determining the amount of security.

3. The effect of the statute was an arbitary discrimination in violation of the equal protection clause of the federal Constitution (Amendment XIV, § 1) and the uniform operation of laws provision of the state Constitution (art. I, § 11) in that: (a) The posting of security by a driver who might not be culpable was required, before his liability was judically determined. (b) Those who were financially able to carry insurance or post security were favored as against those who were not. (c) The provisions permitting any person in whose name more than 25 motor vehicles were registered to qualify as a self-insurer created an arbitrary classification.

Hearing, Due Process

[1] There was no express provision in sections 419 through 420.9 of the Vehicle Code (Stats. 1947, ch. 1235) concerning hearing before determination by the department that security must be deposited or the operator's license suspended. At the time petitioner's license was suspended without hearing, section 315 of the Vehicle Code (Stats. 1947, ch. 431) provided that "A person shall be entitled to demand in writing a hearing before the director or his representative whenever the department * * * [h]as given notice of the suspension * * * of his privilege of operating a motor vehicle upon a highway or of an operator's * * * license issued to such person," but it further provided that "The * * * licensee shall not be entitled to a hearing under this section whenever such action by the department is made mandatory upon the department by the provisions of this code."[2] Since suspension of petitioner's license for failure to deposit security was mandatory (Veh. Code, § 420) whenever it had been determined that a motor vehicle accident had occurred and damages exceeding $100 ensued which probably might result in "a judgment or judgments for damages * * * recovered against such operator," it is apparent that it was not contemplated that the department necessarily should give an operator opportunity to be heard before it determined the amount of security required and notified

2. In 1949 sections 314–317 of the Vehicle Code, concerning notice, hearing, etc., were repealed and new provisions (§§ 314–319.1) concerning these subjects were enacted (Stats. 1949, ch. 1407).

him that his license would be suspended unless he deposited such sum. Thus we have for decision an aspect of the question expressly left open in Ratliff v. Lampton (1948), 32 Cal.2d 226, 233, 195 P.2d 792, 10 A.L.R.2d 826: "Whether such summary procedure might be justified under the police power in some instances * * *."

[2-4] Fundamentally it must be recognized that in this country "Highways are for the use of the traveling public, and all have * * * the right to use them in a reasonable and proper manner, and subject to proper regulations as to the manner of use." (13 Cal.Jur. 371, § 59.) "The streets of a city belong to the people of the state, and the use thereof is an inalienable right of every citizen, subject to legislative control or such reasonable regulations as to the traffic thereon or the manner of using them as the legislature may deem wise or proper to adopt and impose." (19 Cal.Jur. 54, § 407.) "Streets and highways are established and maintained primarily for purposes of travel and transportation by the public, and uses incidental thereto. Such travel may be for either business or pleasure * * *. The use of highways for purposes of travel and transportation is not a mere privilege, but a common and fundamental right, of which the public and individuals cannot rightfully be deprived * * *. [A]ll persons have an equal right to use them for purposes of travel by proper means, and with due regard for the corresponding rights of others." (25 Am.Jur. 456-457, § 163; see also 40 C.J.S., Highways, § 233, pp. 244-247.) Notwithstanding such general principles characterizing the primary right of the individual, it is equally well established (as is recognized in the cases above cited) that usage of the highways is subject to reasonable regulation for the public good. In this connection, the constitutionality of various types of financial responsibility laws has been often upheld against contentions that they violated the due process clause of the Fourteenth Amendment. "The use of the public highways by motor vehicles, with its constant dangers, renders the reasonableness and necessity of regulation apparent. The universal practice is to register ownership of automobiles and to license their drivers. Any appropriate means adopted by the states to insure competence and care on the part of its licensees and to protect others using the highway is consonant with due process." (Reitz v. Mealey (1941), 314 U.S. 33, 36, 62 S.Ct. 24, 86 L.Ed. 21, 24; see also State ex rel. Sullivan v. Price (1937), 49 Ariz. 19, 26; 63 P.2d 653, 108 A.L.R. 1156; Surtman v. Secretary of State (1944), 309 Mich. 270, 15 N.W.2d 471, 474.)

[5] The state, in the exercise of its police power, could constitutionally have required deposit of security by the owners of all vehicles as a condition to licensing them. (In re Opinion of the Justices (1925), 81 N.H. 566, 129 A. 117, 39 A.L.R. 1023; In re Opinion of the Justices (1925), 251 Mass. 569, 147 N.E. 681; Brest v. Commissioner of Insurance (1930), 270 Mass. 7, 169 N.E. 657; Ex parte Poresky (1933), 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152.) Instead, the state chose to allow financially irresponsible licensed operators to drive until they became involved in an accident with the consequences described in sections 419 and 420 of the Vehicle Code and their financial irresponsibility was thus brought to the attention of the department, and then to require suspension of their licenses.

[6, 7] Suspension of the license without prior hearing but subject to subsequent judicial review did not violate due process if reasonably justified by a compelling public interest. (Bourjois, Inc., v. Chapman (1937), 301 U.S. 183, 189, 57 S.Ct. 691, 81 L.Ed. 1027, 1032; see also Phillips v. Commissioner (1931), 283 U.S. 589, 596-597, 51 S.Ct. 608, 75 L.Ed. 1289.) The compelling public interest here appears from the obvious carelessness and financial irresponsibility of a substantial number of drivers and from the following allegations of the petition: There are 3,879,931 motor vehicles registered in California. During the first four months after the effective date of the law now under consideration, 19,808 persons were ordered by the department to establish that they were adequately insured or deposit security. More than 6,567

operators' licenses were suspended under the applicable law, and more than 1,300 "citations per month for suspension of license" were issued by the department. In these circumstances it is apparent that to require a hearing in every case before suspension of a license would have substantially burdened and delayed if not defeated the operation of the law. The requirement of due process was recognized and accepted by section 317 of the Vehicle Code, which declared that "Nothing in this code shall be deemed to prevent a review or other action as may be permitted by the Constitution and laws of this State by a court of competent jurisdiction with reference to any order of the department refusing, canceling, suspending or revoking a license." Such review can be had by application to the superior court for writ of mandate (Code Civ.Proc. §§ 1085, 1086). Also, an action for declaratory relief has been used in a comparable situation (Ratliff v. Lampton (1948), supra, 32 Cal.2d 226, 195 P.2d 792, 10 A.L.R.2d 826). General language concerning the requirement of a hearing in Carroll v. California Horse Racing Bd. (1940), 16 Cal.2d 164, 168, 105 P.2d 110; Ratliff v. Lampton (1948), supra, page 230 of 32 Cal.2d, 795 of 195 P.2d; and People v. Noggle (1935), 7 Cal.App.2d 14, 18, 45 P.2d 430, is not controlling here, for each of those cases concerned a statute which was construed to require opportunity to be heard before discretionary revocation of a license became effective.

Delegation of Power

[8, 9] Giving to the Department of Motor Vehicles the power and duty to find the facts on which suspension of license depended, and to exercise limited "judgment," did not violate section 1 of article III or section 1 of article VI of the state Constitution (see Suckow v. Alderson (1920), 182 Cal. 247, 250, 187 P. 965; Dominguez Land Corp. v. Daugherty (1925), 196 Cal. 453, 483, 238 P. 697, 44 L.R.A. 1.) Although the Legislature did not provide detailed directions as to the manner in which the department was to reach a "judgment" as to the amount of security required, it specified as a guide the probable size of "any [court] judgment" which "may be recovered." (Veh.Code, § 420.) The facts and legal principles governing the recovery of judgments for damages are a matter of public knowledge and provide a reasonable sufficiently certain standard to be followed by the department. (Cf. Dominguez Land Corp. v. Daugherty (1925), supra, pp. 485-486 of 196 Cal. pp. 709-710 of 238 P.; Jersey Maid Milk Products Co. v. Brock (1939), 13 Cal.2d 620, 652-657, 91 P.2d 577; Housing Authority of Los Angeles County v. Dockweiler (1939), 14 Cal.2d 437, 461-462, 94 P.2d 794.)

Culpability

[10] The statute did not require security of every operator who might be involved in an accident, but only of those against whom, in the opinion of the department, a judgment might be recovered. Inasmuch as the recovery of a judgment depends, in theory at least, upon culpability, it would seem that the statute, presumptively properly administered, was not open to the objection that under it the nonculpable were subject to arbitrary discrimination.

Financial Ability, Equal Protection

[11, 12] Financial responsibility laws such as this do not unconstitutionally discriminate against the poor. (See Watson v. Division of Motor Vehicles (1931), 212 Cal. 279, 284, 298 P. 481; Rosenblum v. Griffin (1938), 89 N.H. 314, 319, 197 A. 701, 115 A. L.R. 1367.) Those damaged by the negligence of indigent drivers may be indigent also, and as little able as the drivers to bear the cost of such negligence. The fallacy of the argument that the law favored the rich over the poor "lies in the failure to distinguish between equality of opportunity and ability to take advantage of the opportunity which is offered to all. The equality of the Constitution is the equality of right, and not of enjoyment." (Watson v. Division of Motor Vehicles (1931), supra, p. 284 of 212 Cal., p. 483 of 298 P.) Those who cannot afford to possess automobiles are as little able to enjoy the opportunity of driving on the public highways as those who cannot afford insurance or security.

[13] Objection is made by petitioner that suspending his license after the acci-

dent did not make him more financially responsible; indeed, in his case, suspending his license made him less financially responsible, for it deprived him of his means of livelihood for himself, his wife and nine children. This contention constitutes no more than an argument that the Legislature acted unwisely in selecting a financial responsibility law of a lock-the-barn-door-after-the-horse-is-stolen type instead of a compulsory pre-insurance law or some other method of treating the problem (see 1 Stanf.L.Rev. 263). Our concern, however, is with the validity of the law under attack and not with whether a better law could be devised. (See Watson v. Division of Motor Vehicles (1931), supra, pp. 285-286 of 212 Cal., pp. 483-484 of 298 P.)

Self-Insurers

[14] The provisions permitting persons in whose names more than 25 motor vehicles were registered to qualify as self-insurers (Veh.Code, § 420, subd. (b), par. (4), § 420.7) did not create an arbitrary discrimination. Inasmuch as the provisions were patently based upon the probable financial ability of such persons to respond in damages, the classification was one which the Legislature could reasonably make.

For the reasons above stated, the alternative writ of mandate heretofore issued is discharged, and the petition for the peremptory writ is denied.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

On the main issue, the majority hold (citing as authority Bourjois v. Chapman, 301 U.S. 183, 57 S.Ct. 691, 695, 81 L.Ed. 1027; Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608, 611, 75 L.Ed. 1289,) that due process of law requiring notice and hearing is satisfied because a court review may be had after the suspension of a license without a hearing by the department. In the Bourjois case a Maine statute authorized the public official to issue permits for the sale of cosmetics and refuse such permits where they "* * * contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person." Pub. Laws 1935, c. 109, § 2. The court states: "And neither constitution requires that there must be a hearing of the applicant before the board may exercise a judgment under the circumstances and of the character here involved. The requirement of due process of law is amply safeguarded by Section 2 of the statute, which provides: 'From the refusal of said department to issue a certificate of registration for any cosmetic preparation appeal shall lie to the superior court in the county of Kennebec or any other county in the state from which the same was offered for registration.'"

In the Phillips case the issue involved was the payment of taxes, and was based on the principle that: "Property rights must yield provisionally to governmental need. * * * The underlying principle in that case was not such relation, but the need of the government promptly to secure its revenues." In the instant case it is said that the rule that a hearing in court after the suspension is sufficient to satisfy due process, is limited to cases where there is a "compelling public interest," and such interest in this case is: "* * * the *obvious carelessness* and financial irresponsibility of a substantial number of drivers and from the following allegations of the petition: There are 3,879,931 motor vehicles registered in California. During the first four months after the effective date of the law now under consideration, 19,808 persons were ordered by the department to establish that they were adequately insured or deposit security. More than 6,567 operators' licenses were suspended under the applicable law, and more than 1,300 'citations per month for suspension of license' were issued by the department. In these circumstances it is apparent that to require a hearing in every case before suspension of a license would have substantially burdened and delayed if not defeated the operation of the law." (Emphasis added.)

Assuming that the above rule stated by the majority is sound, there is no "compelling public interest" here. In Bourjois v. Chapman, supra, the vital interest was the necessity for *immediate* protection of

the public health. In Phillips v. Commissioner, supra, it was the immediate necessity that the *government receive its tax revenue in order to function.* We have no comparable pressing need in the instant case. There is no issue of immediate danger to the public health involved nor is there any question of indispensible government revenue. *The sole need is that a private person shall have security for the payment of any damages caused to him by another individual.* Certainly that presents no urgency for immediate action which will justify depriving a person of the use of his automobile, his sole means of livlihood. The majority opinion states, as seen from the above quotation, that obviously careless persons' licenses were suspended for failure to post security. That is a non sequitur. It does not follow from the failure to post security that the drivers were careless. Nor does it follow from the fact that they were in accidents that they were careless drivers. They may have been wholly blameless. But even more important, there is no connection between careless drivers and posting of security, that is, the statute is not designed to keep seemingly careless drivers off the highways. *That is true because they are permitted to drive, careless or not, if they post security.* Hence the purpose of the statute is only security for payment of damages to the innocent person.

The recent U.S. Supreme Court case of Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 70 S.Ct. 870, 872, 94 L.Ed. 1088 involved a statute authorizing the administrator to determine whether probable cause existed for the seizure of goods on the basis that they were falsely labelled. That determination did not result in an immediate seizure. Such could only be accomplished if the attorney general, in his discretion, brought an action to seize and confiscate the goods. Only upon the commencement of such an action could the goods be seized pending the court proceeding. The court stated: "We have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held *before the final administrative order becomes effective.* (Emphasis added.) * * * But this case does not go as far. Here an administrative agency is merely determining whether a judicial proceeding should be instituted. Moreover, its finding of probable cause, while a necessary pre-requisite to multiple seizures, has no effect in and of itself. All proceedings for the enforcement of the Act or to restrain violations of it must be brought by and in the name of the United States. § 307 [21 U.S.C.A. § 337]. Whether a suit will be instituted depends on the Attorney General, not on the administrative agency. He may or may not accept the agency's recommendation. If he does, seizures are made and libels are instituted. But the seizures and suits are dependent on the discretion of the Attorney General." In the instant case the person's license is suspended. Moreover, stress is laid upon the general public interest involved as distinguished from rights between individuals.

It should be noted that the U. S. Supreme Court has said since the Bourjois and Phillips cases: "The demands of *due process* do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding *so long as the requisite hearing is held before the final order becomes effective.*" (Emphasis added.) Opp Cotton Mills v. Administrator, 312 U.S. 126, 152, 61 S.Ct. 524, 536, 85 L.Ed. 624.

In the case at bar no hearing has ever been accorded petitioner. His operator's license has been suspended.

Since his right to operate an automobile on the public highway is essential to his livelihood, I am constrained to hold that he has been deprived of property without due process of law, and the statute here involved is unconstitutional.

I would therefore issue the peremptory writ prayed for.

EDMONDS, Justice. (dissenting).

In my opinion, if the Department of Motor Vehicles may, without a hearing, summarily suspend the license of a person to operate a motor vehicle, the provisions of the Vehicle Code purporting to give that authority violate constitutional gurantees. As the court here construes the statute, one

may lose a valuable property right without the opportunity even to show that the reported accident did not occur or, if there was such an accident, he was not the driver of an automobile causing personal injury or property damage.

The Vehicle Code as it read in 1948 when Escobedo's license was suspended, provided that the Motor Vehicle Department shall "* * * within 60 days after the receipt of a report of a motor vehicle accident within this State which has resulted in bodily injury or death or damage to the property of any one person in excess of one hundred dollars ($100), suspend the license of each operator * * * involved in such accident * * *." Section 420(a), Vehicle Code. The causes for suspension, therefore, are (1) the licensee was the operator of the vehicle involved in the accident; (2) less than 60 days have elapsed since the accident report was received; and (3) bodily injury resulted or property was damaged to an amount in excess of $100.

The license may not be suspended if the operator deposits security "in a sum which shall be sufficient in the judgment of the department to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against such operator or owner." Sec. 420(a), Veh. Code. An operator who alone suffers damage or injury or one who was driving a vehicle which was "* * * stopped, standing, or parked, whether attended or unattended * * *" at the time of the accident (unless he was doing so illegally or the vehicle lacked lighted lamps as required by law), does not have to meet this requirement. And suspension shall not be imposed upon one who has been released from liability, or has been finally adjudicated not liable, or has executed a confession of judgment or has executed an acknowledged agreement in writing providing for the payment of the amount of the damages resulting from the accident, Sec. 420.1.

Self-insurers are exempted from certain requirements of the law and other conditions are exacted of them. Sec. 420.7. Under some circumstances the license of a self-insured operator may not be suspended.

By these provisions, the Legislature has directed the Department of Motor Vehicles to suspend the license of an operator under specified circumstances or for certain causes, but only if his conduct, either at the time of the accident or subsequently, does not bring him within one of the stated exemptions which bars that action. This constitutes statutory authority to suspend an operator's license for enumerated causes only. Certainly the law contemplates a determination that the operator against whom action is proposed to be taken is the person who was involved in the accident reported as having occurred.

The administrative agency must also find whether personal injury occurred or property was damaged in extent of $100; whether the security demanded in the alternative to suspension is "sufficient in the judgment of the department"; whether any other policy on bond held by the driver is "* * * in the judgment of the department * * *" sufficient; whether the vehicle was stopped, standing, or parked, and if so whether it was properly lighted; and finally, whether the operator is a self-insurer.

It is a well established principle that, under a statute providing for dismissal of an employee or revocation of a license "for cause", there must be notice and a hearing before such action may be taken. The rule has been applied to a teacher, Keenan v. San Francisco Unified School District, 34 Cal.2d 708, 214 P.2d 382; automobile operator, Ratliff v. Lampton, 32 Cal.2d 226, 195 P.2d 792, 10 A.L.R.2d 826; liquor licensee, Covert v. State Board of Equalization, 29 Cal.2d 125, 173 P.2d 545; horse trainer, Carroll v. California Horse Racing Bd., 16 Cal.2d 164, 105 P.2d 110; and civil servants generally, La Prade v. Department of Water & Power, 27 Cal.2d 47, 162 P.2d 13; Steen v. Board of Civil Service Comm'rs, 26 Cal.2d 716, 160 P.2d 816. There is at least as much reason for requiring notice and hearing under a statute providing for deprivation of a license for any one of specifically enumerated causes as under legislation which allows

such action "for cause" generally. Where the Legislature has enumerated the causes or conditions for which a license may be suspended, the requirement of notice and a hearing to determine the existence of those causes will be implied. Section 420 (a) must be construed accordingly.

Moreover, section 420(a), under which Escobedo's license was suspended, should be read in conjunction with section 314, which is the general provision governing the suspension and revocation of an operator's license. The latter section provides for suspension or revocation of a license where, among other things, "* * * the licensee has been involved as a driver in any accident causing death or personal injury or serious damage to property [or where] the safety of * * * persons upon the highway requires such action * * *."

Section 314 embodies express provision for notice and hearing, in that it requires an "investigation" and "reexamination of the licensee [upon] 10 days' written notice of the time and place thereof * *" and also provides for modification of any probation "* * * whenever good cause appears therefor." In Ratliff v. Lampton, supra, this court held that section 314 as then worded required "* * * an investigation and hearing conducted by the department which would afford the licensee an opportunity to present evidence under the rule in the Carroll and Steen cases." [32 Cal.2d 226, 195 P.2d 796.] At the time of the Ratliff decision, section 314 provided for a determination after investigation "that good cause exists" for suspension. The causes enumerated by the statute then, as now, included the determination that the licensee was "* * involved as a driver in any accident causing death or personal injury or serious damage to property" and the rule of the Ratliff case in this regard remains unchanged. In fact, subsequent amendment providing for "reexamination" and "written notice" makes it all the more evident that the Legislature intended to continue in effect this court's construction of that section.

Cases such as Surtman v. Secretary of State, 309 Mich. 270, 15 N.W.2d 471; Nulter v. State Road Commission, 119 W.Va. 312, 193 S.E. 549, 194 S.E. 270; LaPlante v. State Board of Public Roads, 47 R.I. 258, 131 A. 641; and Sullins v. Butler, 175 Tenn. 468, 135 S.W.2d 930, which hold that the operation of a motor vehicle upon a public highway is 'merely a personal privilege, and is not a property right, either concerned that right in connection with the use of a pleasure vehicle or failed to recognize the evolution of modern transportation. Today the social and economic circumstances of many persons have placed a motor vehicle in the category of a necessity. Escobedo's situation is a typical example.

He is a gardner living at San Gabriel. By taking care of lawns and gardens there and in Pasadena, he supports himself, his wife and nine children. While driving his automobile from one place of his work to another, his vehicle collided with another one. The state can and does prescribe the qualifications which one must have to obtain a license allowing him to operate a motor vehicle. Failure to meet those requirements justifies denial of the license. But after it has been issued and one is relying upon it as a means of livelihood, a license to operate a motor vehicle attains the status of a property right. The suspension or revocation of such a license must meet the same requirements of procedural due process which have been applied in connection with a license to practice a profession.

The Motor Vehicle Department makes no claim that Escobedo was given a hearing. In an order of the department served upon him, he was told: "Since you have failed to otherwise meet the security requirements of section 420 of the Vehicle Code, you must now deposit security or have your driving privilege suspended." Such suspension was made effective 15 days after the date of the demand unless, in the meantime, security in the amount of $2,800 was deposited with the department. The attorney general does not contend that the department has made any determination of the respective liabilities of the operators of the two cars nor of the amount of damage caused by the crash. As far as the record shows, the order of

suspension is based entirely upon the statements made in an "accident report" filed in one of its offices.

This is far from procedural due process. As succinctly stated in the Ratliff case, "It is contrary to commonly accepted principles of justice to revoke a license for cause without giving the person charged an opportunity to be heard before a decision is made, since the determination necessarily requires a fair consideration of any evidence offered by the licensee." [32 Cal.2d 226, 195 P.2d 796.]

"Subsequent judicial review" of the department's action is no adequate substitute for a hearing in which the licensee would have an opportunity to present evidence tending to prove that he was not subject to the drastic sanction prescribed by the statute. This inadequacy is graphically illustrated by the present record. Escobedo was summarily ordered to surrender his license in September, 1948. When he declined to do so, he was advised that the authorities intend to arrest and prosecute him for having a revoked license in his possession. On January 18, 1949, he filed in this court his petition for writ of mandate. During the 20 months which have since elapsed, presumably he has been unable to carry on his work.

For these reasons, I would grant the writ of mandate.



36 Cal.2d 67

DAVENPORT et al. v. DAVENPORT FOUNDATION et al.

L. A. 21005.

Supreme Court of California, in Bank.

Sept. 19, 1950.

Action by Ralph M. Davenport, as administrator of the estate of Levi M. Davenport, deceased and others, against the Davenport Foundation, a corporation, and others, to have a declaration of trust declared invalid, and a bank account held to be property of the heirs of the decedent. The Superior Court, Los Angeles County, David Coleman, J., rendered judgment in favor of the defendant, and plaintiffs appealed. The Supreme Court, Traynor, J., held that the portion of trust instrument creating charitable trust to establish a department of philosophy and religion at college and which enabled trustee to devote income to noncharitable purposes after statutory period had run was invalid as an unreasonable restraint on alienation.

As modified that part of judgment adjudicating disposition of joint bank accounts affirmed, and in all other respects judgment reversed.

Prior opinion 215 P.2d 467.

1. Evidence ⇐420(3)

Parol evidence is admissible to prove a document was not intended to take effect until the happening of a condition precedent.

2. Wills ⇐91

Where settlor conveyed property to a corporation as trustee and vested management in a foundation to distribute certain amount of income to settlor for life and an amount for annuities and made balance payable to a college to establish a new philosophy and religion department and trustees appointed settlor manager of foundation and allowed him to deal with property in same manner after declaration of trust was executed as he had before, but there was no evidence that college understood declaration of trust was not intended to be presently operative and college was a party to declaration and operated under its terms and received payments, trust was not invalid on ground that it was not intended to be operative during settlor's lifetime.

3. Perpetuities ⇐4(22)

An irrevocable trust, although partially charitable, is invalid to extent that under its terms trustees may apply income or corpus to noncharitable purposes after lapse of statutory period of lives in being or 25 years from its creation. Civ.Code, §§ 715, 716.

4. Charities ⇐4

Where settlor conveyed property to a corporate trustee and vested management

in foundation to distribute certain amount of income to settlor for life, and amount for certain annuities with balance payable to college to establish a philosophy and religion department, and an agreement was executed by settlor and trustees whereby one of settlor's grandchildren was to receive $100 per month for life after death of her mother, and trust provided that all of the rest of the undistributed income could be used by trustee for such purposes consistent with purposes of trust as were determined in sole discretion of trustees, finding was justified that trustees had power to devote income to noncharitable purposes after 25-year statutory period had run and provision was invalid. Civ.Code, §§ 715, 716.

5. Trusts ⇐52

Valid trusts should not be disregarded because in instrument creating them one particular invalid trust is declared, unless the latter is so inseparably blended with the others that it cannot be eliminated without destroying main intent of trustor or without working manifest injustice to other beneficiaries. Probate Code, § 101.

6. Charities ⇐25

Where settlor conveyed property to corporate trustee and vested management in a foundation to distribute a stated amount of income to settlor for life, and an amount for certain annuities, and made balance payable to a college, and trust agreement provided that all of residue of undistributed income could be used by trustee for purposes consistent with purposes of trust as determined in sole discretion of trustee, it would be assumed that settlor intended trustees to have discretion to apply remainder of income for benefit of settlor's relatives whether in being or not at time of creation of trust, or for charitable purposes, and valid and invalid powers under provision were inseparably blended, and whole provision would fall as an unreasonable restraint on alienation. Civ.Code, §§ 715, 716.

7. Trusts ⇐68

Where an express charitable trust was invalid to extent to which trust instrument permitted trustees in their sole discretion to apply residuary income to either charitable or noncharitable uses, to extent that trust failed because of such invalid restraint on alienation, trustees would hold legal title to property on a resulting trust for settlor and his heirs.

8. Limitation of actions ⇐102(6), 103(2)

Ordinarily the trustee of a resulting trust is considered a voluntary trustee, and statute of limitations does not begin to run in favor of voluntary trustee until he repudiates the trust.

9. Limitation of actions ⇐102(2), 103(2)

Generally it is immaterial whether a trustee intends to hold for resulting beneficiary or for intended beneficiary of an invalid express trust, and with respect to statute of limitations trustee is treated as a voluntary trustee so long as he does not repudiate trust.

10. Limitation of actions ⇐103(2)

Where otherwise valid charitable trust was invalid to extent that it imposed invalid restraint on alienation, and trust was never repudiated by trustee, statute of limitations did not start running in favor of trustee, and action by settlor's administrator and heirs to have trust declared invalid and property distributed to them was not barred by statute of limitations.

11. Appeal and error ⇐866(1)

Where settlor's administrator and heirs brought action to set aside as invalid a trust instrument which conveyed property to a corporation as trustee with ministerial duties and vested management in a foundation to distribute a stated amount of income to settlor for life and a stated amount for certain annuities, with balance payable to a college to establish a department of philosophy and religion, and a judgment of nonsuit was entered in trial court, in reviewing judgment of nonsuit, alleged fact that plaintiffs were estopped by laches from bringing action on ground that college had seriously changed its position in reliance on validity of trust could not be considered.

12. Trusts ⇐34(1)

Where depositor placed fund from personal bank account in joint account with

another, and at time issued a directive that joint account should be held in trust for benefit of persons named should they be in special need, and second person accepted trust, joint account created a valid trust when account was opened.

13. Charities ⇐25
Trusts ⇐52

Where depositor placed funds from personal bank account in joint account with another and at same time issued directive that joint account should be held in trust for benefit of persons named should they be in special need, and depositor provided that remainder should be vested in trust foundation created by another trust instrument, interest created in life beneficiaries of bank account was severable from remainder, and even if foundation trust named as remainderman should be found to be wholly or partially invalid it would not affect validity of life interests, and trust bank account would be sustained to extent it provided for named life beneficiaries.

R. R. Colby and Joseph D. Taylor, Los Angeles, for appellants.

Allard, Brownsberger, Shelton & O'Connor, Joseph A. Allard, Jr., and L. A. Shelton, Pomona, Brady & Nossaman and Walter L. Nossaman, Los Angeles, for respondents.

TRAYNOR, Justice.

On May 23, 1939, Levi M. Davenport, then 78 years of age, conveyed certain property to La Verne College, a corporation, as trustee. The trustee was given only ministerial duties. The management of the trust, to be known as the "Davenport Foundation," was committed to a board of directors of five named persons who were to constitute the board of trustees of the foundation. The trust provided:

"Reserves

"Before distribution is made of any of the net income reserves shall be set aside as follows to-wit:

"(1) 25% of the gross income for taxes, supervision and upkeep.

"(2) 12% of the gross income for replacements and betterments.

"Distribution of Income

"All the net income available for distribution shall be paid in monthly installments, as follows:

"(1) To the Trustor, Levi M. Davenport, the sum of Four Hundred Dollars ($400.00) per month, for and during the term of his natural life.

"(2) To La Verne College, a corporation, the sum of Three Hundred Dollars ($300.00) per month for the purpose of establishing a department of Philosophy and Religion, which department shall be established at the beginning of the school year 1939–1940.

"(3) To make suitable and proper provisions for the support and maintenance of J. R. Davenport, my brother, as his needs may require, not to exceed however, One Hundred Dollars ($100.00) per month, all of which shall be at the sole discretion of the Board of Trustees. In the event that any of my children should come to want, the Board of Trustees shall use a portion of the income to care for them in so far as their needs may require, all of which shall be solely within the discretion of the Board of Trustees.

"(4) To American Bible Society, with its principal office at Bible House, New York City, the sum of Three Hundred Dollars ($300.00), per annum, payable annually at the discretion of the Board.

"(5) To the payment of annuities in such amounts as may be agreed upon between the Board of Trustees and the annuitants, who may add to this Trust.

"(6) All of the rest and residue of undistributed income shall be used by the Board of Trustees for such purposes consistent with the purposes of this trust as may be determined in the sole discretion of said Board of Trustees."

The trust then specified in detail the type of religious education that should be provided at La Verne College and the manner in which successors to the Board of Trustees should be selected. The trustees had to subscribe to certain enumerated

religious beliefs, and the Elders Body of the Church of the Brethren was given power over their selection and removal. The declaration of trust conferred usual administrative powers on the Board of Trustees and also provided:

"Others may add to this Foundation, provided the additional income shall be used in maintaining the Doctrines and Principles of our church, as herein set forth, provided, however, that the donor may reserve a portion of such income for himself or herself, or for relatives during his, her, or their lifetime. * * *

"In the event that any provision or provisions of this instrument are or are adjudged to be for any reason unenforceable the remainder hereof, disregarding such provisions, shall subsist and be carried into effect.

"This trust may not be revoked nor, except as otherwise herein provided may any of the corpus of the trust estate be withdrawn."

The Davenport Foundation was incorporated in 1940, and title to the property held by La Verne College that had been conveyed to it by the trustor was deeded to the Davenport Foundation.

Levi M. Davenport died January 6, 1947, and this action was then commenced by the administrator of his estate and his heirs to have the trust declared invalid and the property distributed to them. The complaint also stated a cause of action to have an alleged trust in a bank account declared invalid. This cause of action raises distinct issues and will be treated separately.

Plaintiffs attack the validity of the trust, first on the ground that its provisions suspend the power of alienation of the trust corpus in perpetuity and that its purposes are not wholly charitable, and secondly on the ground that the declaration of trust was not intended to be operative during the lifetime of the trustor and is therefore void as an attempted testamentary disposition. Defendants contend, however, that the noncharitable provisions are operative only for a period measured by lives in being, that the declaration of trust is nontestamentary in character, and that in any event plaintiffs' cause of action is barred by the statute of limitations. At the close of plaintiffs' case the trial court granted a nonsuit as to the causes of action attacking the validity of the declaration of trust establishing the Davenport Foundation. It is necessary to determine, therefore, whether there is evidence in the record that would support findings in plaintiffs' favor on the question of the validity of the trust, and if so whether their action is barred by the statute of limitations.

[1] The declaration of trust provided that Davenport should receive $400 per month and the use of his home rent free during his lifetime. The board of trustees were given power to consult with Davenport and absolved of any responsibility for loss resulting from following his requests, recommendations or advice. Plaintiffs do not contend that the reservations of these interests in the trustor would render the trust invalid as an attempted testamentary disposition. See, Tennant v. John Tennant Memorial Home, 167 Cal. 570, 576, 578–579, 140 P. 242; Restatement, Trusts, § 361. They contend, however, that there is evidence in the record that would support a finding that the trustor did not intend the declaration of trust to be operative at all during his lifetime. They rely on the facts that the trustees appointed Davenport manager of the foundation and allowed him to deal with the property in the same manner after the declaration of trust was executed as he had before. These facts, they contend, will support an inference that it was understood between Davenport and the trustees that the trust was not to become operative during his lifetime. They rely on the rule that parol evidence is admissible to prove that a document was not intended to take effect until the happening of a condition precedent. See, P. A. Smith Co. v. Muller, 201 Cal. 219, 222, 256 P. 411.

[2] Plaintiffs' contention overlooks the fact, however, that the declaration of trust constituted a tripartite agreement among Davenport, the board of trustees, and La Verne College. There is no evidence that La Verne College understood that the declaration of trust was not intended to be

presently operative. It was a party to the declaration of trust and operated under its terms. It received the payments provided for it and used the money according to the directions set forth in the declaration of trust. Under these circumstances, any secret intent of Davenport and the trustees that the declaration of trust should not be presently operative would be immaterial. Brant v. California Dairies, Inc., 4 Cal.2d 128, 133–134, 48 P.2d 13; Watson v. Peyton, 10 Cal.2d 156, 158, 73 P.2d 906. Accordingly, plaintiffs' contention that the trust is invalid because it was not intended to be operative during the trustor's lifetime cannot be sustained.

[3] The parties agree that an irrevocable trust, although partially charitable, is invalid to the extent that under its terms the trustees may apply the income or corpus to noncharitable purposes after the lapse of the statutory period of lives in being or 25 years from its creation. Civil Code §§ 715, 716; In re Estate of Sutro, 155 Cal. 727, 734–736, 102 P. 920; see, Restatement, Trusts, § 398. The only express statements of the purposes of the Davenport trust are found in the six paragraphs dealing with the distribution of income. The first of these, $400 per month to the trustor for life, presents no problem since the payments terminate on the trustor's death. The second and fourth are concededly charitable and hence valid, although the payments may continue beyond the statutory period. The parties' conflicting contentions with respect to the correct interpretation of the other paragraphs may be briefly summarized.

The third paragraph provides for payments to the children of the trustor. If the word "children" includes children who might be born after the creation of the trust, this paragraph would permit distribution of income for noncharitable purposes for longer than the statutory period. Defendants contend, however, that in view of the advanced age of the trustor the word "children" may properly be interpreted as referring only to then living children. See, Restatement, Property, § 243, illus. 4.

The fifth paragraph provides for the payment of annuities to persons who may add to the trust. Plaintiffs contend that under this paragraph the trustees could use income from the original trust corpus to pay annuitants who later contributed to the trust but who were not yet in being at the time of its creation. Defendants, on the other hand, contend that paragraph five is governed by the later provision providing that "Others may add to this Foundation, provided the additional income shall be used in maintaining the Doctrines and Principles of our church, as herein set forth, provided however, that the donor may reserve a portion of such income for himself or herself, or for relatives during his, her, or their lifetime." As so limited, they contend paragraph five only provides for the later creation of separate trusts whose noncharitable purposes will terminate within lives in being at the time of their creation.

Paragraph six provides that "All of the rest and residue of undistributed income shall be used by the Board of Trustees for such purposes consistent with the purposes of this trust as may be determined in the sole discretion of said Board of Trustees." Plaintiffs contend that under this paragraph income could be used for any purpose consistent with the purposes of the foregoing five paragraphs. They contend that payments to descendants or other relatives of the trustor born after the creation of the trust would be for a purpose consistent with payments to himself or his brother or his children. Thus under their interpretation the trustees would have power under paragraph six to devote income to noncharitable purposes for longer than the statutory period. Defendants, on the other hand, contend that when the instrument is read as a whole it is clear that the words "purposes consistent with the purposes of this trust" can properly be construed as meaning only purposes consistent with the religious purposes of the trust. They rely on the extensive provisions dealing with the type of religious education to be provided at La Verne and the religious qualifications required of the trustees. They also

point out that income from the property of others who add to the trust must be used to "maintain the Doctrines and Principles of our church."

[4] It would serve no purpose, however, to attempt to resolve these conflicting contentions from an examination of the declaration of trust standing by itself. The record contains relevant extrinsic evidence bearing on the question of interpretation that would support findings in favor of plaintiffs on at least some of their contentions. The trust was administered by the trustees with the assistance of the trustor for eight years before his death. The practical construction they placed upon the document is entitled to great weight in its interpretation. Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17. The most cogent evidence that a primary purpose of the trustor was to provide for descendants of his, whether or not they were living at the time the declaration of trust was executed, is the fact that an agreement was executed by the trustor and trustees whereby one of the trustor's grandchildren was to receive $100 per month for life after the death of her mother. Given full weight the execution of this agreement would sustain a finding that under paragraph six the trustees had power to devote income to noncharitable purposes after the statutory period had run. Granting a motion for nonsuit was therefore erroneous unless the severability clause may be given effect to eliminate the invalid powers or the statute of limitations bars plaintiffs' action. We have concluded that the severability clause may not be given such broad effect and that the statute of limitations does not bar the action.

[5, 6] The trust provision that "In the event that any provision or provisions of this instrument are or are adjudged to be for any reason unenforceable the remainder hereof, disregarding such provisions, shall subsist and be carried into effect" states essentially the same rule as that laid down in Probate Code section 101. That section provides that "Where [the testator's] intention cannot have effect to its full extent, it must have effect as far as possible." Under its terms the rule has been established that "'valid trusts should not be disregarded because in the instrument creating them one particular invalid trust is declared, unless the latter is so inseparably blended with the others that it cannot be eliminated without destroying the main intent of the trustor, or working manifest injustice to the other beneficiaries.'" In re Estate of Micheletti, 24 Cal.2d 904, 909, 151 P.2d 833, 835. It is assumed for the purposes of applying this rule in reviewing the judgment of nonsuit that under paragraph six the trustor intended the trustees to have discretion to apply the remainder of the income for the benefit of relatives of his, whether in being or not at the time of the creation of the trust, or for charitable purposes. The choice is stated to be in the sole discretion of the trustees. Under these circumstances the valid and invalid powers under paragraph six are inseparably blended and the whole paragraph must fail. In re Estate of Sutro, 155 Cal. 727, 734–735, 102 P. 920; In re Estate of Kline, 138 Cal. App. 514, 520, 32 P.2d 677; In re Estate of Vance, 118 Cal.App. 163, 164–165, 4 P.2d 977. Since the nonsuit must therefore be reversed, no purpose would be served by attempting to determine at this time in the absence of findings based upon all the evidence the extent to which other provisions of the trust may be severable from the invalid provisions, if any. See, Restatement, Trusts, § 398.

[7, 8] To the extent that the express trust may be found to have failed because of an invalid restraint on alienation, La Verne College and its successor trustee, the Davenport Foundation, will have held the legal title to the property on a resulting trust for the trustor and his heirs. See, Bainbridge v. Stoner, 16 Cal.2d 423, 428, 106 P.2d 423. Defendants do not dispute the rules that ordinarily the trustee of a resulting trust is considered a voluntary trustee and that the statute of limitations does not begin to run in favor of a voluntary trustee until he repudiates the trust. See, Berniker v. Berniker, 30 Cal.2d 439, 447–448, 182 P.2d 557. They contend, however, that in this case the trustees were involuntary resulting trustees because they

intended to hold under the express trust rather than under the resulting trust. They thus seek to distinguish the purchase money resulting trust cases where the trustee not only voluntarily holds in trust but intends to hold for the resulting beneficiary. It is generally held, however, that it is immaterial whether the trustee intends to hold for the resulting beneficiary or for the intended beneficiary of the invalid express trust. With respect to the statute of limitations, he is treated as a voluntary trustee so long as he does not repudiate the trust. See, 3 Scott on Trusts, § 409, pp. 2173–2174; 1 Nossaman, Trust Administration and Taxation, § 117, pp. 111–113, and cases cited. Any other rule would allow a trustor to evade prohibitions against restraint of alienation and perpetuities by establishing an invalid trust and merely refraining from attacking it until the statute of limitations had run.

[9] Defendants contend, however, that the cases of Page v. Page, 143 Cal. 602, 77 P.2d 452, and Mackenzie v. Los Angeles Trust, etc., Bk., 39 Cal.App. 247, 178 P. 557, establish the rule in California that in the case of a resulting trust arising because of the failure of an express trust, as distinct from the case of a purchase money resulting trust, no repudiation is necessary to start the statute of limitations running in favor of the trustee. The basis of the decision in the Page case is not entirely clear, and the statement relied upon in the Mackenzie case is dictum. Neither of these cases has been followed by later decisions of the California courts that have consistently classified resulting trusts of both types as voluntary trusts for the purposes of the statute of limitations. Steiner v. Amsel, 18 Cal.2d 48, 54–55, 112 P.2d 635; Bainbridge v. Stoner, 16 Cal.2d 423, 428–429, 106 P.2d 423; see, Ruddick v. Albertson, 154 Cal. 640, 643, 98 P. 1045. Thus to the extent that they are inconsistent with the generally prevailing rule, the Page and Mackenzie cases must be deemed to have been overruled. Since defendants never repudiated the trust, plaintiffs' action is not barred by the statute of limitations.

[10] On the basis of facts pleaded in their answer defendants finally contend that plaintiffs are estopped by laches from bringing this action. They contend that La Verne College has seriously changed its position in reliance on the validity of the trust. This defense may not properly be considered in reviewing the judgment of nonsuit, and in any event it would be obviated if on retrial it were determined that the provisions for the benefit of the college are severable from the remainder of the trust.

Shortly before his death Davenport decided that he should make some provision for ten or twelve nephews and nieces. He considered the possibility of adding $10,000 to the Foundation and giving the trustees discretionary power to provide up to $1000 for each nephew or niece if he or she should have special need for it. Instead, however, on November 23, 1946, he went to his bank with defendant Steinour, treasurer of the Foundation, to make arrangements with the bank to hold an account he had in such a way that Steinour could dispose of it after his death for the benefit of the nieces and nephews and the Foundation. An officer of the bank told Davenport that the bank could take no responsibility and suggested that Davenport open a joint account with a person whom he trusted to carry out his wishes. Davenport then transferred the money in his account into a joint account in his and Steinour's names. After he and Steinour left the bank, Davenport executed the following document:

"11–23–46

"I am directing the Davenport Foundation Inc. to set apart funds sufficient to hold $1000.00 in the interest of the following: [List of twelve relatives of Davenport.]

"This $1000.00 for each shall be set apart from funds derived from a personal bank account now in the Security-First National Bank at 230 Ea. Colorado St. Pasadena, Calif.

"The purpose is to have this, $1000.00 to be a part of Foundation except that if any of these above named persons are in special need, he or she shall appeal for a portion to

the $1000. to their interest, and the Foundation may allot to such person for their need from this personal fund.

"Signed L. M. Davenport."

The trial court did not grant a nonsuit on the cause of action by which plaintiffs sought to secure title to the joint bank account, but at the close of the trial made findings in defendants' favor. The court found that in opening the joint account and executing the directive Davenport created a trust of which Steinour was trustee. The beneficiaries were the named relatives during their lifetimes and thereafter the Davenport Foundation. The purpose of the trust was to provide funds for the named relatives if they should be in need and to add to the assets of the Foundation. The Foundation, however, filed a disclaimer of any interest in the fund.

[11] Plaintiffs contend that no trust was created because Davenport did not intend a trust to arise until after his death; that he merely appointed Steinour his agent to carry out his wishes after his death. They rely on the use of the future tense in the directive to show that no trust was created at the time of its execution. There was substantial evidence, however, to support an inference that by opening the joint account Davenport effectively created the trust. He had expressed his wish that the Foundation should immediately become the trustee. Opening the joint account was a substitute scheme adopted because of uncertainty over the tax consequences of giving the money directly to the Foundation. The use of the future tense in the directive is not inconsistent with the present creation of a trust of which Steinour was trustee. Steinour wished to have directions in writing as to what his duties should be. The directive indicated that the Foundation should become the trustee when the bank account was transferred to it. It does not compel the conclusion that no trust was to arise until that transfer was made. Accordingly, the trial court was justified in concluding that a trust arose when the joint bank account was opened.

[12, 13] Plaintiffs also contend, however, that the remainder interest in the Foundation is void because the declaration of trust setting up the Foundation is invalid for the reasons discussed above. They contend that because the remainder interest is void the whole trust in the bank account must fail and that the invalidity cannot be cured by the disclaimer of its interest by the Foundation. It is clear, however, that the interests created in the life beneficiaries are severable from the remainder. Thus even if the Foundation trust should be found to be wholly or partially invalid it would not affect the validity of the life interests. The life interests and the remainder are not inseparably blended. The invalid interest may be eliminated without destroying the main intent of the trustor or working injustice to other beneficiaries. Accordingly, under the rule set forth in Re Estate of Micheletti, 24 Cal.2d 904, 909, 151 P.2d 833, the trust in the bank account must be sustained to the extent it provides for the named beneficiaries.

Since defendant Davenport Foundation filed a disclaimer of any interest in the fund, the judgment should be modified to award the remainder interest in the joint bank account to the heirs at law of Levi M. Davenport. As so modified that part of the judgment adjudicating the disposition of the joint bank account is affirmed. In all other respects the judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.

99 Cal.App.2d 484

BROWN v. SAN FRANCISCO BALL CLUB, Inc.

Civ. 14191.

District Court of Appeal, First District, Division 1, California.

Sept. 19, 1950.

Myrtle R. Brown sued San Francisco Ball Club, Inc., a corporation, for injuries sustained by plaintiff when plaintiff was struck by an object while plaintiff was attending a professional baseball game. The Superior Court in and for the City and County of San Francisco, Sylvain J. Lazarus, J., entered a judgment upon a directed verdict for defendant and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that plaintiff had assumed the risk.

Judgment affirmed and appeal from order denying new trial dismissed.

1. Negligence ⇐32(1)

Generally, the owner of property, in so far as an invitee is concerned, is not an insurer of safety but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils and he is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care.

2. Theaters and shows ⇐6(18)

A spectator at a professional baseball game, by voluntarily entering into the sport as a spectator, knowingly accepts the reasonable risks and hazards inherent in and incident to the game.

3. Theaters and shows ⇐6(2, 11)

The management of a professional baseball team does not insure patrons against injury resulting from being struck by batted or thrown baseballs, and management need only exercise ordinary care to protect patrons against such injuries, and in so doing, is not obliged to screen all seats, and may provide screened seats only for as many patrons as may be reasonably expected to call for them on any ordinary occasion.

4. Theaters and shows ⇐6(18)

A spectator at a professional baseball game who chooses to occupy an unscreened seat, or is unable to secure a screened seat and consequently occupies an unscreened seat, assumes the risk of being struck by thrown or batted balls and if injured thereby he is precluded from recovering damages therefor.

5. Evidence ⇐5(2)

It is common knowledge that in baseball games hard balls are thrown and batted with such great swiftness they are liable to be thrown and batted outside the lines of the diamond.

6. Theaters and shows ⇐6(18)

The owner of professional baseball stadium performed duty toward patrons of professional game played at such stadium and sponsored by others than owner to whom owner had rented stadium, when owner provided screened seats affording protection from batted and thrown baseballs for all who might reasonably be expected to request them, and a mature patron who was struck by baseball when game had been in progress about an hour, and who had voluntarily occupied an unscreened seat, assumed risk of injury notwithstanding patron's limited experience with baseball.

Edward D. Mabson, San Francisco, for appellant.

S. A. Ladar, Jesse H. Steinhart, and John J. Goldberg, all of San Francisco, for respondents.

FRED B. WOOD, Justice.

This is an appeal by plaintiff from a judgment entered upon a directed verdict for the defendant in an action against San Francisco Ball Club, Inc., for damages for personal injuries sustained while attending a professional baseball game at Seals' Stadium, San Francisco.

The appeal is also from an order denying plaintiff's motion for new trial. That phase of the appeal should be dismissed, for such an order is not appealable.

Appellant, a woman of 46 years, attended the game as the guest of friends, one of whom furnished and purchased the tickets which were for seats in an unscreened portion of the stadium near the first-base line. The game was in progress when they arrived and about an hour later the accident occurred while the players were changing sides. Appellant was struck by some object and sustained serious injury. Evidence is lacking whether or not it was a baseball, or from what direction it came. However, the motion for directed verdict appears to have been made, and the issues discussed by the parties upon this appeal, upon the assumption that appellant was hit by a baseball, possibly thrown from second to first base, touching the first baseman's glove and passing thence into the stand.

Respondent owned and operated the stadium which had a seating capacity of 18,601, divided into screened and unscreened areas. Approximately 5,000 seats were behind a screen back of the home plate. The remainder were unscreened and in two sections behind the first-base and third-base lines respectively. Tickets for seats were sold at separate windows, one window for each of these three sections, each window marked for a particular section. Patrons decided where they would sit, and went to the appropriate window for their seats. It is generally true of all the games held in this stadium that a great majority of the patrons are situated in the unscreened sections, because they prefer an unobstructed view.

The attendance at this particular game was approximately 5,000. There were many vacant seats in each seating area. Most of the spectators were seated in the first-base and third-base unscreened sections, very few in the home-plate screened area.

For this game, held October 14, 1945, after the close of the Pacific Coast League season, respondent rented the stadium to others and had no control over the conduct of the game or the players; nor did it publicize the game or fix the admission price. Ticket sales at the stadium were handled by respondent's employees and the ushers who escorted patrons to their seats were its employees. The rental charged was a percentage of the gross receipts, not of the profits.

Accordingly, the duty of care, if any, which respondent owed to appellant was that of proprietor, toward a patron, of the stadium at which this game was played.

[1] The applicable general principle is that the owner of property, insofar as an invitee is concerned, is not an insurer of safety but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care. Shanley v. American Olive Co., 185 Cal. 552, 555, 197 P. 793; Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 560, 296 P. 76; Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 512, 50 P.2d 801; Dingman v. A. F. Mattock Co., 15 Cal.2d 622, 624, 104 P.2d 26. To the extent that the duty of self-protection rests upon the invitee, the duty of the invitor to protect is reduced. The extent of these relative duties depends upon many factors involving the capacity and opportunity of the invitor to protect the invitee and the capacity and opportunity of the invitee to protect himself.

[2] In baseball, one of these factors is that the patron participates in the sport as a spectator and in so doing subjects himself to certain risks necessarily and usually incident to and inherent in the game; risks that are obvious and should be observed in the exercise of reasonable care. This does not mean that he assumes the risk of being injured by the proprietor's negligence but that by voluntarily entering into the sport as a spectator he knowingly accepts the reasonable risks and hazards inherent in and incident to the game.

[3-5] The duty of the proprietor or operator of a baseball stadium toward his patrons is specifically defined, as follows: " 'With respect to the law governing cases of this kind, it has been generally held that one of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls;

that the management is not required, nor does it undertake to insure patrons against injury from such source. All that is required is the exercise of ordinary care to protect patrons against such injuries (Edling v. Kansas City Baseball, etc., Co., 181 Mo.App. 327, 168 S.W. 908), and, in doing so, the management is not obliged to screen all seats, because, as pointed out by the decisions, many patrons prefer to sit where their view is not obscured by a screen. Moreover, the management is not required to provide screened seats for all who may apply for them. The duty imposed by law is performed when screened seats are provided for as many as may be reasonably expected to call for them on any ordinary occasion (Wells v. Minneapolis Baseball, etc., Ass'n, 122 Minn. 327, 142 N.W. 706, 46 L.R.A., N.S., 606, Ann.Cas.1914D, 922; Brisson v. Minneapolis Baseball, etc., Ass'n, 185 Minn. 507, 240 N.W. 903); and if as in the cases of Wells v. Minneapolis Baseball, etc., Ass'n, supra, and Kavafian v. Seattle Baseball Club Ass'n, 105 Wash. 215, 177 P. 776, 181 P. 679, a spectator chooses to occupy an unscreened seat, or, as in the Brisson Case, supra, is unable to secure a screened seat and consequently occupies one that is not protected, he assumes the risk of being struck by thrown or batted balls; and, if injured thereby, is precluded from recovering damages therefor. As aptly said in Cincinnati Baseball Club Co. v. Eno, 112 Ohio St. 175, 147 N.E. 86, it is common knowledge that in baseball games hard balls are thrown and batted with such great swiftness they are liable to be thrown or batted outside the lines of the diamond, and spectators occupying positions which may be reached by such balls assume the risk of injury therefrom.'" Quinn v. Recreation Park Ass'n, 3 Cal.2d 725, 729–730, 46 P.2d 144, 146.

[6] It would seem necessarily to follow that respondent fully discharged its duty toward appellant, as concerns the risk to her of being hit by thrown or batted baseballs, when it provided screened seats for all who might reasonably be expected to request them, in fact many more screened seats than were requested. Hence, the injury suffered by her when struck by a thrown ball, while voluntarily occupying an unscreened seat, did not flow from, was not caused by, any failure of performance by respondent of any duty owed her, and did not give rise to a cause of action in her favor against respondent for damages for such injury.

Appellant seeks to take this case out of the application of the rule upon the theory that she was ignorant of the game of baseball and the attendant risks, hence cannot be said to have knowingly assumed the risk. The point is not well taken. Although she had a limited experience with baseball, she was a mature person in possession of her faculties with nothing about her to set her apart from other spectators and require of her a lower standard of self-protection from obvious, inherent risks than that required of other spectators. She was, at the time of the accident, 46 years of age; had lived in the San Francisco area since 1926; was about to go to a school for training and to have a job as saleswoman in a real estate office; had seen one baseball game prior to this, in 1928, played in a big field, not a ball park, when she observed the game from an automobile and did not see balls thrown or knocked into the crowd; and had seen kids in the street pitching balls. At the game at which this accident happened she knew there was no screen in front of her seat but failed to notice if any of the seats were behind a screen. She was in attendance for about an hour before the accident, which should have apprised her of the risk of being struck by a ball. Instead of observing, she paid no particular attention to the game and spent her time visiting with a friend. We find nothing here to take appellant outside the usual rule, whether it be said that this "common knowledge" of these obvious and inherent risks are imputed to her or that they are obvious risks which should have been observed by her in the exercise of ordinary care.

Similarly, in the Quinn case, plaintiff urged that because she was a minor of fourteen years and went to the game alone, the question whether she sufficiently understood the risk of being hit by a ball when sitting in an unscreened section was neces-

sarily for the jury. In overruling this contention, the court observed that the evidence showed that Quinn was a "high school student, strong, mentally alert, weighing about 125 pounds, and active in several kinds of athletics, including baseball." 3 Cal.2d at page 730, 46 P.2d at page 146. She had been interested in baseball for about two years, attending such games about twice a week during the baseball season. She was entirely familiar with the rules of the game, the manner in which it was played, the frequency with which foul balls were batted into the grandstand, and the danger to spectators of being struck thereby. This evidence demonstrated actual knowledge of the risk. The significant feature of the case is that in directing a verdict for the defendant the trial court determined from this evidence and from its observation that Quinn had sufficient capacity and understanding of the situation to be governed by the same rule as an adult. By affirming the judgment, the Supreme Court decided that such a question is one proper for the trial court to determine. In respect to the defense of contributory negligence, the Supreme Court said: "* * * it is held generally that, in the absence of a clear showing of abuse of discretion, reviewing courts will not interfere with the rulings of trial courts in submitting or refusing to submit to juries the question of whether the contributory negligence of children of the age of fourteen years and under was such as to prevent their recovering for injuries sustained by them" and that "there are a number of cases involving injuries to minors about the age of the girl in question here wherein it was held as a matter of law that they were guilty of contributory negligence * * *." 3 Cal. 2d at page 731, 46 P.2d at page 147.

Even more like the instant case on its facts is Brisson v. Minneapolis Baseball & Athletic Ass'n, 185 Minn. 507, 240 N.W. 903, cited with approval in the Quinn case. Brisson, an adult spectator, hit by a ball while occupying an unscreened seat at a league game, asserted ignorance of the risks to which he was exposed by the game, with which he said he was unfamiliar, although as a small boy he had witnessed ball games and as an adult had recently witnessed at least one league game and in this game had witnessed some six innings. Such ignorance he claimed took him outside of the usual rule in regard to spectators in his situation at such games. In overruling that contention the court made the following significant observation: "In our opinion no adult of reasonable intelligence, even with the limited experience of the plaintiff, could fail to realize that he would be injured if he was struck by a thrown or batted ball, such as are used in league games of the character which he was observing, nor could he fail to realize that foul balls were likely to be directed toward where he was sitting. No one of ordinary intelligence could see many innings of the ordinary league game without coming to a full realization that batters cannot, and do not, control the direction of the ball which they strike and that foul tips or liners may go in an entirely unexpected direction. He could not hear the bat strike the ball many times without realizing that the ball was a hard object. Even the sound of the contact of the ball with the gloves or mitts of the players would soon apprize him of that. It is our opinion that the plaintiff, notwithstanding his alleged limited experience, must be held to have assumed the risk of the hazards to which he was exposed." 185 Minn. at page 507, 240 N.W. at page 904. The cause was remanded with directions to the trial court to enter judgment for defendant notwithstanding the verdict.

Another case quite like the instant case upon its facts is Keys v. Alamo City Baseball Co., Tex.Civ.App., 150 S.W.2d 368. Plaintiff, a woman of 42 years, injured by a baseball while occupying an unscreened seat as a spectator at a game, testified she knew nothing of the game or the dangers lurking in and about playing fields, claiming that, therefore, it was the duty of the defendant to warn her of those dangers. The issue was submitted to the jury, which found that the failure to warn plaintiff constituted negligence of the defendant proximately causing the accident and that she did not assume the risk of being hit by a baseball. The court held

that both of those findings were conclusively refuted, both by the evidence and by common knowledge, quoting and applying the rule announced in the Quinn case. It further appeared that this was the second baseball game plaintiff had ever witnessed. Her son who accompanied her at this game was fourteen years of age. It was deemed inferable from the record that he was a baseball "fan," as is nearly every normal American boy. He was in the habit of attending games at this field. It was deemed further inferable as a matter of course, and not denied by the plaintiff, that for years the son had handled baseballs in and around his home under the watchful eye of his mother. Said the court: "This history, coupled with a universal common knowledge, was bound to have acquainted plaintiff with the potential dangers inherent in a baseball in play; with the fact that a flying baseball is capable of inflicting painful, sometimes serious and even fatal, injury; and that when in play it may fly in any direction and strike any bystander not on the alert to evade it. The knowledge of those characteristics of a baseball must be imputed to every reasonable person having the admitted experience and opportunities of plaintiff to know these things. Added to that imputed knowledge, plaintiff had sat through five or six innings in this very game, and her son, sitting by her side, noticed that several foul balls had been batted into the grand stands and within the range of his observation. We think the record conclusively refutes the jury finding that plaintiff did not 'assume the risk' of the very accident which befell her, and that the trial judge did not abuse his discretion in rendering judgment against plaintiff, notwithstanding that finding." 150 S.W.2d at page 371.

Continuing, the court held that the trial judge did not abuse his discretion in disregarding the jury finding that defendant was guilty of negligence in failing to warn plaintiff of the dangers incident to occupancy of the unscreened area, saying in that regard: "Plaintiff was a mature woman, presumably possessed of average intelligence, with nothing about her manner or appearance to set her apart from the thousands of other patrons entering the park on this occasion, or to indicate her claimed inexperience or lack of appreciation of the perils of the game. Her own son, sitting at her side, with full knowledge of those perils and of the extent of his mother's awareness, did not warn her. It would have been absurd, and no doubt would have been resented by many patrons, if the ticket seller, or other employees, had warned each person entering the park that he or she would be imperiled by vagrant baseballs in unscreened areas. And yet that would have been defendant's duty, if plaintiff's contention is sound. We overrule that contention." 150 S.W.2d at page 371.

Of the cases relied upon by appellant herein, only one, Ratcliff v. San Diego Baseball Club, etc., 27 Cal.App.2d 733, 81 P.2d 625, relates to the peculiar liability to their patrons of operators of baseball stadiums. That case involved a plaintiff who had elected to occupy a seat within a screened section and was injured while approaching her seat through an unscreened passageway. That case called for the application of a rule of liability materially different from that available to a person injured while occupying a seat in an unscreened section.

We conclude that the evidence herein, viewing it most favorably to the appellant, does not take her outside the application of the rule announced in the Quinn case; that she assumed the risk of injury in respect to which she complains; that the injury was not caused by any negligence upon the part of the respondent; and that determination thereof was a proper function of the trial court upon motion for directed verdict.

In the absence of negligence upon the part of the respondent, it is unnecessary to consider the question of contributory negligence upon the part of the appellant.

The judgment is affirmed and the appeal from the order denying a new trial is dismissed.

PETERS, P. J., and BRAY, J., concur.

99 Cal.App.2d 458

CLARY v. BASALT ROCK CO., Inc.

Civ. 7812.

Sac. 6092.

District Court of Appeal, Third District, California.

Sept. 18, 1950.

Elmer D. Clary brought action against the Basalt Rock Company, Inc., a corporation, to recover the amount of the sales tax, on machinery and equipment sold to defendant. From an order of the Superior Court, Tehama County, H. S. Gans, J., denying a motion for change of place of trial to the county of defendant's principal place of business, defendant appealed. The District Court of Appeal, Van Dyke, J., held that in the absence of an agreement, made or to be performed in Tehama County to pay the sales tax, the defendant corporation was entitled to have the place of trial changed.

Order appealed from reversed, and trial court directed to enter order changing place of trial.

1. Licenses ⇐32(2)

Where seller failed to collect state sales tax from buyer, state had no claim against buyer, since tax is upon retailer and not upon the consumer. Revenue and Taxation Code, § 6051 et seq.

2. Licenses ⇐32(2)

State Sales Tax Act providing taxes shall be collected by retailer from consumer in so far as possible, gives retailer no right of action against consumer, unless consumer has agreed to pay tax and fails to do so. Revenue and Taxation Code, §§ 6052, 6053.

3. Licenses ⇐32(2)

Where retailer and consumer have agreed upon price, saying nothing of a sales tax, no implied obligation arises on consumer's part to pay tax in addition to agreed price.

4. Corporations ⇐503(3)

In seller's action to recover sales tax, brought in county of sale, where the contract sale price had been paid and seller did not allege a contract to pay the tax, corporate buyer was entitled to have venue transferred to county of its principal place of business, since the action was not upon contract made or to be performed in county of sale, and no obligation or liability to pay the tax arose in that county. Const. art. 12, § 16.

5. Appeal and error ⇐1176(6)

Where sole question before District Court of Appeal was whether motion for change of place of trial should have been granted, but effect of decision on motion was that plaintiff had no cause of action, District Court of Appeal would not sustain a demurrer or order dismissal.

Riggins, Rossi & King, Napa, for appellant.

C. A. Stromsness, Corning for respondent.

VAN DYKE, Justice.

This appeal is from an order of the trial court denying a motion by defendant for a change of the place of trial. The action was begun in Tehama County Superior Court. The complaint alleges the corporate capacity of the sole defendant; the making of a written contract between plaintiff and defendant effecting a sale of a business and certain machinery and equipment used therein; that no provision was made in the agreement of sale relative to the payment of any State sales tax which might accrue to the State; that plaintiff, as seller, had been notified that there was due to the State of California a sales tax upon the sale of the equipment; that plaintiff had requested defendant to pay the tax which defendant had refused to do; that plaintiff had not paid the tax, and interest and penalties were accruing; that the tax should be paid by the defendant to plaintiff to be transmitted to the State. After referring to various provisions of the Sales Tax Act of this State, the complaint then alleges that there is an actual controversy between plaintiff and defendant as to liability to pay the tax assessed and judgment is prayed declaring the

rights and duties of the parties under the agreement relative to the payment of sales taxes and declaring that defendant should pay the same to plaintiff, together with penalties and interest accrued to be by plaintiff in turn paid to the State.

The defendant, Basalt Rock Company, Inc., a corporation, noticed a motion for change of place of trial and supported the same by an affidavit of its president. That officer averred the corporation's office and principal place of business at all times had been and still was in the County of Napa. He averred nothing further factually concerning the proper county for the trial of the action and his affidavit concluded with the usual statement of merits.

An affidavit in opposition to the motion was filed for plaintiff declaring that the sales contract was to be performed in Tehama County and was completed and performed therein. The affidavit contained the conclusion that by reason of the foregoing the "obligation was incurred in said county * * * and the venue should be retained therein."

The principal place of business of appellant is in Napa County, which fact was established without dispute in the trial court, and therefore appellant was entitled to have the cause moved unless the action is upon a contract made or to be performed in Tehama County or unless an obligation or liability arose or a breach occurred in that county. Hammond v. Ocean Shore Dev. Co., 22 Cal.App. 167, 133 P. 978; Ward v. Great Western Power Co., 135 Cal.App. 687, 27 P.2d 937; Byrum v. Stockton Comb. Harv. & Agr. Works, 91 Cal. 657, 27 P. 1093; Calif.Const., art. XII, Sec. 16.

When appellant proved that its principal place of business was in Napa County the question arose whether or not the county of original venue was still the proper county. Appellant contends that it was not for the reason that no facts permitting it to be sued in Tehama County existed. With this contention we agree.

[1] Respondent, while not stating the matter directly, assumes that when he sold machinery and equipment to appellant the transaction was taxable under the Sales Tax Act of this State. We make the same assumption. The essence of respondent's suit, therefore, based upon defendant's asserted obligation under the Sales Tax Act of this State, is to compel appellant to pay to respondent the amount of this tax. So far as the State of California be concerned, it has and had no claim against appellant arising out of the sale. The State Sales Tax Act "contemplates the imposing of the fixed rate of the tax on the gross receipts, as defined by the act, and not on the individual sale of merchandise; * * *. 'That in ultimate effect the fund out of which payment [of the tax] is made may be or in fact has been obtained by the dealer from his customers does not make the tax a levy upon the consumer.' * * * the act creates the relationship of sovereign power and taxpayer between the state and the retailer, and not between the state and the consumer. * * * The method of listing the price and the tax separately and defining taxable gross receipts as the amount received less the amount of the tax added, merely avoids payment by the retailer of a tax on the amount of the tax. Under such provisions the effect stated in the case last cited still obtains, namely, that 'the purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all,' and 'the amount added because of the tax is paid to get the goods and for nothing else. Therefore it is part of the price.' The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales." Western Lithograph Co. v. State Bd. of Equalization, 11 Cal.2d 156, 163, et seq., 78 P.2d 731, 735, 117 A.L.R. 838. The court further said in the cited case 11 Cal.2d at page 162, 78 P.2d at page 735, of the reported opinion: "In every case in which that question has arisen under the California

Retail Sales Tax Act, the courts have uniformly and consistently recognized the legislative intent and adhered to the construction that the tax is upon the retailer and not upon the consumer." See, also, National Ice & Cold Stor. Co. of California v. Pacific Fruit Exp. Co., 11 Cal.2d 283, 287-288, 79 P.2d 380.

[2, 3] It is true that the act provides, as the complaint alleges, that the taxes thereby imposed shall be collected by the retailer from the consumer in so far as it can be done; and that a retailer is forbidden to advertise or hold out or state that he will absorb the tax, or not add it to the purchase price or refund it if added. See Sections 6052, 6053, Rev. & Tax.Code. But these provisions give the retailer no right of action against the consumer unless the consumer has agreed to pay the tax as a part of the price and has failed to do so, thus in part failing to pay the agreed price. We think that when a retailer and a consumer have agreed upon a price, saying nothing of a sales tax, no implied obligation arises on the consumer's part to pay a tax in addition thereto. The question of what, if any, addition for taxes shall be a part of the sale price is a matter to be agreed upon when the whole price is fixed. When that price is fixed and the consumer agrees to pay it "to get the goods" the retailer can no longer have any demand upon him because he may not in fact have passed to the consumer the resultant sales tax. In Roth Drug, Inc., v. Johnson, 13 Cal.App.2d 720, 736, 57 P.2d 1022, 1029, it was held that the section of the Sales Tax Act we are now considering "merely authorizes the retail merchant to reimburse himself from the consumer in so far as it may be consistently done. He is not required to do so. He may waive that right."

[4] Turning now to the transaction which respondent by his complaint alleges had occurred between himself and the appellant corporation, we find a direct allegation that when the bargain was made no provision was made for the payment by appellant of any sum referable to the sales tax, but of course it is alleged that the sale price agreed upon was a fixed sum. If ultimately this transaction enhanced respondent's liability to the State government as a retailer it is no concern of appellant. It is not alleged to have contracted to pay that sum. It is alleged appellant agreed to pay a certain price for that which it bought and it is further alleged that it has paid that price. The contract, therefore, was by that performance completely discharged and this suit cannot be said to be based upon the contract. It is, therefore, quite immaterial, so far as venue is concerned, that a contract was made and was to be performed in Tehama County. For the same reasons it must be said that the action is not one upon an obligation or liability to pay a tax arising in Tehama County, for no such obligation or liability arose by reason of the occurrences referred to in the complaint and of course it likewise follows that the suit is not upon the breach of such obligation, since there must be an obligation before there can be a breach thereof.

Respondent argues that "If there is any obligation on the part of defendant to pay a sales tax, that obligation is the result of a transaction which took place in Tehama County and as a direct result of a contract entered into in Tehama County. If there is such an obligation, then suit may be brought in Tehama County." We can concede the validity of the foregoing statements, but respondent is not advantaged thereby. As we have said, the obligation referred to never existed.

We conclude that this action, brought against a corporation with its principal place of business in a county other than that in which the action was begun, is not upon a contract made or to be performed or upon an obligation or liability arising or for a breach occurring in Tehama County and therefore that the trial court should have granted the appellant's motion to change the place of trial to the county wherein is located the principal place of business of the corporation.

[5] We are aware that the effect of what we have said is that respondent has stated no cause of action against the appellant, and for all that now appears upon the

face of the complaint which he filed, he cannot state a cause of action against it. Nevertheless, the sole question before this court is whether or not the motion for change of place of trial should have been granted and what we have said is for the purpose of answering that question only. We answer it from the record as now made up. It is not for this court to sustain a demurrer or order a dismissal. That function, including permission to amend if amendment can be made, is to be performed by the court in which the further proceedings in the cause occur. Abbott v. Peoples' Nat. Fire Ins. Co., 132 Cal.App. 357, 359, 22 P.2d 544.

The order appealed from is reversed and the trial court is directed to make and enter an order changing the place of trial of this action to the Superior Court in and for the County of Napa.

ADAMS, P. J., and PEEK, J., concur.



STATE v. BROTHERHOOD OF RAILROAD TRAINMEN et al.

Civ. 14284.

District Court of Appeal, First District, Division 2, California.

Sept. 18, 1950.

Hearing Granted Nov. 16, 1950. *

Suit by the State against Brotherhood of Railroad Trainmen, an unincorporated association, and another for a declaration of rights and duties under a contract between Board of State Harbor Commissioners and defendant Brotherhoods respecting rates of pay, rules, and working conditions affecting employees of state-owned belt railroad. The Superior Court in and for the City and County of San Francisco, Andrew R. Schottky, J., entered a judgment in favor of defendants and plaintiff appealed. The District Court of Appeal, Goodell, J., held that state-owned belt railroad was subject to Federal Railway Labor Act, that State Harbor Board had power to negotiate contracts fixing rates of pay of employees of such railroad without approval of state Personnel Board or State Department of Finance and that contract was valid and binding, but that certain conclusions of trial court should be rewritten so as not to conflict with such holding of validity.

Conclusions of law modified in accordance with opinion and judgment affirmed.

* Subsequent opinion 232 P.2d 857.

1. Master and servant ⇐15(19)

Belt railroad engaged as common carrier in interstate commerce along waterfront of San Francisco harbor, though owned and operated by state, was subject to Federal Railway Labor Act, and state must deal with employees of such railroad on the same basis and in the same way as would a privately owned carrier. Railway Labor Act, §§ 1 et seq., 2, 45 U.S.C.A. §§ 151 et seq., 152; U.S.C.A.Const. art. 6.

2. Commerce ⇐27(2)

If any action of State Harbor Board in connection with contract regulating rates of pay, rules and working conditions of employees of state-owned and operated belt railroad engaged as a common carrier in interstate commerce should collide with some conflicting provision of state law, Board must follow the course of conduct called for by Federal Railway Labor Act. Railway Labor Act, §§ 1 et seq., 2, 45 U.S.C.A. §§ 151 et seq., 152; U.S.C.A.Const. art. 6.

3. Navigable waters ⇐14(2)

Legislation relating to powers and jurisdiction of State Harbor Board is special in its very nature and character and in its application to the subject matter within its particular provisions such legislation must prevail over general statutes. Harbors and Navigation Code, §§ 1705, 1900, 1990, 3150.

4. Statutes ⇐162

Where both special and general statutes treat of the same subject, unless they are irreconcilably inconsistent, the general statute, though later in date, does not repeal the special, but the special act will prevail in its application to the subject matter coming within its particular provisions.

5. Navigable waters ⇐14(2)

The power of State Harbor Board under special legislation to fix the compensation of its employees was not affected by provisions of general statute making salary fixed by any state agency for an employee or officer and payable out of state funds subject to approval of Department of Finance. Harbors and Navigation Code, §§ 1705, 1900, 1990, 3150; Government Code, § 18004.

6. Statutes ⇐185

Where statute gives power to perform an act, the authority to employ all necessary means to accomplish the end is implied.

7. Railroads ⇐18

The power of State Harbor Board under special legislation to maintain and operate belt railroad along San Francisco waterfront and fix the compensation of board's employees carried with it the authority to negotiate contracts fixing the rates of compensation for employees of belt railroad to the exclusion of any exercise of such powers by State Personnel Board, Department of Finance, or any other state agency. Railway Labor Act, §§ 1 et seq., 2, 45 U.S.C.A. §§ 151 et seq., 152; Harbors and Navigation Code, §§ 1705, 1900, 1990, 3150; Government Code, §§ 18004, 18706, 18707.

8. States ⇐67

The functions of State Personnel Board are purely administrative and it has no powers of management or of operation such as those expressly vested in State Harbor Board. Harbors and Navigation Code, §§ 1705, 1900, 3150; Government Code, §§ 18706, 18707; 18500–19765; Const. art. 24, §§ 2, 3.

9. Navigable waters ⇐14(2)

As applied to state-owned belt railroad along San Francisco waterfront, a special law authorizing State Harbor Board to fix compensation of its employees prevails over provisions of general civil service law authorizing State Personnel Board to establish and adjust salary ranges for each class of position in the State Civil Service. Harbors and Navigation Code, §§ 1705, 3150; Government Code, §§ 18500–19765, 18850.

10. Declaratory judgment ⇐347

In suit by state for a declaration of its rights and duties under collective bargaining contract with brotherhoods representing employees of state-owned belt railroad, apparent conflicts between state law and contract provisions with respect to dismissals, demotions, suspensions, sick leave, leaves of absence, promotions, lay-offs and duration or emergency employees could not be determined in absence of sufficient detailed information in the record to show how various employees were affected either individually or by groups. Harbors and Navigation Code, §§ 1705, 1900, 3150; Government Code, §§ 18500–19765; Code Civ.Proc. § 1060; Const. art. 24, §§ 1–4.

11. Commerce ⇐12

The Railway Labor Act does not so pre-empt the field of regulation of working conditions as to entirely foreclose state action respecting carriers within such Act. Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.

12. Master and servant ⇐15(9)

The Railway Labor Act does not undertake governmental regulation of wages, hours or working conditions, but seeks merely to provide a means by which agreements may be reached with respect thereto. Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.

13. Master and servant ⇐15(9)

The Railway Labor Act does not fix or authorize any one to fix generally applicable standards for working conditions, but seeks to compose differences that threaten continuity of work in order that disagreements about conditions will not interfere with interstate commerce. Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.

14. Master and servant ⇐15(8)

The Railway Labor Act leaves open a field of regulation of working conditions wherein civil service provisions for the benefit of state employees may co-exist with a collective bargaining agreement af-

fecting employees of state agency operating a railroad subject to the act without colliding with such agreement or with Railway Labor Act. Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.

15. Master and servant ⇐3(1)

Contract between State Harbor Board and brotherhoods of railway employees respecting rates of pay, rules and working conditions affecting employees of belt railroad along San Francisco waterfront owned by the state and operated by Harbor Board was valid and binding. Railway Labor Act, §§ 1 et seq., 2, 45 U.S.C.A. §§ 151 et seq., 152; Harbors and Navigation Code, §§ 1705, 1900, 1990, 3150; U.S.C.A. Const. art. 6.

16. Appeal and error ⇐1152

Trial court's conclusions that, in negotiating with employees of state-owned belt railroad respecting increases in rates of pay, etc., State Harbor Board must consult with Personnel Board and Department of Finance and that any agreement with such employees must in proper cases be subject to approval of such agencies were inconsistent with holding that contract entered into by Harbor Board respecting rates of pay, rules and working conditions of such employees was valid and such conclusions should be rewritten by appellate court so as to negative any necessity for such consultation or approval. Railway Labor Act, §§ 1 et seq., 2, 45 U.S.C.A. §§ 151 et seq., 152; Harbors and Navigation Code, §§ 1705, 1900, 3150; Government Code, §§ 18004, 18500–19765; Code Civ. Proc. § 956a; U.S.C.A.Const. art. 6.

Fred N. Howser, Attorney General, Herbert E. Wenig, Deputy Attorney General, for appellant.

Clifton Hildebrand, Oakland, for respondent.

James H. Phillips, Sacramento, for intervenor.

GOODELL, Justice.

The State sued under § 1060, Code of Civil Procedure, for a declaration of its rights and duties under a contract entered into on September 1, 1942 by the Board of State Harbor Commissioners with the defendant Brotherhoods respecting the rates of pay, rules, and working conditions affecting certain employees of the State Belt Railroad. From a judgment in favor of the defendants this appeal was taken on an agreed statement under rule 6a.

The State Belt Railroad is owned by the State of California, and its management, control and operation have always been committed by statute to the Harbor Board. The Railroad operates on the waterfront of San Francisco and its functions and the scope of its activities are fully described in several decisions, including Sherman et al. v. United States, 282 U.S. 25, 51 S.Ct. 41, 75 L.Ed. 143; United States v. State of California, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567, and Maurice v. State of California, 43 Cal.App.2d 270, 110 P.2d 706. The Railroad has between 125 and 225 employees, depending on the volume of business on hand, and the Harbor Board has approximately 425 other employees engaged in its other harbor activities at San Francisco.

The principal question presented is whether the Railroad is subject to the provisions of the Federal Railway Labor Act, 45 U.S.C.A. § 151 et seq. Section 152 thereof provides that "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." Other questions in the case are whether, if the Railroad is subject to the Act, the duty of representing it in making and maintaining such agreements is that of the Harbor Board or of the State Personnel Board, and whether such agreements must be approved by the State Department of Finance. The appellant claims that state statutes on these subjects are conflicting.

The contract in question was negotiated and signed by the Harbor Board, and neither the Personnel Board nor the Department of Finance had any hand in it.

The case of United States v. State of California, supra, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567, is decisive of the main question. That case arose out of a violation by the same State Belt Railroad, of the Federal Safety Appliance Act, 45 U.S.C.A. ch. I, § 6. The United States sued the State for a $100 penalty for the violation; the State resisted payment on the ground that the Belt Railroad was not subject to the Act; the District Court held that it was. The Circuit Court of Appeals reversed, 75 F.2d 41, on a jurisdictional ground, but the Supreme Court reversed the latter court. In holding that the Railroad was an interstate carrier the Supreme Court said that "California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. * * * The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection." [297 U.S. 175, 56 S.Ct. 424.]

In answer to the argument that California in operating the Belt Railroad was performing a public function in its sovereign capacity hence could not constitutionally be subjected to the provisions of the federal act, the court said: "Despite reliance upon the point both by the government and the state, we think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. [Citations.] The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. * * *"

The sovereignty question was later set at rest by our own Supreme Court in People v. Superior Court, 29 Cal.2d 754, 763, 178 P.2d 1, 6, where it said that "The fact that the service is conducted for the benefit of commerce and without profit is insufficient to take it out of what otherwise would be an industrial and commercial character."

Maurice v. State of California, supra, 43 Cal.App.2d 270, 110 P.2d 706, followed United States v. California, supra, in holding that the State Belt Railroad was subject to the Federal Safety Appliance Act, 45 U.S.C.A. § 1 et seq. It held also that it was likewise subject to the Federal Employers' Liability Act, 45 U.S.C.A. ch. II, § 51 et seq.

State of California v. Anglim, 9 Cir., 129 F.2d 455, held that it was subject to the Federal Carriers' Taxing Act, 45 U.S.C.A. § 261 et seq.

In United States v. California, supra, the court said that the State Belt Railroad's service did "not differ in any salient feature from that which this Court, in United States v. Brooklyn Terminal, supra, 249 U.S. 296, 304, 305, 39 S.Ct. 283, 63 L.Ed. 613, 6 A.L.R. 527, held to be common carriage by rail in interstate commerce within the meaning of the Federal Hours of Service Act", 45 U.S.C.A. § 61. The analogy just drawn forecasts what the holding would be if the State Belt Railroad's status should come before that court under the latter Act.

The source of the Federal Safety Appliance Act, the Federal Employers' Liability Act, the Federal Carriers' Taxing Act and the Federal Hours of Service Act is the commerce clause and that, too, is the source of the Railway Labor Act. If the State Belt Railroad is within the purview of all

those pieces of interstate legislation it is certainly subject to the Railway Labor Act.

In United States v. California, supra, the court attached no importance to the fact that the Safety Appliance Act was silent as to its applicability to states or state-owned carriers. In several places in the opinion that subject is mentioned and discounted, hence appellant's argument that Congress could not have intended the Railway Labor Act to apply to states or state-owned railroads, is not persuasive despite the citation of four statutes where Congress took pains to expressly exclude states.

[1, 2] Under the authorities it must be held that the State Belt Railroad is subject to the Federal Railway Labor Act and that in dealing with its employees who are themselves within that act the State of California is bound to deal on the same basis and in the same way as would a privately-owned carrier. If, as a consequence, some action or other of the Harbor Board in connection with the contract should collide with some conflicting provision of state law, there simply would be nothing the Board could do about it but follow the course of conduct dictated or called for by the Railway Labor Act, wheresoever that might lead, since the latter act is "the supreme Law of the Land". Const. Art. VI. It is the plain duty of this and every other state court in such cases to see that the supremacy clause is obeyed.

The State next contends that "the Harbor Board did not have and does not have authority to collectively bargain or to make a collective bargaining contract providing for rates of pay and working conditions in conflict with state civil service laws."

The State also contends that there is a direct conflict between § 1705, Harbors and Navigation Code and § 18004, Government Code.

Section 1705 reads: "* * * The [Harbor] board shall fix the compensation of its officers and employees other than the commissioners." When the contract was made in 1942 the section read substantially the same.

Section 18004 reads: "Unless the Legislature specifically provides that approval of the Department of Finance is not required, whenever any State agency or court fixes the salary or compensation of an employee or officer, which salary is payable in whole or in part out of State funds, the salary is subject to the approval of the Department of Finance before it becomes effective and payable * * *." When the contract was made in 1942 this was § 675.1, Pol.Code, which read substantially the same.

These doubts as to the agency wherein the contractual authority resides and this apparent conflict in legislation, call for an inquiry into the Harbor Board's powers and jurisdiction.

We shall not attempt to give a complete chronological history of the legislation relating to the Harbor Board, but merely enough of it to show that such part thereof as bears on the present problems has followed one definite and uniform pattern with singular consistency for almost nine decades.

By an act of the legislature approved April 24, 1863, the Board of State Harbor Commissioners was created, and called by that name. Stats.1863, p. 406. It is so named today.

The act of 1863 provided for three commissioners and the board is still composed of three commissioners.

The act of 1863 directed that the commissioners should take possession of and hold all that portion of the Bay of San Francisco lying along the water front and for the distance of 600 feet into the waters of the bay. The jurisdiction of the Board so vested has never been narrowed but has been materially enlarged. The section dealing with the Board's jurisdiction became § 2524, Pol.Code, and eventually found its way into several sections of the Harbors and Navigation Code.

The same act of 1863 provided in § 12 that "No contract or obligation entered into by the Commissioners under this Act, which creates a liability, or authorizes the payment of money, shall be valid and of binding force unless the same shall be signed by all three of said Commissioners, and countersigned by the Secretary of the

Board * * *." This became § 2527, Pol.Code, then § 1990, H. & N. Code, which reads substantially the same today as did the Act of 1863.

As early as 1876, § 2524, Pol.Code, provided that "The commissioners shall have power to make reasonable rules and regulations concerning the control and management of the property of the state, which is intrusted to them by virtue of this article * * *." Section 1900, H. & N.Code, now reads substantially the same.

Sixty-one years ago § 2552, Pol.Code, was amended, Stats.1889, p. 388, to fix the salaries of the president of the board, the other two commissioners, other officers and certain employees. It also provided that "The Board must fix the compensation of the other employees." When § 1705, H. & N.Code, was enacted in 1937, it contained substantially the same provision. In 1945 § 1705 was amended and now reads: "* * * The board shall fix the compensation of its officers and employees other than the commissioners."

In 1889 the legislature adopted "An Act to authorize the Board of State Harbor Commissioners to construct railroads over State lands, and lands within their jurisdiction, along the exterior waterfront line of the City and County of San Francisco, and to regulate the use of the same." Stats.1889, p. 388. This apparently was the birth of the State Belt Railroad. In 1913 the board's powers were enlarged with respect to the "state railroad", Stats.1913, p. 383, and in 1937, § 3150, H. & N.Code, restated those powers.

[3, 4] The foregoing sketch suffices to show that the Harbor Board legislation is special in its very nature and character. However, authority is not wanting, for in Bateman v. Colgan, Controller, 111 Cal. 580, 585, 44 P. 238, 240, the court, speaking of § 2524, Pol.Code, which as we have just seen dealt with the Harbor Board's jurisdiction, said: "section 2524 is a part of a special act, applicable to one particular board". The Bateman case held that the Harbor Board, in contracting for the construction of the Ferry Building in San Francisco, correctly resorted to the legal machinery provided by its own legislation, § 2524, in apparent disregard of the provisions of a statute called the "Public Buildings Act". The force of Bateman v. Colgan in its applicability to the instant case is manifest when it is pointed out that the "Public Buildings Act" required "the plans, estimates, etc., to be submitted for approval to the governor, treasurer, and secretary of state, and the contracts thereunder to be certified by the attorney general, before commencing construction." Despite these clear requirements the Harbor Board went ahead under its own contract-making powers as prescribed in § 2524, without submitting anything to the four officials named in the other statute. In upholding the Board's action the court, discussing the two statutes and the dates of their adoption, said, 111 Cal. 586, 44 P. 240: "It is not pretended that there is any express repeal, and it is an established rule of construction that the law does not favor a repeal by implication, but that, where there are two provisions relating to the same subject-matter, they must, if possible, be construed so as to maintain the integrity of both. And, where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter so far as coming within its particular provisions."

The rule (see 23 Cal.Jur. pp. 706–709) is well settled and has been repeatedly applied, two recent cases being In re Shull, 23 Cal.2d 745, 146 P.2d 417, and Division of Labor Law Enforcement v. Moroney, 28 Cal.2d 344, 170 P.2d 3.

[5] In the instant case the contract of 1942 was negotiated and signed by the Harbor Board without any approval by the Department of Finance, and despite the provisions of § 675.1, Pol.Code, now § 18004, Gov.Code. It was made under the authority and within the framework of the Harbor Board's own legislation. The parallel is perfect between this and the Bateman case since in both instances the apparently conflicting legislation required the approval of other state officers. On

the authority of that case, and others like it dealing with conflicts between general and special acts, we must hold that the provisions of § 675.1, now § 18004, being statewide and general in their scope, do not touch or affect compensation fixed by the Harbor Board for its employees under the special provisions of the Harbor Board legislation as a whole, and of § 1705 in particular.

[6, 7] Bateman v. Colgan happens, incidentally, to state another familiar rule, namely, that "where power is given to perform an act, the authority to employ all necessary means to accomplish the end is always one of the implications of the law * * *." Section 3150, Harbors and Navigation Code, gives the Board authority to maintain and operate the State Belt Railroad. A railroad cannot be maintained or operated without hands, and hands have to be paid. Section 1705 expressly provides that the board shall fix their compensation. Certainly, then, the power to maintain and operate the railroad and to fix the compensation of its employees carries with it the authority to negotiate contracts which fix the rates of such compensation.

The vesting of these powers in the Harbor Board necessarily excludes the exercise of the same powers by the State Personnel Board, the Department of Finance, or any other state agency. Again, see the Bateman case, supra, 111 Cal. at page 583, 44 P. at page 239, holding that the Harbor Board is vested with the "control and management exclusively, with certain exceptions not pertinent here, in said harbor commissioners."

[8] Appellant's contention that the power to enter into agreements respecting wages, hours and working conditions of Belt Railroad employees resides in the State Personnel Board, not the Harbor Board, is set at rest by the failure of the Civil Service Act to vest in the Personnel Board any such power either expressly or by implication. That Board has purely administrative functions. It and its executive officer are charged with the duty of administering the Civil Service Act throughout the State. It is vested with no powers of management or operation such as those expressly vested in the Harbor Board.

Moreover, the Harbor Board has always had broad contract-making powers, while those of the Personnel Board are extremely narrow and limited. Appellant has directed our attention to none, and the only ones we have found are in §§ 18706, 18707, Gov. Code, which relate to agreements with personnel agencies in other jurisdictions, political subdivisions, State agencies excepted from State civil service, counties, cities, districts and other subdivisions of the State—all of which might be said to be inter-departmental.

The remaining problems relate to provisions of state law which are seemingly inconsistent with the contract.

In 1934 Article XXIV dealing with State Civil Service was added to the State Constitution. Section 1 provides that "Permanent appointments and promotion in the State Civil Service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination." Section 2 creates the State Personnel Board and § 3 vests it with all "the powers, duties, purposes, functions and jurisdiction" formerly vested in any State officer or agency under the old 1913 Civil Service law. Section 4 provides that State civil service shall include every officer and employee of the State, with fourteen specified exceptions, but the employees of the Belt Railroad are not among them.

In pursuance of those constitutional provisions the legislature in 1937 adopted the present Civil Service Act which replaced the Act of 1913. The new act, Stats.1937, p. 2085, has been codified in §§ 18500 to 19765 of the Government Code. Stats.1945, p. 539.

[9] Appellants draw attention to seven of the principal conflicts apparently existing between our Civil Service Act and the contract of September 1, 1942. The first of these is with respect to rates of pay and overtime. Section 18850, Gov.Code, provides that "The [Personnel] board shall establish and adjust salary ranges for each class of position in the State civil serv-

ice. * * *" Since Belt Railroad employees are civil service employees the language of § 18850 would be broad enough to include them but for § 1705, H. & N.Code, supra. We have already seen, in discussing § 18004, Gov.Code, ex. 675.1, Pol.Code, that one law is general and the other special. So it is with respect to § 18850. That section does not control § 1705, H. & N.Code, for that section, which is a special law, exclusively governs the fixing of compensation for Harbor Board employees. It follows that there is no conflict between § 18850 and the contract executed pursuant to the Railway Labor Act, or the Act itself.

The other six instances are: (1) dismissals, demotions and suspensions; (2) sick leaves; (3) leaves of absence; (4) promotions; (5) lay-offs, and (6) duration or emergency employees.

[10] Granting that the Civil Service Act contains provisions in conflict with the contract of September 1, 1942, still nothing will be gained by making a detailed comparison of these differences since there are from 125 to 225 employees affected by the contract and it may be safely assumed that the civil service status of the members of such a large group will present perhaps as many variations as there are railroad men. Moreover, there is not in this record sufficient detailed information to show how the various employees are affected either individually or by groups. For these reasons we deem it not only prudent but fairer to the employees to refrain from saying anything (beyond what we have already said) which might be invoked later on if and when specific problems arise in individual disputes.

[11-13] It is perfectly clear that the Railway Labor Act does not so pre-empt the field of regulation of working conditions as to entirely foreclose state action respecting carriers within that Act unless Congress has occupied the field in question to the exclusion of such state action, Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571; see, also, People of the State of California v. Thompson, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219. In the Terminal case the court said: "The Railway Labor Act, like the National Labor Relations Act [29 U.S.C.A. § 151 et seq.], does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce." [318 U.S. 1, 63 S.Ct. 423.] While that case deals with working conditions, the rule must be the same with respect to such questions as the six instanced by appellant.

[14] It would seem, therefore, that there is still an open field wherein civil service provisions for the benefit of State employees may coexist with such a contract as that of September 1, 1942, without colliding with it or with the paramount federal legislation under which it was made. Indeed it appears that the contract in question contains several provisions dove-tailing it with the State Civil Service Act and giving the Personnel Board certain functions.

[15] We are satisfied that the contract of September 1, 1942 is valid and binding. We are satisfied, also, that we have answered all the other questions propounded in this case, both by the appellant and the intervenor.

Appellant contends that "the trial court failed to adequately deal with the submitted question concerning the validity of the present contract", in that the holding that the contract is valid is inferentially contradicted by two of the conclusions of law.

The first conclusion (numbered III) is "That in negotiating increases in rates of pay the Board * * * is acting as an agent of the State, * * * *and of necessity must confer and counsel with the State*

Personnel Board and State Department of Finance, and any agreement reached with the employees must in proper cases be subject to the approval of both these agencies."

[16] We have held that the power and authority of the Harbor Board was and is exclusive and independent of both the Personnel Board and the Department of Finance. If that holding is correct, then the emphasized portion of the conclusion is not consistent therewith.

The second conclusion (numbered IV) is "That the Board * * * and its president should represent the State in negotiating with the employees working on the State Belt Railroad. *Of course, it must counsel and confer with the State Personnel Board and the State Department of Finance, and ultimately the resulting agreement must be such an agreement that meets with the approval of these agencies.*"

For the reasons just stated, the emphasized portion of the latter conclusion is likewise subject to the same criticism.

Accordingly, under the power granted by § 956a, Code Civ.Proc., we are rewriting the first conclusion to read:

"III.

"That in negotiating under the Railway Labor Act respecting rates of compensation for employees of the State Belt Railroad the Board of State Harbor Commissioners was and is acting as the agent of the State of California, and was and is the only agent or agency of said State authorized and empowered to so act. That in negotiating, making, maintaining and performing all contracts respecting the compensation of said employees said Board is not required by law to confer or counsel with the State Personnel Board or the State Department of Finance, and the contract or contracts so negotiated and entered into, and the rates of compensation so fixed by said Board of State Harbor Commissioners are not in any case subject to the approval of said Personnel Board and said Department of Finance, or either of them."

We are also rewriting the second conclusion to read:

"IV.

"That the Board of State Harbor Commissioners and its President should represent the State in negotiating with the employees working on the State Belt Railroad."

With the conclusions of law modified in the foregoing respects the judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



BLACHE v. BLACHE et al.
Civ. 14250.

District Court of Appeal, First District, Division 1, California.

Sept. 12, 1950.

Rehearing Denied Oct. 11, 1950.

Hearing Granted Nov. 9, 1950.*

Action by Anna J. Blache against her husband, Maurice J. Blache, also known as Jean J. M. Blache, and Jeanne C. Pedebidou, also known as Jeanne Blache, wherein plaintiff sought separate maintenance, recovery of certain community property conveyed by the husband to his codefendant, determination of plaintiff's interest in the community property, and allocation of such interest to her. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., entered judgment ordering Maurice to pay Anna $50 per month for one year for maintenance, and disposing of the community property, but made no disposition as to the increment of the community property. From the judgment entered all three parties filed separate appeals. The District Court of Appeal, Bray, J., held that the evidence was sufficient to support the trial court's judgment, but that the trial court had erred in holding that the determination of whether there were increments from the community property and the disposition thereof was not before it.

Affirmed in part, reversed in part.

* Subsequent opinion 233 P.2d 547.

1. Appeal and error 1202, 1214

Where appellate court ordering new trial had directed that whether new additional evidence should be presented was question to be decided by trial court and respective attorneys, it was within discretion of trial court to permit either counsel to try his case anew or to submit it on record of previous trial, either with or without new or additional evidence and trial court did not err in admitting transcript of testimony given at first trial.

2. Appeal and error ⇐1214

Where transcript of evidence in first trial was admitted in evidence on second trial, and at no time during second trial was correctness of transcript questioned or objection made to fact that it had not been certified by reporter, objection to absence of certification could not be made on appeal. Code Civ.Proc. § 273.

3. Husband and wife ⇐298¾

In separate maintenance action by wife against husband and woman with whom husband had contracted voidable second marriage wherein husband filed cross-complaint for divorce and annulment of marriage, evidence sustained trial court's judgment dividing property of parties.

4. Husband and wife ⇐249

Property acquired by spouse during marital relationship but while actually separated from other is community property. Civ.Code, § 164.

5. Judgment ⇐568

While defaulting constitutes admission of truth of material averments of complaint, it is for court in subsequent action to weigh such admission against defaulting party's testimony and determine which to follow.

6. Divorce ⇐160

In wife's separate maintenance action against husband, where it appeared that wife had defaulted in original divorce proceedings instituted by husband on grounds of desertion, but that no judgment of divorce had been entered, trial court could find that wife's admission of desertion by defaulting was contrary to truth where there was corroborated testimony as to acts of physical violence and cruelty by husband when parties last lived together.

7. Judgment ⇐568

A default judgment, if court has jurisdiction, is waiver of one's right to subsequently litigate adjudicated issues.

8. Divorce ⇐172

Where there was default in original divorce proceeding instituted by husband, but no judgment of divorce was entered, issue as to whether husband deserted wife or vice versa was not previously adjudicated.

9. Estoppel ⇐53

To constitute waiver there must be manifest, clear, and unmistakable intention to waive.

10. Husband and wife ⇐297

In separate maintenance action by wife against husband and woman with whom husband had contracted voidable second marriage, evidence sustained trial court's finding that wife had not waived claim to support or to her community interest by her conduct or in her correspondence.

11. Appeal and error ⇐996

Where facts established are such as to reasonably permit opposing inferences to be drawn therefrom and trial court has adopted one and rejected other, appellate court will not disturb findings.

12. Estoppel ⇐55, 56

One of the elements necessary to constitute estoppel is that silence of person sought to be estopped has been relied upon by other party or has caused such party to change his position.

13. Husband and wife ⇐297

In separate maintenance action by wife against husband and woman with whom husband had contracted voidable second marriage, where it appeared that wife had first learned in 1932 that no judgment of divorce had been entered in proceedings instituted by her husband but that she had not brought her action until 1939, evidence sustained trial court's findings that wife had not been guilty of laches and was not estopped to claim support or her community interest. Civ.Code, §§ 124, 125.

14. Limitation of actions ⇐197(1)

In separate maintenance action by wife against husband and woman with whom husband had contracted voidable second marriage, evidence sustained trial court's finding that cause of action, in so far as it related to recovery of both real and personal property and other relief, was not barred by statute of limitations. Code Civ.Proc. §§ 338, subd. 3, 4, 343.

15. Husband and wife ⇐270(8)

In separate maintenance action by wife against husband and woman with whom husband had contracted voidable second marriage, evidence sustained trial court's findings that certain transfers of real and personal property made by husband to "other woman" had been fraudulent because made without consideration, not in good faith, and for purpose of depriving wife of her community interest therein, notwithstanding that transfers were made pursuant to written agreement and purportedly in settlement of "other woman's" right to damages against said husband because of his action in purporting to marry her when he was legally unable to do so. Code Civ.Proc. § 1962, subd. 2; Civ.Code, § 172a, 3439.07.

16. Fraudulent conveyances ⇐163

Where transferee participates in fraudulent intent, transfer is void as to transferor's creditors, even though valuable consideration may have been paid. Civ.Code, § 3439.07.

17. Husband and wife ⇐265

Where husband transferred certain property to "other woman" after informing her of his valid pre-existing marriage, wife, who had not joined in conveyance and who brought her action within one year, could avoid transfers. Civ.Code, § 172a.

18. Husband and wife ⇐265

Where divorce has already been granted, or husband has died, conveyance of community property by husband without wife's consent may be set aside only as to her community one-half interest, but where community still exists conveyance may be set aside in its entirety.

19. Husband and wife ⇐265

Where divorce or separate maintenance proceeding is pending, court has power to set aside entire transfer of community property made by one spouse without other's consent awaiting its disposition of community property.

20. Husband and wife ⇐265

In separate maintenance action by wife against husband and woman with whom husband had contracted voidable second marriage, it was proper for court to set aside entire transfer of community property made by husband to "other woman" so that husband's share might also be subject to court's order.

21. Husband and wife ⇐270(7)

In separate maintenance action by wife against husband and woman with whom husband had contracted voidable second marriage, where wife sought cancellation of husband's transfers of property to codefendant, and one count of complaint alleged fraud on information and belief but later paragraph of complaint alleged that transfer had been made with intent to conceal ownership of property and to prevent wife from obtaining any part of it and in order to defraud wife, complaint was sufficient and demurrer was properly overruled.

22. Appeal and error ⇐175

In separate maintenance action by wife against husband and woman with whom husband had contracted voidable second marriage, where complaint alleged the marriage and that plaintiff and her husband were still husband and wife, and aside from "other woman's" denial of allegation by her answer there was no claim made that marriage had been dissolved, so far as proceedings at trial was concerned, dissolution of first marriage or validity of second marriage was not issue and therefore could not be raised on appeal.

23. Appeal and error ⇐1214

On retrial of separate maintenance action by wife against husband, trial court did not err in awarding payment of $50 per month for one year as support money where such award was supported by her

showing of need at time of first trial, notwithstanding failure of wife to testify at second trial as to her present need and regardless of whether that need continued to time of second trial. Civ.Code, § 137.

24. Appeal and error ⇐1212(1)

In separate maintenance action by wife against husband and woman with whom husband had contracted voidable second marriage, where husband filed cross-complaint for divorce and annulment of marriage, husband's failure to appeal from judgment denying his cross-complaint left judgment final as to him and on issues set forth in cross-complaint, and therefore court did not err, on re-trial of action, in not considering issues raised in such cross-complaint, notwithstanding that in reversing judgment on first trial appellate court had used language "in other respects judgment is reversed".

25. Husband and wife ⇐272(4)

Spouse who was entitled to be awarded share of community property was also entitled to be awarded increment from that share.

26 Husband and wife ⇐298¾

In separate maintenance action by wife against husband and woman with whom husband had contracted voidable second marriage, where wife sought share of community property and alleged that rentals, issues and profits of certain real property were community property, determination of whether there were increments from community property and disposition thereof was before court.

David Livingston, Louis F. DiResta, San Francisco, for appellant.

Ernest J. Torregano, San Francisco, for defendant and appellant, Maurice J. Blache, aka Jean J. M. Blache.

Edward J. Lynch, San Francisco, for defendant and appellant, Jeanne C. Pedebidou, aka Jeanne Blache.

BRAY, Justice.

Action started in 1939 brought by Anna, wife, against defendant Maurice, her husband, and defendant Jeanne, with whom Maurice had contracted an illegal marriage, and in which Anna sought separate maintenance, the recovery of certain community property conveyed by Maurice to Jeanne, and a determination of Anna's interest in the community property and an allocation of such interest to her. This case was before this court in Blache v. Blache, 69 Cal. App.2d 616, 160 P.2d 136[1] and in Blache v. Blache, 78 Cal.App.2d 168, 177 P.2d 345. From the judgment rendered on the retrial, all three parties have filed separate appeals.

Facts.

A detailed statement of the history of the parties appears in the opinion in the Blache case. Only such facts as are necessary to this opinion will be set forth here. Anna and Maurice were married in 1912. In the following two years they separated three times, the final separation occurring in Canada. Maurice came to California, and in 1916 sued for divorce, alleging that Anna had deserted him. She defaulted. When the case came on for trial the court refused to grant the divorce without further corroboration. Later the action was dismissed by the court. In 1918 Maurice (although still not divorced from Anna, but believing that he was) married Jeanne.

Anna started this action in 1939. Maurice cross-complained for a divorce on the grounds of cruelty and desertion, and also for an annulment of the marriage, based upon alleged fraud in obtaining his consent to the marriage contract. The trial court denied Maurice any relief on his cross-complaint, and denied Anna a monthly sum for separate maintenance, but awarded Anna $7,989.13 in lieu of her rights in the community property, ordering it to be paid by Jeanne to Anna for the account of Anna, also allowing her attorney's fees, and setting aside transfers of real and personal property made by Maurice to Jeanne on the ground that they were the community property of Anna and Maurice.

Anna appealed, primarily from the court's failure to assign her half of the community property and to award support and maintenance. Maurice did not appeal.

1. Hereinafter referred to as "the Blache case."

Jeanne appealed from the judgment insofar as it affected her. On the appeal, this court held that "The action of the court in striking out the finding of 'wilful neglect,' coupled with the insertion of the provision giving Anna less than one-half of the community property, and the evidence in the case, make it necessary to reverse the judgment. * * *

"In view of the conclusions reached herein it does not seem necessary to consider further questions raised by appellant Jeanne. Whether the property described in the complaint was the separate property of Jeanne is a question of fact which may be tested again on a retrial." 69 Cal.App.2d at page 631, 160 P.2d at page 144.

"The judgment in so far as it refers to attorney fees and all provisions of said judgment protective of those fees are affirmed; the portions of the judgment adjudicating Maurice's ownership of one-half of the real and personal property, and vacating and setting aside certain transfers of his interests in such properties to Jeanne, insofar as such transfers affect his one-half interest, and the provisions of the judgment granting an injunction against Maurice until the rights of the parties can be determined, are also affirmed; in other respects the judgment is reversed, and the cause remanded for a new trial in accordance with the views herein expressed." 69 Cal.App. 2d at page 633, 160 P.2d at page 145.

At the retrial judgment was rendered (1) ordering Maurice to pay Anna for maintenance $50 per month for one year, (2) setting aside the transfers of real and personal property by Maurice to Jeanne, (3) awarding Anna one-fourth of the bank account and one-fourth of certain stock which Maurice had transferred to Jeanne, (4) awarding Maurice one-fourth of this bank account and stock, (5) awarding Anna and Maurice each one-fourth of the real property theretofore conveyed by Maurice to Jeanne, and ordering the latter to make deeds thereof accordingly, (6) impressing liens in favor of Anna and her attorneys upon the interests of Maurice in the properties and on the obligations of Jeanne to Maurice under the judgment, (7) granting Jeanne a $10,000 lien on Anna's interest in the property and assets and a similar lien on Maurice's interest, (8) enjoining Maurice and Jeanne from disposing of any of the property until the judgment in favor of Anna has been satisfied in full (not applying, however, to Jeanne's residual one-half interest), (9) reserving to the court the power to make further orders as may be necessary to carry the judgment into effect, and (10) granting Anna $584.37 costs against Maurice and Jeanne.

The appeals of each party will be considered separately, except where two parties make the same contention, as—

Use of Prior Trial Testimony.

[1] The opinion of this court, 69 Cal. App.2d at page 631, 160 P.2d at page 144, said: "Whether the factual questions on a new trial should be submitted on the same record, or whether new or additional evidence should be presented, is a question to be decided by the trial court and the *respective* attorneys." (Emphasis added.) At the second trial Anna did not appear personally. Over the determined objections of both Maurice and Jeanne, the transcript of testimony of Anna and five other witnesses given at the first trial was admitted. Both Maurice and Jeanne complain of this as error, and point out that ordinarily the prior testimony of a party or witness can only be used where the foundation is laid by showing that the witness is absent, infirm, dead, etc., or where it is used for impeachment purposes. The court's ruling in permitting use of the transcript was based upon the above-quoted sentence in the Blache opinion. A careful study of that sentence justifies the position taken by the trial court. It means that on the new trial it was in the discretion of the court to permit either counsel to try his case anew or to submit it on the record of the previous trial either with or without new or additional evidence. The construction contended for by both defendants, to the effect that the sentence means that if all counsel and the court agree, the new trial could be had on the previous record alone or with new or additional evidence, makes the sentence unnecessary and meaningless. This would be true of all retrials, whether the appellate

court mentions the subject or not. Defendants claim they were at a disadvantage as their witnesses were present in person and the major portion of Anna's case was submitted on the cold record, and therefore the court did not have an opportunity, as it did with defendant's witnesses, of observing the demeanor of Anna and her witnesses to determine their credibility. Actually, as a general rule, the person who submits his case on a cold record is at a disadvantage as against the one who presents the witnesses. Defendants must have been poor witnesses, indeed, when the trial court refused to believe them. While both defendants contend that they were deprived of the opportunity of cross-examining Anna, it must be pointed out that at the previous trial, Maurice's attorney cross-examined her for approximately 245 pages of the transcript and Jeanne's attorney waived his right to examine. Moreover, if defendants desired to further examine Anna, they could have taken her deposition.

Cases like Kuehn v. Carlos, 32 Cal.App. 2d 295, 89 P.2d 672, and Kuck v. Raftery, 117 Cal.App. 755, 4 P.2d 552, are not applicable here. The use of the transcript in this case was on the direct mandate of the appellate court, which undoubtedly had in mind the great length of the previous trial and desired to provide a method of shortening the new trial.

[2] Defendants make a point of the fact that the transcript used was not certified by the reporter as provided in section 273 of the Code of Civil Procedure. At no time during the trial did they raise this objection nor question the correctness of the transcript, nor do they now question its correctness. It is too late to object to it now.

Sufficiency of the Evidence.

[3] Both defendants contend that the evidence is insufficient to support the judgment, insofar as it affects each. This requires a consideration of the particular findings of the court and will be discussed together with other questions if raised as to such findings. Generally, the language of the court in the Blache case, 69 Cal.App. 2d at page 624, 160 P.2d at page 141, applies to the claim here that the evidence is insufficient: "There appear enough contradictory and inconsistent statements in the transcript of the testimony of each of the three principal parties to justify this court in sustaining a finding contrary to the testimony of any one of the parties. Arguments in the briefs that one party should be believed and not the other will not be considered in detail."

Community or Separate Property?

As did the trial court at the first trial, the trial court at the new trial found that one-half of all property which had been accumulated by defendants during their putative marriage was the community property of Anna and Maurice, even though Anna in no wise contributed to its accumulation. Except as it is affected by the transfers by Maurice to Jeanne, which will be considered later, the evidence is strong that the property was accumulated, as found by the court, by the joint efforts of Maurice and Jeanne, and is the property of Maurice and Jeanne in equal shares. While defendant Jeanne contends that the accumulation grew from a sum of about $10,000 which Jeanne claimed to have had at the time of her marriage, plus her skill and efforts, the evidence well supports the conclusion to which the trial court came. The judge succinctly expressed it in his opinion: "There is some evidence that Jeanne invested some of her own money—the total amount of which is not too convincing—into the business. Counsel for plaintiff are willing to concede it to be the sum of $10,000.00 and that Jeanne is entitled to this sum plus a reasonable return on her investment. Because of the rapidity in which money was made by Maurice and Jeanne, I believe that Jeanne is entitled to have $20,000.00 returned to her. I am definitely of the opinion that it was not the investment of any sum of money by Jeanne which caused the accumulation of so much in so short a time but that it was the technical and business ability of Maurice in a specialized field coupled with the thrift and help of Jeanne." The trial court obviously did not believe Jeanne's story

that there was an agreement between her and Maurice that the business of the Blache Film Laboratory, and the profits therefrom, were to be her separate property. This is the testimony upon which both defendants base their claim that placing the property in joint tenancy constituted a gift from Jeanne to Maurice.

[4] Defendants contend that in order for the property acquired by the husband to be community property the spouses must be actually living together. We can find no such requirement. Section 164 of the Civil Code defines community property as all property acquired during marriage by either husband or wife, other than that mentioned in certain code sections not applicable here. There is no requirement that the husband and wife must be living together at the time of acquisition. There are any number of cases in California holding that property acquired by a spouse during the marital relationship but while actually separated from the other is community property. Britton v. Bryson, 216 Cal. 362, 14 P.2d 502, is one. There the spouses did not live together during a period of over thirty years.

[5–8] Both contend that Anna waived and relinquished her rights to any community interest, and point first to the fact that Anna permitted a default to be entered against her in the action brought against her by Maurice in Los Angeles in 1916 on the grounds of desertion. While defaulting constitutes an admission of the truth of the material averments of a complaint, Horton v. Horton, 18 Cal.2d 579, 116 P.2d 605, it is for the court in the subsequent action to weigh such an admission against the party's testimony here and determine which to follow. The only issue in the Los Angeles action was whether Anna deserted Maurice. Her failure to answer constituted an admission that she had. However, Anna testified to various acts of physical cruelty by Maurice, including physical violence, when they were last living together in Canada. This testimony was corroborated. Anna had Maurice arrested but did not prosecute. Anna denied Maurice's testimony to the effect that their last separation was by agreement made at the time of the dismissal of the criminal charge. Thus there was ample evidence from which the court could and did determine that the admission was contrary to the truth. Moreover, the effect of her admission has already been passed upon in the Blache case, supra, 69 Cal.App.2d at page 632, 160 P.2d at page 144: "There was a default in the original proceeding but no judgment of divorce entered. A default judgment, if a court has jurisdiction, is a waiver of one's right to subsequently litigate the adjudicated issues [citation], but the 'issues' in the present case were not previously adjudicated. [Citations.]"

[9–11] Again, they contend that Anna by her conduct and in her correspondence waived and is estopped from making any claim to support or community interest and was guilty of laches. This is based partly upon the claim that by an express oral agreement made in 1914 Anna agreed to make no claims on Maurice. Although Jeanne's brief states that Maurice's testimony as to the conversation in which this agreement is claimed to have been made was not contradicted by Anna, the record shows that it was. Anna at first stated that she did not recall any such conversation, and later flatly denied that it had taken place. It was the trial court's province to determine whether to believe Maurice or Anna. The judge at the first trial as well as the one at the second trial refused to believe Maurice. See the Blache case, supra, 69 Cal.App.2d at pages 621 and 624, 160 P.2d at page 136. This point is also based upon the fact that from 1916 to 1932 she made no effort to locate Maurice, although she knew the address of the attorney who represented him in the divorce suit which he brought against her, and that in 1932 when she learned of the Blache Film Laboratory in San Francisco she did not immediately pursue the matter after phoning once and learning that he was not in. It is based also upon the correspondence. While from these facts and statements in the letters the conclusion could be drawn that Anna did not intend to hold Maurice responsible for her support or to claim any interest in the community property, there was no express waiv-

er of either. To constitute a waiver the courts have held that there must be manifest a clear and unmistakable intention to waive. See Jones v. Lamont, 118 Cal. 499, 50 P. 766, 62 Am.St.Rep. 251; Estate of Minier, 215 Cal. 31, 8 P.2d 123, 81 A.L.R. 689. Moreover, while the letters are susceptible to the above-mentioned conclusion, they are also reasonably susceptible to a contrary conclusion, which is the one the court drew. As said in the Blache case, supra, 69 Cal.App.2d at page 632, 160 P.2d at page 144: "Whether Maurice deserted Anna or vice versa is entirely a question of fact. The same statement may be made in reference to letters subsequently written by Anna to Maurice." "The rule is well settled that where the facts established are such as to reasonably permit opposing inferences to be drawn therefrom and the trial court has adopted one and rejected the other, an appellate court will not disturb the finding." Baylis v. Baylis, 48 Cal.App.2d 674, 679, 120 P.2d 89, 91.

[12, 13] In May, 1932, Anna learned for the first time that the Los Angeles divorce proceeding had not been completed. Both defendants claim that because of her failure to bring action until 1939, Anna is estopped to make any claims. One of the elements necessary to constitute an estoppel is that the silence of the person sought to be estopped has been relied upon by the other party, or has caused the latter to change his position. See Burgess v. California Mutual B. & L. Ass'n, 210 Cal. 180, 290 P. 1029. The evidence shows that substantially all of the property had been accumulated before May, 1932, and hence Jeanne was not misled by the failure of Anna to act promptly. The evidence discloses no change of position by Jeanne, based on her lack of knowledge of the validity of her marriage, after that date. Anna's letters show that she was withholding action because of Maurice's representations that Jeanne was ill and that the shock of learning the truth might prove injurious or even fatal. The case of Hensgen v. Silberman, 87 Cal.App.2d 668, 197 P.2d 356, cited by Jeanne, is clearly distinguishable from our case. There the wife and husband went to Mexico and made the necessary arrangements for a Mexican mail-order divorce, in which the wife was granted a final decree of divorce. Thereafter in good faith and relying upon this divorce, one Rose married the ex-husband and lived with him for five years as his wife. In the meantime the first wife, with knowledge of the remarriage, herself remarried. Even though she visited at the home of the husband and his new wife several times, at no time did she claim the invalidity of the Mexican divorce nor Rose's marriage, until the death of the husband about five years after his marriage to Rose, at which time she made claim to joint savings accounts and other property of Rose and her husband. The court held that the first wife was estopped from claiming any interest in the property as she permitted Rose to hold herself out as the lawful wife and to "incur the benefits and obligations incident to a valid marriage", 87 Cal.App.2d at page 673, 197 P.2d at page 359, and also to work and pool her earnings with his. There was no such situation here. Practically all of the pooling had been done prior to Anna's discovery of the true situation, and Anna's permitting Jeanne to continue thereafter to hold herself out as Maurice's wife was in the interests of Jeanne's health. We cannot say that under the evidence, as a matter of law the court's findings on laches and estoppel were erroneous.

Statute of Limitations.

[14] The court found that Anna's cause of action for maintenance was not barred by sections 124 or 125 of the Civil Code. In other words, it found that there was no unreasonable lapse of time before the commencement of the action nor such lapse of time as to establish the presumption that there was condonation of the offense or full acquiescence therein. The court found Maurice guilty of desertion, failure to provide for Anna for more than one year prior to the commencement of the action, and adultery. While there is evidence upon which the court could have found that Anna's cause of action was so barred, there was contrary evidence, and we are bound by the court's finding thereon. The same thing applies to the court's finding

that the cause of action as it related to the recovery of both real and personal property and other relief was not barred by subdivisions 3 and 4 of section 338, and section 343, of the Code of Civil Procedure.

Transfers of Real and Personal Property.

[15] On May 25, 1939, shortly after Maurice told Jeanne of his marriage to Anna, Maurice and Jeanne signed a withdrawal slip and the latter withdrew the entire bank account of $15,978.26 from their joint tenancy account and redeposited it under the name of "Lucille Codo" and shortly after withdrew it from that account and redeposited it under the fictitious name of "Mary White." About the same time Maurice transferred to Jeanne his interest in 100 shares of Pacific Gas and Electric Company stock issued in the names of Maurice and Jeanne as joint tenants. On June 1, 1939, both defendants signed a document called a settlement and release of claims, which set forth that Jeanne had "presented certain claims" against Maurice "to real property standing in * * * [their] joint names * * * as well as for damages resulting from misrepresentations and concealments of * * * [Maurice] which caused * * * [Jeanne] to believe that she was * * * [his] legal wife * * * and which resulted in damages and losses to" her, "and also for services and for monies had and received," and that Jeanne had a good cause of action against Maurice based upon said claims and had indicated her intention of suing him unless satisfactory adjustments were made; that Maurice had admitted the justice of the claims and desired to remedy the wrong and to restore "to her that which is actually hers." Maurice then agreed, in settlement, to convey to her by deed all his interest in the five parcels of real estate then standing in the names of Maurice and Jeanne as joint tenants. The same day he executed deeds to Jeanne of his interest in said real property. The trial court found that these transfers of both personal and real property were fraudulent because they were made without consideration, not in good faith, and for the purpose of depriving Anna of her community interest therein. Both defendants contend that the court's finding is not supported by the evidence and that there was ample consideration, as Jeanne was foregoing her right to damages against Maurice, because of his action in purporting to marry her when he was legally unable to do so, citing Lazzarevich v. Lazzarevich, 88 Cal.App.2d 708, 200 P.2d 49. While it is true she had such right, the court found that in obtaining the transfers she, in effect, was not asserting or enforcing such right, but was attempting to defraud Anna. In spite of the presumption of consideration from the execution of the written instruments, the conclusive presumption of section 1962, subdivision 2, Code of Civil Procedure (which binds only the parties to the agreement) and Jeanne's testimony on the subject, there was substantial evidence to support the court's finding to the contrary. The circumstances of the case, the transfer by Maurice of his interest in the bank account, and Jeanne's redeposit of it in another name, before the so-called settlement of claim was made, the contradictory testimony of Maurice and Jeanne that the property was hers alone and had been placed in joint tenancy on a banker's advice to avoid probate expense, Jeanne's refusal at first to account for the money, are evidence to the contrary, or at least raise reasonable inferences to the contrary.

[16] Moreover, assuming that there was consideration for the transfers, they nevertheless were fraudulent under section 3439.07 of the Civil Code as being conveyances made to hinder, delay or defraud a creditor (here, Anna). "Where the transferee participates in the fraudulent intent, the transfer is void as to creditors, even though a valuable consideration may have been paid. [Citations.]" Rossen v. Villanueva, 175 Cal. 632, 635, 166 P. 1004, 1005.

[17] Again, Anna, the legal wife, had the right to have the transfer of the real property set aside under the provisions of section 172a of the Civil Code, which provides: "The husband has the management and control of the community real property, but the wife * * * must join with

him in executing any instrument by which such community real property or any interest therein * * * is sold, conveyed, or encumbered; * * *." The exception that the section does not apply to a purchaser in good faith without knowledge of the marriage relation is not applicable here, as, of course, Jeanne knew of the marriage relation at the time the transfer was made. The suit to avoid the transfer was brought within the year prescribed by the section.

Maurice's One-Fourth.

[18–20] Jeanne claims that in any event the court erred in setting aside that portion of the transfers which included Maurice's one-half of the community interest or a one-fourth interest in the whole property. She points out that Maurice did not ask for the setting aside of the transfers. She cites authorities such as Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173, 152 P. 542, to the effect that a transfer may be good as between the parties even though void as to creditors, and cases such as Taylor v. Russell, 8 Cal.App.2d 61, 47 P.2d 305, to the effect that a decree avoiding a deed as to creditors of the grantor leaves the deed operative between the parties. These principles are applicable in the event that Maurice should attempt to assert adverse claims against Jeanne. They do not apply, however, to the action of the court in setting aside the transfer of the entire community interest so that it may be available in the maintenance action for disposition by the court. Under certain circumstances it could award the entire community interest to the wife, or, as here, could award her merely half and require the other half to be subject to payment of its order for support. Heuer v. Heuer, 33 Cal.2d 268, 201 P.2d 385, does not apply to this situation. In that case the divorce had already been granted. Where such is the situation or the husband has died, it has been held that conveyances by the husband without the wife's consent may be set aside only as to her community one-half. Pretzer v. Pretzer, 215 Cal. 659, 12 P.2d 429; Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477. But where the community still exists, the conveyance may be set aside in its entirety. Ballinger v. Ballinger, 9 Cal. 2d 330, 70 P.2d 629; Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221. Where there is pending either a divorce or maintenance proceeding the court has the power to set aside the entire transfer to await its disposition of the community property. Therefore, here, it was proper for the court to set aside the transfer as to the whole of the community property and to require Jeanne to convey one-fourth to Maurice as well as one-fourth to Anna, so that Maurice's one-fourth may be subject to the court's orders. Moreover, as said in Blache v. Blache, supra, 78 Cal.App.2d 168, 177 P.2d 345, referring to the opinion in the Blache case: "The transfers were held to have been correctly set aside to protect that half of the property which, if on retrial is found not to be the separate property of Jeanne, may be treated as if it were the community property of Maurice and Anna. Blache v. Blache, supra, 69 Cal.App.2d 624, 160 P.2d 136." 78 Cal. App.2d at page 170, 177 P.2d at page 346.

Demurrer.

[21] Jeanne contends that the court's action in overruling her demurrer to the complaint is erroneous because the complaint alleges fraud on information and belief and in general terms. An examination of the first amended complaint fails to support the charge. In one paragraph plaintiff did allege on information and belief that Maurice, with intent to conceal the ownership of all the property from plaintiff and to prevent her from obtaining any part of it, quitclaimed it to Jeanne. However, later, plaintiff positively alleged that Maurice attempted to give all of the community real property to Jeanne, that Maurice and Jeanne conspired with each other to transfer title to the community property to Jeanne for the purpose of defrauding plaintiff with intent to conceal its ownership and to prevent plaintiff from obtaining any interest in it, that in furtherance of the conspiracy Maurice did cause to be made, executed and recorded quit-

claim deeds of it to Jeanne. The complaint (while hardly a model of pleading) was sufficient.

Presumptions.

[22] Based upon Mazzenga v. Rosso, 87 Cal.App.2d 790, 197 P.2d 770, both defendants contend that the presumption of the validity of the second marriage overcomes the presumption as to the validity of the first marriage, and then claim that there is no evidence that the first marriage had not been terminated. The finding of continued marriage is not based upon the presumption following from the first marriage, but on the positive testimony that it had not been dissolved. In the amended complaint Anna alleged the marriage and that she and Maurice ever since were and now are husband and wife. Maurice, by failure to deny, admitted it. Jeanne's answer denied the allegation. Anna positively testified that other than the Los Angeles divorce action which was dismissed, she had never been either a plaintiff or defendant in a lawsuit. Maurice testified that in 1932 he found out that he had not obtained a divorce. Except for the formal denial in Jeanne's answer there never was any claim at any time, including the other appeal, that the marriage had been dissolved. The language used by the court shows that "There can be no community property in the absence of a valid marriage. * * * However, Maurice's share of the property acquired during his association with Jeanne may be the community property of himself and Anna in the absence of evidence that their marital status has been legally dissolved * * *." 69 Cal.App.2d at page 624, 160 P.2d at page 140. So far as the proceedings at the trials were concerned, the dissolution of the first marriage or the validity of the second marriage was not an issue. To attempt to raise the question now is trifling with the court.

Necessity for Support.

[23] Maurice also contends that the order for support was invalid because Anna was not present at the trial to testify as to her present needs (her testimony at the prior trial showed her need as of that time). The award of $50 per month for one year is well supported by her showing of need at that time, regardless of whether that need continued to the time of the second trial. There is nothing in section 137, Civil Code, which prohibits the making of such order.

Maurice's Cross-Complaint.

[24] Maurice contends that the court erred in not considering the issues raised in his cross-complaint. The court found: "The issues presented by Maurice's cross-complaint for divorce and annulment were disposed of at the previous trial of this case, and the decision at said trial on said issues is embodied in [certain] Findings * * * filed in this case at the conclusion of said previous trial. Maurice did not appeal from the judgment entered pursuant to said findings, and said decision upon said issues became final." This finding is correct. Maurice's failure to appeal from the judgment denying his cross-complaint left the judgment final as to him on the issues set forth in the cross-complaint. Anna's appeal, of course, was not from that part of the judgment denying Maurice relief under his cross-complaint. Nor did Jeanne appeal therefrom. (It is doubtful if she could have done so.) Therefore, the issues under the cross-complaint were not before the appellate court, and it had no power to reverse the judgment thereon, had it wished to do so. The language used in the opinion, 69 Cal.App.2d at page 633, 160 P.2d at page 145, "in other respects the judgment is reversed," cannot be stretched to cover that portion of the judgment which was not before the appellate court. The judgment against Maurice on his cross-complaint is separate from the rest of the judgment in the case. The situation here is somewhat similar to that in Neill v. Five C. Refining Co., 79 Cal.App.2d 191, at page 194, 179 P.2d 818, at page 820, where the court said:

"Maguire contends that the judgment which it consented to against itself is not binding in this case, because it was thereafter reversed by the District Court of Appeal. Coates v. Maguire etc. Corp., 47 Cal. App.2d 275, 117 P.2d 898.

"However, the judgment which was reversed by the District Court of Appeal was against another defendant in the same action. No appeal was perfected by Maguire, and the two judgments are separate. Code of Civil Procedure sec. 579. Therefore, the judgment against Maguire was not considered by the District Court of Appeal, and remained final despite the reversal of the judgment as to the other defendant. Lake v. Superior Court, 187 Cal. 116, 200 P. 1041; Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898."

Moreover, the trial court in effect found on the matters set up in the cross-complaint. It specifically found that Anna was not guilty of extreme cruelty towards Maurice. Its finding that Maurice deserted Anna negatives Maurice's allegations that she deserted him, or was guilty of fraud in marrying him with the intent not to live with him. The refusal of the trial court to consider Maurice's cross-complaint in no wise prevented Maurice from asserting and presenting to the court, as he did, all of the defenses he claimed to have against all matters raised by her complaint.

Anna's Appeal.

[25, 26] Anna's sole ground of appeal is that the court failed to dispose of the increment of the community property, consisting of moneys in the bank and certain stocks. The court found that money was deposited in various banks in San Francisco and that various shares of stock were purchased by Jeanne but "said assets are not before the Court for disposition." We are unable to determine the foundation of such a statement. In the amended complaint it is alleged that "the rentals, issues and profits of said real property are community property, and are of a monthly value in excess of One Thousand Dollars ($1,000.00)." In the prayer plaintiff asks that all of the community property be set aside to her and that a receiver be appointed to take control of all of the community property. Thus, the determination of whether there were increments from the community property, and the disposition thereof, was before the court. It is a little difficult to determine Jeanne's position on this subject. She seems to contend that any division of the increment would be an allowance to Anna of maintenance or support which the court could not allow for certain reasons which she sets forth in her answering brief. But such a contention is wrong. A spouse who is entitled to be awarded a share of the community property is also entitled to be awarded the increment from that share. "There is no constitutional or statutory provision expressly declaring that 'rents, issues, and profits' of community property shall partake of the same attributes of ownership as the capital property, but such characteristic must follow as a matter of law, because the right of beneficial use is an incident of ownership." Boyd v. Oser, 23 Cal.2d 613, 621, 145 P.2d 312, 316. The second contention made by Jeanne is that the "Court's function on retrial was simply to determine title to a one-half interest in the properties." Assuming that this was the court's only function, she does not specify why increment is not included in this specification. Increment is a part of the "properties." If she means that the retrial was merely to determine whether Jeanne had any interest in the one-half of the real and personal properties specifically mentioned in the prior opinion (other than the one-half which the court held in that opinion was her separate property), she is wrong. The very purpose of the action was to determine what share plaintiff should be awarded of whatever community property there was, and hence when the court determined that Jeanne had no interest in that half of the property, its functions did not end but it was required to dispose of the whole of that half interest, necessarily including increments.

In the judgment, the court reserved the right and power to make further orders and decrees, and possibly it intended that the determination of this matter should be done later. However, it should have been done then. The case will have to be remanded for the purpose of determining the increment applicable to the portion of the community awarded plaintiff. Inasmuch as Anna did not appeal from that portion of the judgment which awarded her one-

fourth of the community property, in any event she would not be entitled, as intimated in her brief, to a greater share of the increments than one-fourth.

The judgment insofar as it provides that the increments from the community property are not before the court, is reversed, and the cause remanded for the trial and determination of that issue; in all other respects the judgment is affirmed, Anna to recover her costs on all appeals.

PETERS, P. J., and FRED B. WOOD, J., concur.



PEOPLE v. WISSENFELD et al.

Cr. 4465.

District Court of Appeal, Second District, Division 1, California.

Sept. 21, 1950.

Rehearing Denied Oct. 5, 1950.

Hearing Granted Oct. 19, 1950.*

Jacob Wissenfeld and others were convicted in the Superior Court, Los Angeles County, Joseph M. Maltby, J., of grand theft and a violation of the Dangerous Weapons Control Law, and defendant Wissenfeld appealed. The District Court of Appeal, Doran, J., held that evidence was insufficient to sustain the conviction.

Judgment reversed and cause remanded for new trial.

Larceny ⇦65
Weapons ⇦17(4)

Evidence was insufficient to sustain conviction for grand theft or violation of Dangerous Weapons Control Law. Gen. Laws, Act 1970, § 13.

Enger & Hiller, Los Angeles, Louis Thomas Hiller, Henry S. Gross, Jr., Los Angeles, of counsel, for appellant.

Fred N. Howser, Attorney General, William E. James, Deputy Attorney General, for respondent.

DORAN, Justice.

Defendants were charged with grand theft and a violation of Section 13 of the Dangerous Weapons Control Law of 1923, Gen. Laws, Act 1970. Following a conviction on both counts of the information, defendant Wissenfeld alone prosecutes this appeal.

It is contended on appeal that,

1. "The evidence, as a matter of law, is insufficient to sustain a conviction of the crimes as charged in the information."

2. That "There was judicial error in the ruling on the exceptions to the cross-examination of witness Luke."

3. That "There was misconduct of the trial judge in instructing the jury during the absence of both defendant and his counsel."

The record reveals that on the night of August 16 Officers Shaw and Milevich in a police patrol car stopped the car in which the three defendants were riding because its rear license plate "was obviously wired on and was swinging". The three defendants were in the front seat; defendant Wissenfeld was driving the car. Officer Shaw testified to the following conversation with defendant Wissenfeld at this time, "I said, 'What seems to be the trouble with your license plate?' And he looked at it and said that he thought it would stay on and I asked him if the car belonged to him. When he didn't answer the question and said several times he was staying at the Wilton Hotel, I questioned him further about the ownership of the car and he said it belonged to a friend in Los Angeles.

"Q. Did you ask him anything further concerning the friend? A. When I asked what his friend's name was he said he didn't know."

On cross-examination the witness testified,

"Q. In other words, all you did in this particular case was to make the arrest? A. Yes.

* Subsequent opinion 227 P.2d 833.

"Q. After that you turned it over to the investigating officers? A. That is correct.

"Q. And you have told us practically all of the conversation that you had with the defendants at that time? A. All that I remember.

"Q. All that you remember. I take it that at that time you didn't know this car was stolen? A. I assumed that.

"Q. You didn't know it. A. I didn't know it.

"Q. And that is the reason you didn't ask them any questions about stolen automobiles, isn't that correct? A. Well, I did ask them about the ownership of the automobile and so forth.

"Q. He told you it was a friend's? A. He didn't say as to who owned it or whether he owned it."

An automatic and a .32 calibre revolver wrapped in a paper bag were found in the glove compartment of the car. The number on the revolver had been obliterated. In reply to questions regarding these guns defendant Wissenfeld replied to the officers, "Well, I don't know anything about the guns." There is no evidence of any admission of guilt by defendant Wissenfeld as to either count.

Defendant Luke pleaded guilty and in connection with the theft of the car and the ownership of the guns testified as follows:

"Q. Did you on or about the 22nd day of August, 1949, in the County of Los Angeles, State of California, take a certain motor vehicle, the property of Lucia Haskill, with the intent to deprive her of the use of that car? A. I did.

"Q. Was Miss Diltz with you at anytime when you took that automobile? A. She was not.

"Q. Was Mr. Wissenfeld with you at anytime you took that automobile? A. No.

"Q. Did you ever tell Karyl Diltz at anytime that you stole the automobile? A. No, I didn't.

"Q. Did you ever tell Jake Wissenfeld that you ever stole the automobile? A. No.

"Q. Did you have in your possession or in this automobile on the date of your arrest, or was there in the glove compartment of the automobile, the date of your arrest, exhibit 2 in evidence, People's Exhibit 2? Look it over and see if that is the one. A. This is the firearm I had.

"Q. Did Jake Wissenfeld or Karyl Diltz file any of the numbers on this? A. No, they did not.

"Q. Did you file the numbers off this gun? A. Yes.

"Q. Did you ever tell Karyl Diltz or Jake Wissenfeld that you filed the numbers off or you had this gun in your possession? A. No, I didn't.

* * * * * *

"Q. Did you permit Mr. Wissenfeld to use your automobile to take out girl friends? A. Yes, I did.

"Q. And at anytime did you ever tell him you had stolen this car? A. No.

"Q. Do you know whether or not Karyl Diltz ever drove this car? A. She did not. She never drove it.

"Q. When did you first meet Jake Wissenfeld? A. It was a Saturday night at the Toddle House in Culver City, the 27th of August, I believe the date was.

"Q. And you had some conversation with Jake that night? A. Yes, I did.

"Q. And without going into all the details, what was said? A. I told him I was looking for a job and I had transportation and if he heard anything, I knew, I heard he was a better and possibly he would know somebody who would have a job for me driving or something like that.

"Q. So he told you he would put you to work? A. He said he might have something coming up and he would keep me in mind.

* * * * * *

"Q. By Mr. Zeman: What were your duties with Mr. Wissenfeld? A. I was supposed to drive him around to certain places in Hollywood and Beverly Hills

and through Los Angeles to make bets and to pick up collections and he told me that sometimes in case he might have trouble making his collections, he might want me along for that reason.

"Q. I see, and there were no particular hours, were there? A. None. No, there were no particular hours.

"Q. Whenever he needed you? A. Yes.

"Q. Did you have any definite arrangement for salary? A. He would keep me in spending money and pay all the bills. That was the agreement we came to.

"Q. In other words, your salary depended on how lucky he got, is that right? A. That is correct."

Several witnesses testified that defendant Wissenfeld did not have a car.

The only evidence of guilt was that appellant was driving the car at the time of the arrest.

Appellant cites People v. Zervas, 61 Cal. App.2d 381, 142 P.2d 946, which the respondent contends is not applicable because in the instant case the defendant was driving the car and refers to People v. Cole, 141 Cal. 88, 74 P. 547, and People v. Gonzales, 66 Cal.App. 646, 226 P. 946 as appropriate authority. The cited cases are of little help for in the within action the witness Luke testified to the theft of the car which evidence, in the light of the record, cannot be dismissed with the comment of respondent, "Thus, we need not concern ourselves with the 'story' told by the co-defendant Luke, whom the jury disbelieved". Even if the defendant Luke had not testified the only evidence of guilt remains the same.

Without going into detail it is sufficient to note that the cross-examination of the witness Luke was prejudicial. Practically all of appellant's objections were overruled and much of the cross-examination was improper; Luke was not on trial.

With regard to the instructions, the court, in the absence of defendant and counsel when the verdicts were first returned stated, "As to the verdicts on 503, grand theft, you cannot find the same defendant guilty of both offenses, *you must find the defendant guilty of one or the other.* I do not know what your thought about it was, which one you intended to bring in, but you cannot bring in both. *I am going to send you out again and you may come back with one or the other of these verdicts and indicate to us which one you want to be the verdict.*" (Italics added.)

A review of the record reveals that appellant did not receive the trial that a defendant in a criminal action is entitled to.

The judgment is reversed and the cause remanded for a new trial.

WHITE, P. J., and DRAPEAU, J., concur.



99 Cal.App.2d 446

KLIMPER v. CITY OF GLENDALE et al.

Civ. 17380.

District Court of Appeal, Second District, Division 3, California.

Sept. 18, 1950.

Rehearing Denied Oct. 11, 1950.

Hearing Denied Nov. 16, 1950.

Action by Maude Klimper against the City of Glendale and others to recover damages for wrongful issuance of warrant and arrest and imprisonment of plaintiff thereunder. The Superior Court of Los Angeles County, Kurtz Kauffman, J., entered judgments upon orders sustaining, without leave to amend, demurrers to amended complaint, and plaintiff appealed. The District Court of Appeal, Wood, J., held that presentation of a written, verified claim, as required by city charter and ordinance, was a condition precedent to maintaining action against defendant city or an officer thereof upon a claim for damages founded in tort, and that defendant city and its officers were not estopped from relying on plaintiff's failure to present any claim.

Judgments affirmed.

1. Evidence ⇨31

Courts take judicial notice of provisions of a city charter making presenta-

tion and rejection of a demand against city for money or damages a prerequisite to maintenance of any action thereon.

2. Evidence ⇐32

Courts may not take judicial notice of a municipal ordinance.

3. Municipal corporations ⇐741(2)

Presentation of a written, verified claim, as required by city charter and ordinance of Glendale, was a condition precedent to maintaining an action against the city or an officer thereof upon a claim for damages founded in tort. St.1921, p. 2221, art. 11, § 5.

4. Estoppel ⇐62(5)

That city officials allegedly advised plaintiff that her claim against city and officers thereof for wrongful issuance on warrant and arrest and imprisonment thereunder could be adjusted and that she should await developments did not estop city or officers from relying on plaintiff's failure to file claim at any time as barring action thereon. St.1921, p. 2221, art. 11, § 5.

5. Malicious prosecution ⇐49

Complaint alleging that defendant had signed a complaint charging plaintiff with violating the Vehicle Code, without alleging absence of probable cause for such complaint, did not state a cause of action. Vehicle Code, § 739.

Paul S. Crouch, Los Angeles, for appellant.

Henry McClernan, City Attorney, John W. McElheney, Deputy City Attorney and City Prosecutor, Glendale, for respondents City of Glendale, Charles R. Dyer, Mrs. Earle Bullock, Charles Dieffenbach, Frances W. Kelley, W. R. Stenberg and Walter E. Hegi.

WOOD, Justice.

Plaintiff appeals from a judgment in favor of defendants City of Glendale, Charles R. Dyer (Police Judge of Glendale), and five police officers of Glendale, which judgment was entered upon orders sustaining, without leave to amend, demurrers of said defendants. The demurrers of the first two defendants above mentioned were to the second amended complaint. The demurrers of the other defendants above mentioned were to the third amended complaint. Plaintiff also appeals from a judgment in favor of another defendant, Marshall B. Everett, entered upon an order sustaining, without leave to amend, his demurrer to the third amended complaint.

It was alleged in the second amended complaint as follows: The City of Glendale is a political subdivision of California. Defendant Dyer at all times mentioned therein was a police judge of the City of Glendale. Defendant Rassmussen at all times therein mentioned was Chief of Police of said city. Defendant Hegi at said times was a captain of police of said city. Defendants Bullock, Dieffenbach, Kelley, and Stenberg at said times were police officers of said city and were acting under the supervision of defendants Rassmussen and Hegi. On October 27, 1947, defendant Everett filed a complaint in the police court of said city, a copy of which is attached to the third amended complaint and marked exhibit A. (Said exhibit A was entitled "The People of the State of California, Plaintiff, vs. Maude Klimper, Defendant, Complaint—Criminal," and it was alleged therein in substance in count 1 that said Maude Klimper on October 26, 1947, in the city of Glendale did unlawfully, while driving a motor vehicle on San Fernando Road, a public highway in said city, and intending to make a left turn at Princeton Street, an intersecting highway, make the approach for such left turn from a portion of the roadway at a place other than the portion nearest the center line thereof. It was also alleged therein in substance in count 2 that said defendant Klimper on October 26, 1947, in said city did unlawfully, while driving a motor vehicle on San Fernando Road, turn said vehicle from a direct course at a time when such movement could not be made with reasonable safety, and without giving the appropriate signal provided for in subdivision (b) of section 544 of the Vehicle Code. The said "Complaint—Criminal" was signed by said defendant Everett.)

Plaintiff alleged upon information and belief that defendant Everett filed said complaint at the request of defendant Stenberg. On October 28, 1947, pursuant to said complaint, defendant Dyer, Police Judge of Glendale, issued a warrant of arrest, and pursuant to said warrant the defendants Bullock, Dieffenbach and Kelley, acting under the direction of defendants Rassmussen and Hegi, arrested plaintiff and incarcerated her in the city jail; that defendants Rassmussen, Hegi, Bullock, Dieffenbach and Kelley refused to let plaintiff communicate with an attorney, bail bond broker, or any of her relatives or friends and plaintiff therefore was unable to "raise bail" until the morning of October 29, 1947. Defendant Dyer set the bail in the amount of $100, which bail was disproportionate to the offense involved. Said warrant was issued in violation of provisions of section 739 of the Vehicle Code "in that if an offense had been committed it was in the presence of Defendant W. R. Stenberg, and of which he was aware." Plaintiff was not at any time prior to her arrest given a notice to appear pursuant to provisions of section 739 of the Vehicle Code, and defendants did not comply with any of the provisions of said section, and "the Complaint issued by said defendant was a misdemeanor" and an alleged violation of the provisions of the Vehicle Code, and that section 739 of the Vehicle Code "was the only statute applicable for procedure for the alleged violation." Defendants and each of them acted wilfully and with malice and intent to degrade, humiliate and embarrass plaintiff, and the defendants knew that the warrant was not issued pursuant to the provisions of said section 739. Within 90 days from October 27, 1947, plaintiff did present to the City of Glendale a claim. By reason of the aforesaid acts plaintiff suffered shock and humiliation which affected her health and she was unable to work for a period of time and by reason thereof she has sustained actual damages in the sum of $25,000, and plaintiff asks for an additional $25,000 as exemplary damages.

For a further and separate cause of action it was alleged therein as follows: (Paragraph I) Plaintiff incorporates all of the said allegations of her first cause of action, above stated, as though set out verbatim. (Paragraph II) Within 90 days from October 28, 1947, plaintiff did present her claim to the City of Glendale "in that she contacted Joseph F. Baudino who was Mayor during this period of time, Vernon Rassmussen, the Chief of Police, who was acting during this period of time, and G. A. Campbell who was a Councilman of the City of Glendale during this period of time. That these Officials of the City of Glendale were fully advised of her grievance against the City of Glendale and Officials thereof, and requested of them what procedure she should take and they did not advise her to file a written verified claim with the City of Glendale, but told her to wait and see what would develop. That the City of Glendale is now estopped to assert as a defense the fact that the Plaintiff should have filed a verified claim as provided by their City ordinance, and that the Plaintiff relied upon the statements made by the Officials of the City of Glendale that they would wait and see what developed."

The third amended complaint was in substance the same as the second amended complaint, with the following exceptions: (1) The City of Glendale and Charles R. Dyer were not parties thereto; (2) Paragraph II of the second amended complaint was omitted from the third amended complaint, and in lieu thereof it was alleged as follows: Within 90 days from October 28, 1947, the "Plaintiff did present her claim to the City of Glendale and the officers who are referred to in this Complaint, and that she contacted one, Joseph F. Baudino who was the Mayor of the City of Glendale during this period of time, and also contacted Vernon Rassmussen, Chief of Police of the City of Glendale who was Chief of Police during this period of time, and Charles E. McCall who was the City Manager of the City of Glendale during this time, and the Plaintiff also contacted G. A. Campbell who was a member of the City Council of the City of Glendale during this time, and she advised these officials of the City of Glendale that she intended to file a claim with the City of

Glendale and the officers thereof, and that she later intended to file a suit against the City of Glendale and the officers involved. That the said officials were fully advised of her grievance against the City of Glendale and the officials and police officers thereof, and the Plaintiff requested of said officials, Joseph F. Baudino, Vernon Rassmussen, G. A. Campbell, what procedure she should take and said officials, just named, advised the Plaintiff that her claim could be adjusted and settled and advised her to wait and see what would develop. That the said officials did not advise the Plaintiff to file a written, verified claim with the City of Glendale or the officers or officials thereof, but assured her that her grievance against the City of Glendale and against the officials and officers thereof would be properly taken care of. That the Plaintiff believed and relied upon the said representations and assurances, and therefore failed to file a written, verified claim with the City of Glendale and the officials and officers thereof within the ninety (90) day period as set up by the City Ordinance and Charter of the City of Glendale. That had the officials of the City of Glendale, aforenamed, not made the representations and given said assurances, and had the Plaintiff been advised to file a written, verified claim she would have filed her claim with the City of Glendale and the officials and officers within the ninety (90) day period. That the Plaintiff was not fully advised by the aforesaid officials or anyone that it was necessary to file a claim with the City of Glendale and with the officials thereof, until after the ninety day period had elapsed. The Plaintiff brought this action as soon as it became apparent to the Plaintiff that the City of Glendale and the officials or officers thereof were not going to make any adjustment or settlement of her claim against the City of Glendale or the officials or the officers thereof."

[1-3] The demurrers of all defendants except Everett were made upon the ground, among others, that it appeared that plaintiff's alleged causes of action were barred by article XI, section 5, of the charter of the City of Glendale and ordinance 2100 of said city in that plaintiff had not filed a verified claim for damages as required by said article and section of the city charter and by said ordinance. Said article XI, section 5, of the charter of the City of Glendale provides in part: "No action shall be brought on any claim or demand for money or damages against the City or any Board, Commission or Officer thereof, until a demand for the same has been presented as provided in this charter or by ordinance and rejected in whole or in part." Stats. 1921, p. 2221. Courts take judicial notice of the provisions of a city charter such as the one involved here. See Tilden v. Blood, 14 Cal.App.2d 407, 413, 58 P.2d 381; Adams v. Wolff, 84 Cal.App.2d 435, 440, 190 P.2d 665. There is no provision in the charter as to the manner, form, or time in which such a demand should be presented. The court cannot take judicial notice of a municipal ordinance. The plaintiff alleged in her third amended complaint, however, in the part thereof relating to estoppel as shown above, that she believed and relied upon representations of certain officers of Glendale "and therefore failed to file a written, verified claim with the City of Glendale and the officials and officers thereof within the ninety (90) day period as set up by the City Ordinance and Charter of the City of Glendale." It appears therefore, from that allegation, and from other above mentioned allegations in said complaint, that plaintiff alleged in effect that an ordinance and the charter of the City of Glendale provided that such a claimant as plaintiff should file a written, verified claim with the City of Glendale and the officials and officers thereof within 90 days from the date of the alleged injury. In her second amended complaint, plaintiff alleged: "That the City of Glendale is now estopped to assert as a defense the fact that the Plaintiff should have filed a verified claim as provided by their City ordinance * * *." Furthermore, it appears from the briefs of the appellant (plaintiff) and the respondents that this appeal is presented upon the basis that ordinance 2100 of the City of Glendale, relating to claims for damages against the

city or an officer thereof, was properly before the trial court. A copy of that ordinance was attached to the demurrers. As stated in appellant's brief, the first question involved on this appeal is "Did failure of the appellant to file a claim with the respondents preclude her from maintaining her causes of actions?" Appellant then asserts in her brief as follows: "To this question the appellant respectfully submits that her failure to file a written claim as required by the ordinance of the City of Glendale did not foreclose her from bringing the type of action that she filed. The first reaction after reading the City ordinance * * *." Ordinance No. 2100 of the City of Glendale is in part as follows: "Section 1. All claims for damages, founded in tort, against the City of Glendale * * * or any * * * officer or employee, must be in writing, verified and presented to the City Clerk, and to the * * * officer or employee against whom it is intended to bring action, within ninety (90) days after the tort from which the damages arose. * * * Section 2. No action shall be brought against the City of Glendale or against * * * any * * officer or employee thereof unless a claim has been presented as required by section 1 of this ordinance, and such claim has been rejected in whole or in part." A case involving the same charter provision and the same ordinance, as those involved here, is Slavin v. City of Glendale, 97 Cal.App. 2d 407, 217 P.2d 984. In that case a demurrer to the third amended complaint was sustained without leave to amend. In affirming the judgment therein, the court said, 97 Cal.App.2d at page 411, 217 P.2d at page 987: "Plaintiff did not and could not allege that the required claim [required by the charter of Glendale and said ordinance 2100] had been filed as required by the law, either within the 90 day period or at any other time." The presentation of a written, verified claim, as required by said charter and ordinance, is a condition precedent to maintaining an action against the City of Glendale or an officer thereof upon a claim for damages founded in tort. See Slavin v. City of Glendale, supra.

[4] Appellant contends further that she alleged sufficient facts to show that respondents City of Glendale and officers were estopped to rely upon the provisions of the charter and the ordinance with reference to presenting a claim. Appellant cites certain cases in which the doctrine of estoppel was applied. It is to be noted that in each of those cases a claim had been filed but it was not filed within the time provided by law for filing such claim. In the present case no claim has been filed. Sufficient facts were not alleged to excuse appellant's failure to file a claim.

[5] As to the demurrer of respondent Everett, the appellant makes no argument in her briefs other than to state that the arguments of the other respondents relative to filing a claim were not applicable to respondent Everett. As to him, of course, it is not necessary that such a claim be filed. According to the third amended complaint, the basis of the alleged cause of action against respondent Everett is that he signed the complaint wherein plaintiff herein (Mrs. Klimper) was charged with violating the Vehicle Code. It was not alleged therein that there was no probable cause for his act in signing that complaint. No cause of action was stated as to respondent Everett. Plaintiff had filed three amended complaints.

By reason of the above conclusions it is not necessary to discuss other contentions of respondents.

The judgments are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

POTTER v. PACIFIC COAST LUMBER CO. OF CALIFORNIA et al.

Civ. 17303.

District Court of Appeal, Second District, Division 1, California.

Sept. 22, 1950.

Hearing Granted Nov. 20, 1950.*

G. E. Potter, a lumber broker, sued Pacific Coast Lumber Company of California and others, for balance claimed to be due under contracts for the sale of carloads of lumber to defendant corporation. The Superior Court of San Luis Obispo County, Ray B. Lyon, J., rendered a judgment adverse to defendants and defendants appealed. The District Court of Appeal, White, P. J., held that evidence did not establish as a matter of law an accord in satisfaction or an account stated.

Judgment affirmed.

1. Appeal and error ⇐1011(1)

A finding of trial court upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports the judgment.

2. Appeal and error ⇐996

The conclusion of trier of fact from evidence or testimony that is susceptible of conflicting or opposing inferences will not be set aside by an appellate tribunal.

3. Accord and satisfaction ⇐7(1)

In order that acceptance of an offer of payment of a lesser sum in discharge of greater sum shall result in discharge of debt, offer must be made upon condition that creditor accepts offered sum in full satisfaction of indebtedness.

4. Accord and satisfaction ⇐11(2)

In order that acceptance of check or remittance shall operate as a full discharge of claim or obligation, condition that it is to be accepted in full satisfaction of pending claim or obligation must be expressly made or circumstances must be such as to indicate clearly to creditor that it is so sent.

5. Accord and satisfaction ⇐7(1)

Where a check is tendered by debtor, even though it accompanies an account, if there is no expression of condition that it must be accepted in full payment of obligation or claim, acceptance of check does not constitute "accord and satisfaction" as no agreement to that effect can be implied from transaction.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Accord and Satisfaction".

6. Accord and satisfaction ⇐27
Account stated ⇐20(1)

Evidence that an acknowledged debtor disputed one small separate item of an invoice received in regular course of business and deducted from his remittance the amount he disputed and remitted in regular course of business amount he admittedly owed, and that check was accompanied by voucher in customary form which recited that remittance was accepted "in full settlement of account stated below", and that creditor accepted check, did not establish as a matter of law an accord and satisfaction or account stated.

Buck & O'Reilly and John F. Runner, all of San Luis Obispo, for appellants.

Renetzky & Davis, Laura O. Coffield, all of San Luis Obispo, for respondents.

WHITE, Presiding Justice.

Defendants appeal from a judgment in favor of plaintiff, a lumber broker, in an action for a balance claimed to be due under contracts for the sale of three carloads of lumber to the defendant corporation, Pacific Coast Lumber Company. Defendants C. V. Wilson and S. G. Truitt, as vice-president and purchasing agent, respectively, of defendant corporation, negotiated the contracts. The complaint was in the form of common counts. The answer, in addition to denials, set forth an affirmative defense of accord and satisfaction, the substance of the allegations in this respect being that three checks in stated amounts had been mailed to plaintiff by defendant corporation; that attached to each of said checks was a voucher in which said defendant informed plaintiff that it

* Subsequent opinion 234 P.2d 16.

intended the check as full payment of a certain disputed claim; that the vouchers so attached to the three checks informed plaintiff that the checks were intended as full payment; that the plaintiff indorsed and cashed each check, and thereby agreed to the settlement intended by the defendant corporation; that at the time of making said payments the defendants in good faith disputed the amounts due the plaintiff.

The first transaction involved a carload of pine, of specified grade, widths, surfacing, and price per thousand board feet, "F.O.B. mill," with 2% discount for cash. The lumber was to be shipped from Oregon to San Luis Obispo. Upon arrival of the shipment, defendant corporation paid the carrier's freight bill which covered freight from Spokane, Washington, to San Luis Obispo. The corporation then remitted $2,930.14 by check to the plaintiff, this sum representing the amount of the plaintiff's invoice less the cash discount and less $86.40 claimed as "freight overcharge"—being the difference between the freight actually paid the carrier and the freight from Portland, Oregon.

Subsequently defendant corporation ordered two more carloads of pine, one to be shipped to Grover City, California, and the other to Santa Barbara. Again, it was understood that the lumber was to come from Oregon, although the plaintiff testified that he informed defendants it would come from eastern Oregon. The lumber in these two carloads was rough-milled at Seneca, in eastern Oregon. One carload was then shipped to Brewster, Oregon, for "re-manufacture", and from there transported to Grover City, while the other carload was shipped to Portland for "re-manufacture" and thence to Santa Barbara. On each of these shipments defendant corporation remitted to the plaintiff by check, deducting the 2% cash discount and also deducting the items representing freight charges from eastern to western Oregon. In the case of the Santa Barbara car defendant also made certain deductions for "scant loading", "improper surfacing", and "random widths".

Defendant C. V. Wilson testified that by "F.O.B. mill" he understood to mean F. O.B. the "re-manufacturing" mill where the lumber was finished and from whence it was finally shipped; he and other witnesses also testified to a custom of the lumber trade that where Oregon lumber is sold "F.O.B. mill" a zone freight rate is often specified, but if nothing is said about the zone, then the "Portland rate", from Portland, Oregon, to destination, will apply; in such case the custom is for the purchaser to charge back to the seller any excess freight paid to the carrier. In none of the transactions here in question was there anything said concerning freight or the freight rate applicable except the bare phrase "F.O.B. mill". Plaintiff denied the existence of any such custom.

In remitting for each of the three shipments, defendant corporation mailed to the plaintiff a check or draft, attached to which was a voucher identifying the shipment for which payment was intended and setting forth the amount of the corresponding invoice, with deductions noted. Printed at the top of each such voucher was the notation:

"Payee will please detach and keep this statement. Payment of sight draft attached hereto is accepted in full settlement of account stated below, and endorsement thereof will constitute payee's receipt to the Pacific Coast Lumber Company of California."

The trial court found that defendants were indebted to plaintiff in the sum of $1,011.96; and with respect to the special defense found that the allegations thereof (except, of course, that the checks were actually sent) were untrue, thereby finding that it was not true that by the voucher attached to each check defendant corporation "informed plaintiff that it intended the check as full payment of a certain disputed claim," or that the vouchers "informed plaintiff that the said checks were intended as full payment". The court further found that "it is not true that plaintiff, by the acceptance, endorsement and/or depositing for collection of said drafts, or in any other manner, agreed to any settlement of the amount due plaintiff."

Appellants contend that the trial court's findings relating to the alleged accord and

satisfaction were contrary to undisputed facts in evidence. With respect to the finding (implied) that plaintiff was not informed that the checks he received were intended by defendant corporation as payment in full, attention is directed to testimony of the plaintiff, as follows:

"Q. Did you talk to him (Mr. Wilson) before you cashed it? Did you call him up before you cashed it? (Referring to the payment on the first shipment.) A. Yes, I think I did; and then I felt, if they were going to be that way about it, the best thing for me to do was to cash the draft so they couldn't stop payment on the draft. This was not a check, it was a draft. I knew that, with a dispute of that type, that there would be a question as to my accepting that as final payment, but I figured that a bird in the hand was better than nothing.

* * * * * *

"Q. Well, Mr. Potter, at the time you cashed those checks, you knew there was a dispute as to the amounts? A. Yes, because the amount was short on the draft. I figured we would be able to settle it one way or the other later.

"Q. Did you know the basis for the dispute? A. No, only from checking the deductions that I figured that they took. I knew that the freight amounted to so much.

"Q. Then you surmised, at least, that the deduction on one item was for freight? A. That's right.

"Q. And on the other item, you had notice of what the deductions were from the attached statement with the check, did you not? A. Yes, sir."

Appellants argue that "on the basis of the foregoing testimony the ultimate fact irresistibly following is that the defendant corporation informed the plaintiff * * * that the check or draft tendered therewith was offered in full payment of a certain fully identified, disputed claim." Appellants' remaining two contentions with respect to the findings are that there is no support in the evidence for the finding that by his acceptance of the checks or drafts plaintiff did not agree to a settlement, or for the finding that there was no bona fide dispute concerning the amount due.

[1,2] As conceded by appellants, "A finding of the trial court upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports the judgment." Fewel & Dawes, Inc. v. Pratt, 17 Cal.2d 85, 89, 109 P.2d 650, 652. It is also well settled that the conclusions of a trier of fact from evidence or testimony that is susceptible of conflicting or opposing inferences will not be set aside by an appellate tribunal. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689.

Conceding the force of appellants' argument that the evidence clearly shows the existence of a dispute as to the amount due, and further that plaintiff was informed, by the fact that the checks were for less than the amount of his invoice, by the notations appearing on the attached vouchers, and through telephone conversations with defendants, that defendant corporation contested the particular freight items in question—it does not follow that the trial court erred, as a matter of law, in concluding that no accord and satisfaction was consummated.

[3-5] It was an essential element of defendants' proof of an accord and satisfaction that their tender of a check for less than the amount due be expressly conditioned that if the money be accepted, it is to be in full satisfaction. 1 Am.Jur. 222, 223. As said in the cited authority, at page 223:

"As pointed out in the preceding section, in order that the acceptance of an offer of payment of a lesser sum in discharge of a greater shall result in the discharge, it is a necessary element that the offer be made upon condition that the creditor accept the offered sum in full satisfaction of the indebtedness. This principle finds frequent application in the case of checks and other remittances. In order that the acceptance of the check or remittance shall operate as a full discharge, the condition that it is to be accepted in full satisfaction of the pending claim or obligation must be expressly made or the circumstances must be such as

to indicate clearly to the creditor that it is so sent.

"When the assent of the creditor is sought to be inferred from the acceptance of a less sum than that claimed to be due, the fact that such amount is offered in full discharge of the whole claim must have been communicated to the creditor in some unmistakable manner. Consequently, where a check is tendered, even though it accompanies an account, if there is no expression of the condition that it must be accepted in full payment, the acceptance of the check does not constitute an accord and satisfaction, as no agreement to that effect can be implied from the transaction. * * *."

Under the particular facts of the case at bar, it would appear that the trier of fact was justified in concluding, despite the printed statement on the voucher, that the tender of each check or draft was not unequivocally stated to be on condition that it be accepted in full settlement. The language of Owens v. Noble, 77 Cal.App.2d 209, 215, 175 P.2d 241, 244, quoting from Biaggi v. Sawyer, 75 Cal.App.2d 105, 114, 170 P.2d 678, is here pertinent: "'Whether there was a dispute concerning the amount due, and whether the tender was on condition that acceptance would be in full satisfaction, are primarily questions of fact for the trial court.' In the case of Work v. Associated Almond Growers, 102 Cal.App. 232, 236, 282 P. 965, 966, this court quoted from cited authorities as follows: 'It is an essential element in accord and satisfaction by tender of a check, that the tender is subject to the condition that the acceptance of the check is satisfaction in full. This condition is not shown by the mere fact that the debtor accompanied the check with an account showing a balance equal to the amount of the check, and *it is disproved where the giving and acceptance of the check is followed by such conduct of both parties as clearly shows that they did not consider the check a final settlement of the debt.*' (Italics added.) Also see 1 Cal. Jur. p. 134, par. 10; Lapp-Gifford Co. v. Muscoy Water Co., supra [166 Cal. 25, 134 P. 989]; Duncan v. F. A. Hihn Co., 27 Cal. App. 152, 155, 148 P. 971; Wallace v. Crawford, 21 Cal.App.2d 394, 404, 69 P.2d 455."

The record does not disclose conclusive evidence that the plaintiff was *explicitly* advised that his acceptance of the checks or drafts in any of the three transactions would be considered as an agreement to an accord and satisfaction. On the contrary, the actions of the parties indicate, simply that the defendant corporation asserted that it was not liable for certain freight charges and refused to pay them. It is significant in this respect that the disputed freight charge was a separable item. The amount tendered by defendant corporation was an amount admittedly due. The trier of fact could well conclude that the amount tendered was not offered in settlement of a disputed claim, but, as above stated, in payment of a conceded indebtedness, leaving at large the question of from which point freight should be charged to the buyer. Upon analysis, the facts herein show that an acknowledged debtor has made a remittance of an amount admittedly due, and now seeks to have declared an accord and satisfaction because the creditor accepted what was concededly justly due him. The trier of fact was warranted in concluding that there was lacking an essential element of an accord and satisfaction, to-wit, that the payment was offered and accepted in settlement of a disputed demand. Here no payment whatever was made on the "disputed" demand.

[6] The situation here presented is one in which an acknowledged debtor, disputing one small separable item of an invoice received in the regular course of business, deducts from his remittance the amount he disputes and remits in the regular course of business an amount admittedly owed, accompanying his check with a voucher in customary form containing printed words to the effect that the remittance is accepted "in full settlement of account stated below." It cannot be held that as a matter of law in such circumstances there has been an accord and satisfaction or account stated.

"* * * To hold otherwise would put it in the power of a sharp, shrewd business man frequently to take advantage of the

ignorant, uneducated, or unwary, and open the way, in the business and commercial world, to the perpetration of frauds rather than the honest settlement of disputes." Sanders v. Standard Wheel Co., 151 Ky. 257, 151 S.W. 674, Ann.Cas.1915A, 954.

Appellants state that they make no point of the fact that the judgment runs against Mr. Wilson and Mr. Truitt, agents of defendant corporation, "unless the suggestion is met with that the judgment ought to stand against the defendant individuals even though it be reversed as to their principal." No such problem arising, the question need not receive further consideration.

The attempted appeal from the order denying defendants' motion for new trial is dismissed. The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



99 Cal.App.2d 559

PEOPLE v. JOHNSON.

Cr. 2638.

District Court of Appeal, First District, Division 2, California.

Sept. 22, 1950.

Samuel Louis Johnson was convicted in Superior Court in and for the City and County of San Francisco, Edward P. Murphy, J., of selling marijuana and he appealed. The District Court of Appeal, Goodell, J., held that uncorroborated testimony of police officer that defendant sold marijuana to officer justified conviction.

Judgment affirmed.

1. Criminal law ⇐814(8)

In prosecution for sale of marijuana, issue of entrapment was properly removed from consideration of jury where there was no foundation laid for such defense since defendant denied having made sale and having met police officer to whom sale was allegedly made, and police officer testified that defendant accosted officer with colloquialism intended to discover whether officer wanted to buy marijuana. Health and Safety Code, § 11500.

2. Poisons ⇐9

Uncorroborated testimony of police officer that defendant sold marijuana to officer justified conviction for selling marijuana. Health and Safety Code, § 11500.

3. Criminal law ⇐1036(1)

Admission in evidence of unobjected to testimony which went in when defendant was represented by counsel could not be urged as error on appeal from conviction for selling marijuana. Health and Safety Code, § 11500.

Samuel Louis Johnson, in pro per.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Dep. Atty. Gen., for respondents.

GOODELL, Justice.

This is an appeal from a judgment of conviction entered on a verdict, and from an order denying a new trial.

By an amended information appellant was accused of the sale of marijuana, § 11500, Health & Safety Code, to which charge he pleaded not guilty.

Appellant was represented on his arraignment and throughout the trial by an assistant public defender, but filed this appeal *in propria persona* and prosecutes it without the aid of counsel.

On July 14, 1949 between 9 and 10 p. m., Officer Finis of the San Francisco Police Department's Bureau of Special Services, or "Vice Squad", dressed in plain clothes, while standing in the doorway of a pool room in San Francisco, was spoken to by appellant who, according to the officer's testimony, asked him if he was "straight". This expression, according to the testimony of another witness means colloquially "'Have you some narcotics,' or 'do you want some', it is used interchangeably. That is an opening statement to the prospective customer or to someone you would like to buy from * * *." The officer replied that he wanted a can of marijuana

cigarettes, not just a few, as he was a merchant marine and had a chance to make some money with them on the ship; appellant responded that "he might be able to fix me up" and that the can would cost $20 but he would have to go and get it; they "argued about the price and finally rather than go off, I agreed to take six marijuana cigarettes for $5. * * * He sold me the cigarettes in the men's toilet in the back of the pool room." A $5 bill was paid by the officer, with no third person present. The officer testified that he took the cigarettes and left, agreeing to meet appellant the following day at 1:15 or 1:30, at which time appellant said he could procure the can of marijuana. The officer testified that at the appointed time the next day appellant failed to show up.

The six cigarettes were analyzed and identified as marijuana.

The officer next saw appellant on the evening of July 18 at the same pool room. Again the officer was alone and in plain clothes but Inspector Noel of the State Narcotics Department was waiting down the street. On this occasion appellant said he could still get the can of marijuana and that it would cost $20. The officer then said, "I don't have enough to make a $20 purchase, but my partner is out on the street on the corner waiting and perhaps we can pool our money to buy enough." Officer Finis and appellant then joined Inspector Noel on the street and appellant told them he would have to go to Third Street to get the stuff. As appellant hailed a taxicab the two officers placed him under arrest for selling narcotics. They searched him but found no marijuana. Inspector Noel testified that appellant said "Can you give me a break" to which he replied "Give you a break, what for—for selling marijuana? * * * why did you sell marijuana to this San Francisco Police Officer previously?" to which appellant replied "Well, he was a colored man and I was a colored man and I was just trying to do him a favor."

Appellant denied seeing Officer Finis on the 14th or ever in his life before the 18th, and denied making the sale, but admitted seeing the officer on the 18th in the pool room. He denied having discussed with Officer Finis the matter of marijuana claimed to have been sold four days before, or the arrangement for the proposed sale of a can of marijuana. He denied having been in the pool room prior to July 18, and denied having hailed a taxicab.

Appellant's principal contention is that entrapment was resorted to and that an instruction defining it should have been given. He cites nineteen California cases dealing with entrapment. This is not understandable since an examination of them shows that in each of them no entrapment was proved, and the judgment of conviction was affirmed. The language which he quotes from these cases, defining entrapment and showing how it operates, is orthodox and unimpeachable but it in no way helps him.

No foundation was laid for this defense since appellant flatly denied that he had made the sale on July 14, or at all, and denied that he had ever met Officer Finis prior to July 18, the day of his arrest. His position is similar to that of the appellant in the case of People v. Lee, 9 Cal.App.2d 99, 48 P.2d 1003, where Lee denied that any sale was made or that he had any narcotics in his possession, but still argued entrapment. At pages 109–110 of 9 Cal.App.2d, 48 P.2d at page 1007, the court there said: "It is our understanding that the defense of entrapment is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is being prosecuted. *The invocation of the defense necessarily assumes that the act charged as a public offense was committed.*" (Emphasis added.)

People v. Lee is followed in People v. Grijalva, 48 Cal.App.2d 690, 694, 121 P.2d 32, in People v. Billingsley, 59 Cal.App.2d Supp. 845, 847–848, 139 P.2d 362, in People v. Gelardi, 77 Cal.App.2d 467, 477, 175 P.2d 855, and in People v. Carlton, 83 Cal.App.2d 475, 477, 189 P.2d 299. All five cases are among those cited by appellant.

In People v. Billingsley, supra, 59 Cal. App.2d Supp., 845, 847, 139 P.2d 363, it is

said, "If a crime is committed at the suggestion of the defendant, the doctrine of entrapment is not applicable." Officer Finis testified that on July 14th appellant, opened the conversation with the inquiry "Are you straight?" an expression having a definite meaning in the trade. Appellant's testimony that he never met the officer until the 18th, and made no sale to him, raises a conflict, but the jury resolved this against the defendant as they did in the Billingsley case.

[1] There was no evidence in the record which would have justified an entrapment instruction. The subject had apparently been brought up in argument and the court instructed the jury that "The doctrine of entrapment which has been referred to by counsel has no applicability to the facts in the case before you." It was proper to thus remove this false issue from the jury's consideration. There is no merit in appellant's claim of entrapment.

[2] Appellant's next contention is that the verdict is not sustained by the evidence. In this connection he points out that there was no corroboration of the testimony of Officer Finis. It is true there was none respecting the sale itself since it was conducted in a small room with nobody present other than the officer and appellant, according to the testimony. To prove certain offenses the testimony of more than one witness is required, see, for example, §§ 653f, 1103, 1103a, Penal Code, but the sale of narcotics is not one of them. The uncorroborated testimony of the officer, if believed—as it was, according to the verdict —was sufficient.

Appellant argues that he would not have been convicted without the testimony of Inspector Noel. The inspector's testimony was confined to the happenings on the 18th, four days after the sale. He testified to meeting appellant with Officer Finis; walking with them; the discussion about going to Third Street for the stuff; the arrest and search, and the conversation after the arrest. Appellant's reply to his question as to why he had made the sale previously, that he wanted to do a favor was an admission which lent some corroboration to the testimony of Officer Finis that the $5 sale had been made.

[3] All of Inspector Noel's testimony went in without objection; appellant was represented at the time by counsel and he cannot now urge error in its admittance.

Appellant quotes from several cases where judgments of conviction were reversed notwithstanding no objections were made at the trial. Among them is People v. Gordon, 88 Cal. 422, 26 P. 502, but appellant's quotation is not to be found therein. The reversal there was because of erroneous instructions wherein the judge charged the jury on the facts. In People v. Wynn, 44 Cal.App.2d 723, 732, 112 P.2d 979, cited by appellant, it is true the judgment of conviction was reversed for misconduct of the district attorney to which the defendant had made no objection, but that was a close case where the juries had disagreed in two earlier trials. Likewise, People v. Ford, 89 Cal.App.2d 467, 471, 200 P.2d 867, cited by appellant, was a close case in which there was a serious question whether the confession had been voluntary, and there was but slight circumstantial evidence in addition to the questionable confession. In that case the briefs on appeal did not even raise the point of the district attorney's misconduct but the court held it to have been too flagrant to be overlooked on appeal. The instant case is not at all closely balanced hence these three cases, and others cited by appellant dealing with misconduct of a district attorney, are not in point.

The offense charged was the sale of the six cigarettes for $5 on July 14. Accordingly appellant argues that the testimony of Inspector Noel as to the sidewalk conversation four days later was highly prejudicial particularly in view of the fact that appellant was then virtually in custody although he was technically arrested later. Not only was no objection made to the admissibility of this testimony, but defendant did not contradict it.

No satisfactory reason has been advanced to show that the evidence is insufficient to sustain the judgment of conviction. The sale of the six cigarettes was shown by the

testimony of Officer Finis; his uncorroborated testimony was sufficient, under the law, to prove the case. It was believed by the jury as indicated by the verdict. Although not requiring corroboration, it was corroborated in certain respects by the testimony of Inspector Noel. There is no merit in the appeal.

The judgment and order appealed from are affirmed.

NOURSE, P. J., and DOOLING, J., concur.



In re KNAPP'S ESTATE.

GODLEY v. STATE.

Civ. 17350.

District Court of Appeal, Second District, Division 1, California.

Sept. 13, 1950.

Rehearing Denied Oct. 2, 1950.

Hearing Granted Nov. 9, 1950.*

Proceedings in the matter of George Owen Knapp, deceased, wherein the Superior Court, Santa Barbara County, Ernest D. Wagner, J., entered an order fixing the amount of inheritance tax and Frederick A. Godley, as executor, appealed. The District Court of Appeal, Drapeau, J., held that the inheritance tax appraiser had erred in basing the inheritance tax on the contingent remainder interest of testator's daughter-in-law upon an assessment to her of the entire property passing under the will at date of testator's death.

Order reversed with directions.

See also, 213 P.2d 408.

1. Statutes ⇐245

Since tax proceedings are in invitum, tax laws are strictly construed in favor of taxpayer and against state and equitable construction is not applicable to taxing statute, because presumptively legislature has given in plain terms all power intended to be exercised.

* Subsequent opinion 236 P.2d 372.

2. Taxation ⇐895(4)

Property transferred by will is valued as of date of testator's death. Revenue and Taxation Code, §§ 13311, 13951.

3. Taxation ⇐896, 897

When will creates separate interests in property disposed of, separate values of each successive interest must be ascertained, and where interests created are life estate and remainder, value of life estate is computed by use of actuarial tables and value of remainder is value of property as whole over and above value of life interest. Revenue and Taxation Code, § 13953.

4. Administrative law and procedure ⇐800
Statutes ⇐219

While regulations promulgated by state controller's office are not binding on courts, they are nevertheless persuasive authority because designed to be interpretations of statutes to which they point.

5. Taxation ⇐895(4)

Revenue Code section providing for taxing interest terminated by death at actual value does not require taxing at face value an interest that is accelerated because of death. Revenue and Taxation Code, § 13955.

6. Taxation ⇐897

Where testator bequeathed annuities from testamentary trusts to son for life and annuities from same trusts to son's wife after death of her husband if she were then living, and son died before inheritance tax had been determined, wife's remainder would be valued as of date of death of testator at its present worth and not at its face value. Revenue and Taxation Code, §§ 13411, 13952, 13955.

7. Taxation ⇐886½

Where testator bequeathed annuities from testamentary trust to son for life and annuities from same testamentary trust to son's wife after death of her husband if she were then living, and son died before inheritance tax had been determined, Revenue Code section relating to computation and rate of tax on transfers subject to contingency or condition could be applied only

to that portion of entire property which was left after deducting value of son's life estate as of date of death of testator. Revenue and Taxation Code, §§ 13411, 13952, 13953, 13955; Administrative Code, Tit. 18, §§ 786, 793, 856.

8. Taxation ⇐896

Where testator bequeathed annuities from testamentary trust to son for life and annuities to son's wife after death of her husband if she were then living, and son died before inheritance tax had been determined, inheritance tax appraiser erred in assessing to son's wife entire property passing under will at date of testator's death. Revenue and Taxation Code, §§ 13411, 13952, 13953, 13955; Administrative Code, Tit. 18, §§ 786, 793, 856.

Heaney, Price, Postel & Parma, Santa Barbara, for appellant.

James W. Hickey, Chief Inheritance Tax Attorney, Sacramento, Morton L. Barker, Los Angeles, and Raymond G. LaNoue, Deputy Inheritance Tax Attorney, Sacramento, Bert G. Wetherby, Assistant Inheritance Tax Attorney, Los Angeles, for respondent.

DRAPEAU, Justice.

George Owen Knapp, a resident of Santa Barbara County, died on July 21, 1945. By his last will (admitted to probate on August 20, 1945), his son William Jared Knapp (hereinafter referred to as William) was bequeathed an annuity of $10,000 per year from each of five testamentary trusts aggregating a total of $50,000 per year for life. Upon the death of William, his wife Louise Allen Knapp (herein referred to as Louise), if then living, was to receive an annuity of $15,000 per year from each of the said five trusts, or $75,000 per year for her life. Upon the death of Louise, or the death of William, if Louise predeceased him, the remainders were to go to specified grandchildren of the testator.

On July 12, 1947, the state inheritance tax appraiser in the instant estate filed his report in which the various interests under the will were valued in accordance with section 13953, Revenue & Taxation Code, using the mortality tables therein specified. However, on July 19, 1947, before any action was taken on that report, William, the first annuitant, died leaving Louise surviving.

On August 17, 1948, said inheritance tax appraiser filed his second report, pursuant to section 13955, Revenue & Taxation Code, to-wit:

"*Valuation of annuity or life estate terminated prior to fixing of tax.* If an annuity or a life estate is terminated by the death of the annuitant or life tenant or by the happening of a contingency, and the tax upon the transfer of the annuity or estate has not been determined, the value of the annuity or estate is the *present value,* at the date of the transferor's death, of the amount of the annuity or income actually paid or payable to the annuitant or life tenant during the period he was entitled to the annuity or was in possession of the estate."

In the first report, William's interest was valued at $463,161.35 upon which a tax of $33,834.52 was assessed. In the second report which was based on the amount actually paid to him, sec. 13955, supra, William's interest was reduced to $99,726.03 and a tax of $3,139.04 was imposed.

According to the first report, Louise's interest was appraised at $96,346.65 and taxed at $7,534.67; in the second report her interest was increased to $546,032.04 and the tax assessed at $66,804.81.

The total tax imposed in the first report against the various interests under the will was $43,907.67; the second report assessed a total tax of $71,174.49.

On August 19, 1948, the executor of the Estate of George Owen Knapp, deceased, filed objections to the second report. A stipulation of facts was filed, and the matter submitted on written briefs. Thereafter, the court overruled the objections to said report and on May 9, 1949, made an order fixing the inheritance tax in accord with the second report. This appeal is from that order.

It was stipulated, among other things, that (a) at the death of William, the tax upon his life estate under the will *had not*

been determined; (b) that no issue was made by objector to the correctness of the inheritance tax imposed by reason of the death of the testator, George Owen Knapp, except as to the tax charged against Louise.

It is here urged that for tax purposes the interest of Louise became fixed on the death of testator, and it was error to raise the tax on her interest upon the death of William, the first annuitant; that although section 13955, supra, "controls the valuation of William's interest, *it has no effect whatsoever on the value of Louise's interest.*" Accordingly, it is contended that the order appealed from wherein it reads "Louise Allen Knapp (daughter-in-law) 546,032.04 66,804.81", should be changed to read "Louise Allen Knapp (daughter-in-law) 96,346.65 $7,534.67" pursuant to the first report.

Appellant argues that while section 13955, supra, must be followed for the purpose of taxing William's interest, "it is error to use the value of William's interest thus arrived at as a factor in computing the taxable value of Louise's interest. In other words, the taxable value of Louise's interest is arrived at by deducting from the *'entire property'* the value of William's interest as computed under section 13953 and *not* by deducting from the 'entire property' the value of William's interest as computed under section 13955." Louise's *remainder,* as thus valued, should then be taxed pursuant to section 13411. That section reads as follows:

"Transfers subject to a contingency or condition. In the case of a transfer made subject to a contingency or condition upon the occurrence of which the right, interest, or estate of the transferee may, in whole or in part, be created, defeated, extended, or abridged, the tax is computed as though the contingency or condition has occurred, and at the highest rate possible."

Respondent claims that at the death of testator, William had a vested life estate followed by future contingent interests, and that these contingent interests made it necessary to tax the "entire property" tentatively to Louise under section 13411. Therefore, the second report considered "as a report returned on the *highest possible contingency,* correctly assessed the entire remainder of the corpus to Louise." Briefly, that where contingent interests are involved the vested life interest is never computed under section 13953.

A settlement of the instant controversy requires a construction of the various applicable sections of the State Inheritance Tax Law, sections 13301–14901, Revenue and Taxation Code.

[1] As stated in 24 Cal.Jur. 27, section 11:

"Since tax proceedings are *in invitum,* tax laws are strictly construed in favor of the taxpayer and against the state * * * because presumptively the legislature has given in plain terms all the power intended to be exercised.

"A statute will not be held to have imposed a tax unless it is clear and explicit. No presumption is indulged in favor of the right to take property or of any intention that is not distinctly expressed in the statute under which it is sought to be taken. Nor may a tax be extended by construction to those not named or described in the statute. * * * equitable construction * * * is not applicable to a taxing statute." See, also, In re Estate of Potter, 188 Cal. 55, 64, 204 P. 826; In re Estate of Steehler, 195 Cal. 386, 389, 233 P. 972.

[2] It is a fundamental rule of law that property transferred by will is valued as of the date of testator's death. Secs. 13951, 13311, Rev. & Tax. Code. See, also, 24 Cal.Jur. 463, sec. 422; 30 A.L.R. 478.

[3] "And when a will creates separate interests or estates in the property disposed of, such as a limitation over after a life estate or other precedent interest, the separate values of each of the successive interests must be ascertained. The value of a life estate is computed by the use of tables prepared by actuaries for ascertaining the expectancy of life for purposes of life insurance, and the value of the remainder is the value of the property as a whole over and above the value of the life interest." 28 Am.Jur. 117, sec. 232.

Section 13952 of Rev. & Tax. Code reads: "Same *(Valuation as of date of transferor's death)*: *Estates for life or years: Estates determinable upon contingency: Reversions, remainders, etc.* In the case of a transfer of any estate, income, or interest (a) for a term of years or for life, or (b) determinable upon any future or contingent event, or (c) constituting a remainder, reversion, or other expectancy, the *entire property* by which the estate, income, or interest is supported, or of which it is a part, *is valued as of the date of the decedent's death.*"

Having thus provided the date for valuation and the estates which are affected, section 13953 then sets forth the method for determining the value of the particular interests here involved:

"Future, contingent or limited estate, income or interest: Use of mortality tables: Rate of interest. The value of a future, contingent, or limited estate, income, or interest is determined in accordance with the rules, methods, and standards of mortality and value that are set forth in the actuaries' combined experience tables of mortality, as extended, for ascertaining the values of life insurance policies and annuities and for determining the liabilities of life insurance companies, save that the rate of interest used in computing the present value of the estate, income, or interest is four (4) per cent per annum."

That respondent customarily followed the method laid down by the foregoing rules is evidenced by regulations of the Inheritance Tax Department contained in Title 18, secs. 793 and 786 of the California Administrative Code:

"Sec. 793: *Remainders.* The present worth of a remainder is obtained by computing the present worth of the precedent or outstanding estate and subtracting the amount thereof from the total value of the property involved. The difference will represent the present worth of the remainder. *Example:* A by will gives the annual income from $100,000 to B for life, with a remainder over to C. B at the time of the gift is 40 years of age. By an application of the method set forth in sec. 787 for determining the present value of a life estate, B's life interest is found to be $67,164.50. The latter subtracted from $100,000 results in a difference of $32,835.50, the present value of C's remainder."

"Sec. 786: *Generally.* The value of a limited, contingent, or future estate, income or interest in property is generally the present value or worth of such estate, income or interest at the applicable valuation date. In this connection, the Inheritance Tax Law specifically provides that such present value or worth is to be determined in accordance with the Actuaries' or Combined Experience Tables of Mortality employed in ascertaining the value of life insurance policies and annuities and the liabilities of life insurance companies, save that the rate of interest shall be 5 (4) per centum per annum in the case of future and contingent estates * * *."

[4] While as stated by respondent, the regulations promulgated by the State Controller's office are not binding on the courts, nevertheless, they are persuasive authority because designed to be interpretations of the statutes to which they point. See In re Estate of Atwell, 85 Cal.App.2d 454, 468, 193 P.2d 519.

The foregoing sections of the Inheritance Tax Law comprise the authority pursuant to which Louise's interest should be valued and taxed.

As hereinabove noted, William died prior to a determination of the tax upon his interest, and it is conceded by both sides herein that it became necessary to compute the value of his estate under section 13955, supra.

[5, 6] An examination of the terms of that section reveals that it is authority for taxing at *actual value* an interest terminated by death, but it does not provide for taxing at face value an interest that is accelerated because of that death. Statutory authority is required to overcome the effect of section 13952. This is supplied by section 13955, but only insofar as William's interest is concerned. Louise's remainder must be valued under section 13952 which directs that such valuation be made as of the date of death of testator, to-wit: at its *present worth* and *not at its face value.*

[7] Respondent contends that under section 13411, supra, the "entire property" passing under the will at the date of death of testator must be assessed to Louise, because such an assessment will provide the highest rate of tax.

That section reads: *(Computation and rate of tax) "Transfers subject to a contingency or condition.* In the case of a transfer made subject to a contingency or condition upon the occurrence of which the right, interest, or estate of the transferee may, in whole or in part, be created, defeated, extended, or abridged, the tax is computed as though the contingency or condition has occurred, and at the highest rate possible."

Said section cannot be applied to William's interest which vested on testator's death; but only to that part of the *entire property* which comprises the contingent estate.

As pointed out by appellant, that part of the entire property which was *neither future nor contingent* was William's vested life estate. Therefore, section 13411 can apply only to that portion of the entire property which is left after deducting the *present* value of William's life estate, to-wit: its value as of the date of death of testator.

Again respondent's regulation, Sec. 856, Title 18, California Administrative Code, supports this construction of said section: that it applies only to the contingent remainder and not to the entire property.

The regulation provides:

"Contingent and Conditional transfers. If a taxable transfer is made subject to a contingency or condition upon the occurrence of which the interest of any transferee of the property involved may, in whole or in part, be created, defeated, extended or abridged, the tax is computed at the highest rate possible upon the happening of the contingency or condition. For example, A by will gives B, who is 50 years of age, a life interest in property valued at $100,000, and C, D and E, or the survivor, a remainder interest in the property at B's death. C, who is not related to A, is 25 years of age at the date of the gift. D and E, who are brothers of A, are, respectively, 62 and 70 years of age at the date of the gift. In such case the *tax on the remainder* will be computed on the supposition that the property will go to C, since *a tax on a remainder to C* would be computed at higher rates than on a remainder going to D or E, see Section 852. Any person who pays the tax so computed may secure a refund in the event that D or E survives B's death, in an amount equal to the difference between the tax paid and the tax which would have been paid had the tax been computed on the basis of a transfer to the actual survivor, see Section 919.

"The payment of a tax due on a contingent or conditional transfer may be deferred on the filing of a bond, see Section 880, and may under proper circumstances be subject to a compromise, see Section 882."

Both parties have cited New York cases in support of their contentions. And it appears that New York does have statutory authority which permits the taxing of a contingent remainder in accord with respondent's theory. Moreover, the enactment in this state in 1911 of paragraph 6, section 15 of the Inheritance Tax Law, Stats.1911, Ch. 395, P. 721, would here support respondent, but that support has been withdrawn with the repeal of that section in 1941, Stats.1941, Ch. 833, P. 2393.

[8] By reason of the foregoing principles of law and the construction placed by this court upon the applicable sections of the Inheritance Tax Law, the method used by respondent in valuing and taxing Louise's contingent remainder was erroneous.

The order appealed from is reversed, and the trial court is directed to value and fix the tax on the interest of Louise Allen Knapp bequeathed to her under the will of testator in accordance with the views herein expressed.

WHITE, P. J., and DORAN, J., concur.

In re McGEE.

MARKWORT v. McGEE.
Civ. 18130.

District Court of Appeal, Second District, Division 1, California.

Sept. 21, 1950.

Hearing Granted Nov. 2, 1950.*

Proceeding in the matter of the contest of the nomination of Patrick D. McGee to the office of Member of Assembly from the 64th Assembly District of California by the Democratic and Republican Parties at the primary election, wherein Eldon James Markwort filed an affidavit of contest on ground that McGee was ineligible to the office of Assemblyman. The Superior Court of Los Angeles County, Norman F. Main, J., entered judgment declaring McGee eligible to the office and contestant appealed. The District Court of Appeal, Per Curiam, held that the evidence sustained finding of trial court that nominee had been a resident of state for more than three years, a bona fide citizen and inhabitant of Assembly District in question for more than one year and a citizen of the United States since 1931.

Affirmed.

1. States ⇐28(1)

For purposes of determining an election contest, the word "residence" as used in the Election Code and words "citizen and inhabitant" as used in the Constitution defining eligibility of office of Assemblyman have the same meaning. Government Code, §§ 243, 244; Elections Code, §§ 5650–5661, 5653; Const. art. 4, § 4.

2. Domicile ⇐10

The formal acts of registering and voting are convincing and persuasive evidence of residence, but not necessarily conclusive.

3. States ⇐28(1)

In election contest, evidence sustained finding of trial court that nominee had been a resident of State for more than three years, a bona fide citizen and inhabitant of Assembly district in question for more than a year and a citizen of the United States since 1931.

4. Elections ⇐295(1), 305(7)

In an election contest, question of residence or domicile is a mixed question of law and fact, and determination of trial court on conflicting evidence is conclusive upon a reviewing court.

5. Elections ⇐298(1)

California courts have jurisdiction to determine eligibility of candidates for nomination to office of member of the assembly. Elections Code, § 8600.

Rollin L. McNitt and Edythe Jacobs, Los Angeles, for appellant.

Frank P. Doherty, Los Angeles, and Spencer E. Van Dyke, Manhattan Beach, for respondent.

PER CURIAM.

Patrick D'Arcy McGee was born in Canada. He came to the United States with his parents in 1924. He was then seven or eight years old. He went to grammar school at Lincoln Park, Michigan.

In 1931, by virtue of his father's naturalization, Mr. McGee became a citizen of the United States.

Mr. McGee went to grammar school until 1930. From grammar school he went to Notre Dame, Indiana, worked a year, and studied four years in high school. Then he went to the University of Portland, in Oregon, from the fall of 1936 to June, 1938. This schooling was financed on a football scholarship. Before completing his studies in Oregon he was injured so that he could no longer play football; his scholarship was revoked; and he had to leave.

From Oregon, Mr. McGee came to California. As stated, this was in 1938. He lived in San Jose from July until the middle of November of that year. He worked at what he could find, and tried, unsuccessfully, to get on the football squads at Stanford or Santa Clara.

In November of 1938, Mr. McGee's father and mother and their family in Detroit were in dire financial straits. They sent word that they had to have their son's help. So

* Subsequent opinion 226 P.2d 1.

he went to Detroit. He worked at odd jobs from November, 1938 to the spring of 1940, when he was employed by the Ford Motor Company. He lived with his father and mother, and the rest of their family. They lived in a tent until a house was built, in part by Mr. McGee's labor.

April 1, 1941, Mr. McGee was inducted into the Royal Canadian Air Force. May 5, 1943, he was transferred to the United States Navy Air Force. He was stationed at a number of places while he was in the service. He gave his mailing address as 90 Collingwood, Detroit, Michigan; the home of his parents. But he never lived at that address.

September 12, 1945, Mr. McGee was discharged from the Navy at Alameda, California. For a few months before his discharge he was stationed at Crows Landing, California. He was allowed travel pay by the Navy from Alameda to Detroit, Michigan.

After his discharge from the Navy, Mr. McGee applied to take the law course at Harvard University. He also applied to, and was accepted as a student at Boalt Hall at the University of California in Berkeley. Before actual enrollment at Boalt Hall he was advised he would be permitted to enter the law school at Harvard University. So he went to Cambridge, Mass., and studied law at Harvard from October 22, 1945 until the end of January, 1948.

While at Cambridge, Mr. McGee applied to, and received from the State of Michigan a soldier's bonus given by that state to residents of Michigan who served in the second world war.

Mr. McGee also registered as an elector in Cambridge, Mass., and voted at a school board election held there.

After his enrollment at Harvard, Mr. McGee filed a law student's notice of intention to take the California bar examination. July 3, 1948, he filed student's application and affidavit with the State Bar. In the last application he stated that he had been continuously a resident of California from March 10, 1948. In response to the question: "State the facts upon which you base your claim to have become and to be such a resident," he stated: "Having finished law school in February, 1948, I proceeded to Los Angeles, arriving on the above date with the intention of remaining permanently, and have so remained."

At the primary election in California in the spring of 1950, Mr. McGee was a candidate for member of assembly from the 64th Assembly District. In his declaration of candidacy he stated he had been a resident of California for twelve years. He filed on both Democratic and Republican tickets, and received a majority of the votes cast by the electors of each party.

Affidavit of contest, as permitted by the Elections Code, was filed by the candidate whom Mr. McGee defeated. The contest grounded on the proposition that Mr. McGee was, and is, ineligible to the office of assemblyman, in that he was not a citizen and inhabitant of the State of California three years next before November 7, 1950, as required by Art. IV, Sec. 4 of the Constitution of the State of California.

The contest was heard in the Superior Court of the State of California in and for the County of Los Angeles. Upon the evidence before the court, it was found that Mr. McGee had been a resident of the state for more than three years; a *bona fide* citizen and inhabitant of the 64th Assembly District for more than a year; and a citizen of the United States since 1931. From the judgment declaring Mr. McGee eligible to the office, contestant appeals.

Nothing need be added to the foregoing statement of facts, except that the record shows that Mr. McGee was called as a witness for contestant under Sec. 2055 of the Code of Civil Procedure, and exhaustively cross-examined by counsel for contestant. All of the evidence possible in such a case as this was presented to the court. Several Navy friends of Mr. McGee's testified to declarations made by him while in the service of his residence in California.

Mr. McGee testified that he made up his mind to live in California and to become a resident and citizen of this state while he was in San Jose in 1938; that that was his intent all the time he was out of the state:

taking care of his family in Detroit, in the service, and going to school. With reference to the Michigan bonus, he said he was working his way through Harvard on a GI allotment, charged with the support of a wife and child, and he needed the money. With reference to voting in Cambridge, he said he was assured that students at Harvard could vote at a school board election.

Under the familiar substantial-evidence rule, the judgment must stand, unless it be held that all, or any, of the three facts most strongly urged against Mr. McGee's residence in California—voting in Cambridge, collecting the Michigan bonus, and his declaration to the California State Bar—as a matter of law determine the ultimate fact of residence.

[1] For the purposes of this decision, it may be held that the word "residence" used and defined in our law, and the words "citizen and inhabitant" as used in the Constitution have the same meaning.

Pertinent sections of our codes are as follows: Government Code, sections 243 and 244; Elections Code, sections 5650 to 5661.

Elections Code, section 5653 codifies well-established rules that a person does not gain or lose residence by his presence or absence from a place while in the armed services, nor while a student at any institution of learning.

Residence is essentially a question of intention. Ericksen v. Ericksen, 57 Cal.App. 2d 532, 535, 134 P.2d 825. But always the union of act and intent is necessary. Gov. Code, sec. 244; Los Angeles County v. Superior Court, 128 Cal.App. 522, 529, 18 P.2d 112.

[2] The formal acts of registering and voting are convincing and persuasive evidence of residence, but not necessarily conclusive. Taff v. Goodman, 41 Cal.App. 2d 771, 775, 107 P.2d 431.

[3, 4] Taking the evidence as a whole, as we must; resolving every substantial conflict in favor of the trial court's findings and judgment, Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 780, 163 P.2d 756; it becomes clear that this court is required to affirm the judgment. The question of residence or domicile is a mixed question of law and fact, and the determination of the trial court upon conflicting evidence is conclusive upon a reviewing court. Sheehan v. Scott, 145 Cal. 684, 79 P. 350; In re Estate of Peters, 124 Cal.App. 75, 77, 12 P.2d 118; In re Estate of Winzeler, 42 Cal. App.2d 246, 248, 108 P.2d 720.

[5] Some argument in the briefs has been devoted to the jurisdiction of the court to hear the contest. See Allen v. Lelande, 164 Cal. 56, 127 P. 643. Section 8600 et seq., Elections Code, provide for the contest. The California courts have jurisdiction to determine the eligibility of candidates for nomination. Elections Code, sec. 8600 et seq.; Heney v. Jordan, 179 Cal. 24, 175 P. 402; Norcop v. Jordan, 216 Cal. 764, 17 P.2d 123; Hubbard v. Jordan, 216 Cal. 788, 17 P.2d 127; Ackley v. Jordan, 216 Cal. 789, 17 P.2d 127; Puccinelli v. Superior Court, 183 Cal. 775, 192 P. 707.

Also the briefs argue whether a candidate who did not receive the highest vote at a primary election can bring a candidate's contest under section 8600 of the Elections Code. Nothing appears in the law which would forbid such procedure.

The judgment is affirmed.

MACMILLAN PETROLEUM CORPORATION v. GRIFFIN et al.

No. 14300.

District Court of Appeal, First District, Division 1, California.

Sept. 21, 1950.

Rehearing Denied Oct. 21, 1950.

Hearing Denied Nov. 16, 1950.

Action by Macmillan Petroleum Corporation, substituted for Mileage Gasoline Company, against Clyde A. Griffin and George H. Jovick, wherein an application was made to grant enforcement of a judgment which had been recovered against the defendants. An order was entered in the Superior Court, City and County of San Francisco, Edward P. Murphy, J., denying plaintiff's motion to set aside ex parte order vacating minute order denying motion of George H. Jovick to vacate order granting enforcement of judgment, and granting the motion of George H. Jovick to vacate minute order, and granting motion of George H. Jovick to vacate order substituting Macmillan Petroleum Corporation for Mileage Gasoline Company, and granting motion of George H. Jovick to set aside order of enforcement, and denying plaintiff the right to enforce the judgment, and the Macmillan Petroleum Corporation appealed. The District Court of Appeal, Bray, J., held that the order granting enforcement of the judgment was void because the then plaintiff Mileage Gasoline Company was a dissolved Nevada corporation, and that the void order could be set aside when the true status of the plaintiff was discovered.

Appeal of Mileage Gasoline Company dismissed, and that part of order granting motion to vacate order of substitution reversed, and order affirmed in all other respects.

1. Parties ⇐59(2)

An assignee is entitled to be substituted as party plaintiff in place of assignor.

2. Parties ⇐61

Notice of application for substitution of a party plaintiff is the better practice, but is not required.

3. Parties ⇐61

An order of substitution of party plaintiff was not invalid by reason of having been made by presiding judge of superior court rather than by the judge in whose department the matter was pending.

4. Courts ⇐47

There is but one superior court in a county, and the action of any judge of that court is the action of the court, and not merely of the particular judge.

5. Judgment ⇐855(1)

Holder of purported assignment of judgment made prior to dissolution of corporate judgment creditor could be substituted as party plaintiff in proceeding to enforce judgment.

6. Corporations ⇐691

The capacity of a Nevada corporation which had been dissolved for 3 years to file motion in California court for enforcement of judgment in favor of corporation must be determined by Nevada and not California law.

7. Corporations ⇐691

Under Nevada law, a corporation which was dissolved on December 24, 1937, was completely defunct after December 24, 1940, and hence had no capacity to file motion on December 19, 1947, to enforce judgment in favor of corporation. Code Civ.Proc. § 1875, subd. 3, Corporations Code, § 6602.

8. Judgment ⇐502

An order granting application of Nevada corporation for enforcement of judgment could be declared invalid by trial court when it became apparent to court that order was void for lack of capacity of corporation under Nevada law due to corporation's dissolution for three years, notwithstanding that trial court had entered order denying motion to vacate enforcement order. Corporations Code, § 6602, Code Civ.Proc. §§ 1916, 1917.

9. Judgment ⇐847

Corporate judgment creditor's purported assignment of judgment prior to dissolution would not validate order which granted enforcement of judgment and which was void under Nevada law due to dissolution for three years of creditor, but assignment and subsequent diligence of assignee could be shown on assignee's application for order of enforcement. Code Civ.Proc. §§ 385, 685.

10. Appeal and error ⇐154(1)

Defendant appealing from order denying defendant's motion to vacate order of enforcement of judgment did not thereby recognize invalidity of subsequent order vacating order denying motion.

11. Appeal and error ⇐439

A court may set aside a void order at any time, even after appeal.

12. Motions ⇐59(3)

An order refusing to vacate a void order cannot give validity to the void order.

Robert E. Hatch, San Francisco, Frederick W. Mahl, Jr., Los Angeles, for appellant.

Courtney L. Moore, San Francisco, for respondents.

BRAY, Justice.

The basic questions are whether a certain order granting enforcement of a judgment is void because the then plaintiff was a dissolved Nevada corporation, and whether it could be set aside when the true status of the plaintiff was discovered. There is also involved the question of the validity of an ex parte order substituting party plaintiff. There are a number of orders made culminating in the order appealed from.

Summary.

On May 17, 1934, Mileage Gasoline Company (hereafter called Mileage) recovered a judgment against defendants Griffin and Jovick. Approximately 13 years later, in 1947, an application by Mileage's attorney was made to the superior court on notice to grant enforcement of this judgment and to order execution to issue. Apparently, Griffin was not served, and so far as this appeal is concerned will not be considered further. December 19, 1947, the court made an "Order Granting Leave to Enforce Judgment" against Jovick. Thereafter the following orders were made and proceedings had:

April 20, 1948—a minute order denying respondent's motion to vacate the order of enforcement.

May 3—an ex parte order vacating the April 20 order, endorsed on a notice of motion by respondent to be heard May 7 to vacate that very order.

June 14—an order (1) vacating the order of April 20; (2) permitting respondent to renew his motion to vacate the December 19 order; (3) granting his motion to vacate that order; and (4) denying Mileage the right to enforce the judgment.

(June 15—respondent appealed from the April 20 order. This appeal apparently has not been perfected.)

August 10—by stipulation the order of June 14 was vacated and the matters which were before the court on June 14 were to be again presented. At this moment, the order of April 20 refusing to vacate the order of enforcement was in effect, unless the order of May 3 vacating it was valid.

August 21—an ex parte order substituting Macmillan Petroleum Corporation (hereafter called Macmillan) for Mileage as party plaintiff.

September 4—respondent filed notice of motion to set aside this order of substitution.

October 25—Mileage and Macmillan filed notice of motion to vacate the May 3 order which purported to vacate the April 20 order.

December 3—the order appealed from. The order (1) denied plaintiff's motion to set aside the order of May 3; (2) granted respondent's motion to vacate the order of April 20; (3) granted respondent's motion to vacate the August 21 order of substitution; (4) granted respondent's motion to set aside the December 19 order of enforcement and denied plaintiff the right to enforce the judgment.

Order of Substitution.

[1–5] Respondent contends that neither Mileage nor Macmillan have any standing on this appeal—Mileage, because it is a dissolved Nevada corporation with no capacity to appear in this case; and Macmillan, because the order of substitution is void. For the reasons hereafter set forth in the discussion concerning the validity of the

December 19 order, Mileage has no capacity to carry on this litigation, and hence its appeal must be dismissed. Moreover, if the order substituting Macmillan is valid, Mileage is completely out of the case, and hence could not appeal if it had capacity. Macmillan claims to hold an assignment of the judgment made by Mileage prior to its dissolution. An assignee is entitled to be substituted as party plaintiff in the place of the assignor. Bancroft's Code Practice and Remedies, vol. 1, p. 651. That portion of the order of December 3 setting aside the order of substitution was made upon the claim by respondent that the order was invalid because made ex parte. While it is better practice that a notice be given, there is no requirement that notice of application for substitution of a party plaintiff be given to the defendant. Bancroft's Code Practice and Remedies, vol. 1, p. 654. Respondent also contended that it was invalid because made by the presiding judge of the superior court rather than by the judge in whose department the matter was pending. It is not clear from respondent's brief whether he still makes the same contention. The point is unfounded. There is but one superior court in a county, and the action of any judge of that court is the action of the court, and not merely of the particular judge. Brown v. Campbell, 110 Cal. 644, 43 P. 12. As the order of substitution was valid, that portion of the order of December 3 vacating it must be reversed.

Was the Order of Enforcement Void?

The application for order enforcing the judgment was based, as it had to be, on the claim that the then plaintiff had exercised due diligence in not collecting the judgment theretofore. It was accompanied by the affidavit of Attorney Hatch in which he stated that continuously from a time prior to the date of the judgment he had been one of the attorneys for plaintiff. He then set forth efforts to collect the judgment, and that under examination, defendants had stated that they had no assets, but agreed to notify affiant whenever they were able to make any payments. Affiant had never been so notified, but recently had learned that they, or at least respondent, did have assets. There was no mention of Macmillan in the proceedings. On the motion heard April 20 to vacate the December 19 order of enforcement, respondent filed an affidavit claiming that the December 19 order of enforcement had been taken against him by surprise and excusable neglect in that at that time he did not know that Mileage was a dissolved Nevada corporation. He then set forth that Mileage had been a Nevada corporation which had surrendered its license and authority to conduct business in California, and had voluntarily dissolved on December 24, 1937. A certificate of its withdrawal from business in California and of its dissolution in Nevada accompanied the affidavit. This fact of dissolution has never been denied, and could not be, in view of the certificate of dissolution. On August 21, on the ex parte application for substitution, Macmillan filed an affidavit of Morris P. Macmillan, fomer president of Mileage and now vice president of Macmillan, stating that prior to the dissolution of Mileage it had assigned its assets to Macmillan and that as president of Mileage and vice president of Macmillan he had authorized Attorney Hatch to proceed with the enforcement and collection of all judgments.

It appears from the affidavit later filed by respondent on the proceedings to set aside the order of April 20, which order refused to vacate the order of enforcement, that court and counsel on the April 20 hearing assumed that the effect of the dissolution of Mileage was to be determined by California rather than Nevada law. When respondent's counsel returned to his office he discovered authorities which convinced him that the Nevada law should govern. He thereupon wrote a letter to the judge to whom the matter had been submitted calling his attention to the law on the subject, but the judge had already decided the matter adversely to him by making the April 20 order. Respondent thereupon filed a notice of motion to vacate that order, setting forth in an affidavit these facts.

Respondent concedes that the court had no authority in its May 3 or December 3 order to set aside the order of April 20 denying his motion to vacate the order of

enforcement on the grounds of a mistake in law or fact. Such mistake could be considered only on the appeal from that order. Respondent contends, however, that as the order of enforcement of December 19 was void because the court had no jurisdiction of the person of Mileage, likewise the order of April 20 was void in refusing to vacate that order, and that, in any event, the order of enforcement being void, the court's order of December 3 vacating it was proper.

Effect of Dissolution of Nevada Corporation.

[6, 7] This question must be determined by the Nevada and not the California law. "It appears to be settled law that the effect of the dissolution of a corporation, or its expiration otherwise, depends upon the law of its domicile (Restatement, Conflict of Laws, pp. 228, 229, sec. 158; 20 C.J.S., Corporations, §§ 1899, 1900, pp. 128, 129, and that a defunct foreign corporation has no greater capacity or higher standing to commence or maintain an action in the state of the forum than it would have in the state of its domicile. [Citations.]" Fidelity Metals Corp. v. Risley, 77 Cal.App.2d 377, 381, 175 P.2d 592, 594. In re Estate of Lund, 26 Cal. 2d 472, 159 P.2d 643, 162 A.L.R. 606, (on the question of legitimation of a child), and the cases against the Hibernia Savings & Loan Society, Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062 (on the question of membership in the Hibernia Bank), cited by plaintiff on the policy of the lex forum, are not in point. This court takes judicial notice of the laws of the several states. Code Civ. Proc, § 1875, subd. 3; Corporations Code, § 6602. The Nevada law provides that upon filing with the Secretary of State the certificate of dissolution provided for, the corporation is dissolved, although it may continue for the period of three years thereafter for the purpose of prosecuting and defending suits. After the expiration of the three years, it is completely defunct. It "'no longer exists for any purpose.'" Fidelity Metals Corp. v. Risley, supra, 77 Cal.App.2d at page 382, 175 P.2d 592, 594. There was until 1949 no provision, as under California law, for the directors to continue as trustees to carry on any of its powers. Mileage was dissolved on December 24, 1937, and after December 24, 1940, it was completely defunct. Hence, on December 19, 1947, it had no capacity to move to enforce the judgment and therefore the order was void. In Fidelity Metals Corp. v. Risley, supra the charter of a Nevada corporation had been revoked for failure to comply with the Nevada laws in 1938. Having become delinquent in the payment of its property taxes in California, its property here was sold in 1942 to the State of California. The State deeded the property to Risley in 1943. In 1944, more than three years after the revocation of its charter in Nevada, the corporation sued Risley to quiet title to the property. Judgment in the trial court was in his favor. The corporation appealed. Risley then moved to dismiss the appeal on the ground that the corporation plaintiff was without capacity to sue or prosecute the action by reason of the revocation of its charter. In dismissing the appeal the court, after examining the Nevada cases on the subject, held that under the Nevada law the dissolution of a Nevada corporation deprived the corporation of the right, after three years, to bring or maintain any suit either in that or this state. Therefore, it followed that the corporation was without capacity to appeal. Thus, here, Mileage had no right to appear in the trial court and apply for an order of enforcement. However, its lack of capacity did not appear at that time, and on the face of the proceedings, the order appears valid.

This brings us to the question of whether a court at any time can vacate an order apparently valid on its face, but which actually is void because of the lack of capacity of the party obtaining the order. "Any judicial record may be impeached by evidence of a want of jurisdiction in the court * * *." Code Civ.Proc., § 1916. "The jurisdiction sufficient to sustain a record is jurisdiction over the * * * parties * * *." Code Civ.Proc., § 1917. In Lewis v. Superior Court, 21 Cal.App.2d 340, 69 P.2d 220, petitioner had made three successive motions to dismiss an appeal from a justice's court judgment on the ground that the notice of appeal was filed too late.

All were denied. Petitioner then sought a writ of prohibition to restrain the superior court from hearing the appeal. The respondents contended, as does respondent here concerning the order of April 20, that the orders denying the motions became res judicata. The court in granting the writ held, "Where a court actually has no jurisdiction of an action, that question may be raised at any time." 21 Cal.App.2d at page 343, 69 P.2d at page 222. Referring to the failure of counsel on the hearing of the three motions to offer proper proof of notice of entry of judgment, which notice started the time in which to appeal, the court said: "Omission by counsel cannot confer jurisdiction on any court where that court in fact has no jurisdiction of a cause." 21 Cal.App.2d at page 343, 69 P.2d at page 222.

15 Cal.Jur., p. 52, § 141, states that a judgment is absolutely void if there was no jurisdiction. Section 145 (p. 59) states the general rule that to be attacked collaterally for lack of jurisdiction, the judgment must be void on its face. Section 146 (p. 61), discussing the limitations on this rule, says: "And it has been held that 'for the purpose of showing that jurisdiction could not have been acquired in the manner shown by the record, evidence is admissible to prove any fact the existence or nonexistence of which is not conclusively established by the record or its recitals.'[4]" Footnote 4: "Thus if a judgment against a corporation recites due service of process upon the corporation, or the appearance for it of some authorized person, *it may be set aside upon proof that it had been dissolved,* and had no legal existence for any purpose at the time the action was begun and until the rendition of the judgment." (Emphasis added.) The above footnote also refers to section 161 (p. 89) which states: "But it may always be shown collaterally that the person against whom a judgment was rendered was dead when the action was begun, or, *in the case of a corporation, that its legal existence had been terminated.*" (Emphasis added.)

[8] Another qualification of the rule that a judgment may not be collaterally attacked for defects not apparent in the record is applicable here: "And if the parties admit or stipulate, or fail to object to the evidence of, the facts showing a lack of jurisdiction, it is then established that the judgment is void as effectively as though shown by the record; and whenever such fact is brought to the attention of the court, it is the duty of the court to so declare as a matter of law." 15 Cal.Jur. p. 62. In the instant proceeding appellant did not contest the *fact* of dissolution, but did contest the legal effect. The fact of the dissolution was before the court not only by the affidavit of Jovick but by the provisions of section 6602 of the Corporations Code, which provide that the court shall take judicial notice of "the official acts affecting corporations of the * * * executive * * * departments of the State or place under the laws of which the corporation purports to be incorporated." When the dissolution became apparent to the court, it was bound to find the order void. See Thompson v. Cook, 20 Cal.2d 564, 569, 127 P.2d 909; San Francisco Unified Sch. Dist. v. San Francisco, 54 Cal.App.2d 105, 111–112, 128 P.2d 696.

Smith v. Lewis, 211 Cal. 294, 295 P. 37, is determinative of the question here. There, a minority stockholder successfully brought an action on behalf of a corporation, judgment being rendered against defendants and in favor of the corporation; then the defendants brought an action to set aside the judgment and enjoin enforcement thereof on the ground that the judgment was void because at the time the former action was commenced the corporation was under suspension of its corporate rights for failure to pay its license tax. The court affirmed judgment for the defendants in their action, partly on the ground that their complaint had been demurred to and hence the disability of the corporation was admitted, and said: "Reduced to its lowest terms, this controversy is one wherein a judgment is sought to be set aside on the ground that the court was without jurisdiction to enter the same. While it may be said that the judgment on its face did not disclose that the corporation was without power to sue or to have suit brought on its behalf, nevertheless

jurisdiction thus appearing was only apparent [citation], and it may always be shown even collaterally that a corporation had no legal existence when the action was commenced. (Crossman v. Vivienda Water Co., supra [150 Cal. 575, 89 P. 335].) The same rule would be applicable where the corporation had, as here under the statute, no power to sue." 211 Cal.2d at page 300, 295 P. at page 40.

Prior to a later statutory enactment on the subject, the rule as to California corporations was: "It is settled beyond question that, except as otherwise provided by statute, the effect of the dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued as a corporate body or in its corporate name. It is dead, and can no more be proceeded against as an existing corporation than could a natural person after his death. There is no one who can appear or act for it, and all actions pending against it are abated, and any judgment attempted to be given against it is void. As to this, all the text writers agree, and their statement is supported by an overwhelming weight of authority. * * *

"There can be no serious doubt that such a void judgment can be collaterally impeached and its invalidity shown by any one interested, such as one entitled either as creditor or stockholder to participate in the assets of the corporation, or a stockholder liable for the debts of the corporation." Crossman v. Vivienda Water Co., 150 Cal. 575, 580, 581, 89 P. 335, 337; see also Newhall v. Western Zinc Min. Co., 164 Cal. 380, 128 P. 1040.

[9] On July 1 plaintiff filed the affidavit of Attorney Hatch in which he states that at the hearing culminating in the order of April 20, it was understood that in the event the court did not see fit to deny respondent's motion on points of law, a further hearing should be had, as to the facts of whether there had been a dissolution of Mileage and whether it had transferred the judgment to Macmillan prior to its dissolution. Plaintiff now urges that in the event we do not agree with its contentions, we remand the case for such a trial of fact. We see no necessity for so doing. There has not been, nor can there be, any question that Mileage was dissolved on December 24, 1937. The fact that, prior to dissolution, Mileage had assigned the judgment to Macmillan, does not change the situation, nor does the assumption that Macmillan was carrying the action on in the name of its assignee. Long prior to December 19, Mileage was defunct. No attempt was made to show the court then of any diligence by Macmillan, and as pointed out heretofore there could be no showing of diligence by the defunct corporation. The attorney appearing at that hearing only purported to represent Mileage, and his right to represent it had long since ceased. There are no facts that can be shown now which would breathe life into the order of December 19.

Nothing herein stated will prevent an application by Macmillan to the superior court for an order enforcing the judgment. On such application the assignment of the judgment by Mileage prior to dissolution, as well as any facts showing diligence on the part of Macmillan after such assignment, may be shown to the superior court.

Plaintiff attempts to avoid the invalidity of the December 19 order by contending that Macmillan as assignee had the right to carry on the action in the name of Mileage, its assignor, citing section 385 of the Code of Civil Procedure. Assuming that an assignee may carry on an action in the name of a dissolved corporation which has lost its capacity, the question here is not that. Here an affirmative action was taken in the name of Mileage under section 685 of the Code of Civil Procedure. That section implies that a showing be made of diligence. It is conceded that at that time Attorney Hatch had no knowledge of the dissolution of Mileage. Here the only showing of diligence was the acts of the attorney for Mileage. Mileage had long since become defunct, and, of course, when it died, the attorney's right to represent it died also. Therefore, neither he nor it could appear in the action, and his acts from the date upon which it became completely defunct could not be considered.

Had Macmillan appeared in the proceeding as assignee and given evidence of its affirmative acts, there would have been a different situation. Until a plaintiff with capacity to act appeared in the case, the court had no jurisdiction.

Effect of Appeal from April 20 Order.

[10] Plaintiff contends that by appealing from the April 20 order respondent recognized the invalidity of the order of May 3 setting it aside. This does not necessarily follow. Respondent could have appealed because the time was running out and he feared that the order of June 14 would be appealed by plaintiff. (This order was set aside later by stipulation.) If the order of May 3 was valid, the appeal was an idle act. If the order of May 3 was not valid, and if the order of June 14 did not stand, respondent was protected by his appeal from the order of April 20.

[11, 12] Plaintiff further contends that by the appeal the court lost the power to set aside that order, as it did on December 3. However, a court may set aside a void order at any time. An appeal will not prevent the court from at any time lopping off what has been termed a dead limb on the judicial tree—a void order. As we have held that the order of December 19 is void, the order of April 20 refusing to vacate it could not give it validity. Moreover, as Mileage had no capacity, it had no right to resist the April 20 motion and the court had no jurisdiction to do other than grant it. It is academic whether the order of May 3 vacating the order of December 19, or that portion of the order of December 3 again vacating it, or that portion of the order of December 3 refusing to vacate the May 3 order, is the controlling order.

The appeal of Mileage is dismissed and that portion of the order of December 3 granting respondent's motion to vacate the order of substitution of August 21, 1948, is reversed. In all other respects said order is affirmed, each party to bear his own costs.

PETERS, P. J., and FRED B. WOOD J., concur.

99 Cal.App.2d 518

LA MILLER v. ST. CLAIRE PACKING CO., Inc., et al.

Civ. 7773.

District Court of Appeal, Third District, California.

Sept. 20, 1950.

Action by R. J. LaMiller against St. Claire Packing Company, Inc., a corporation, and another, for damages occasioned by the breach by defendant of a written contract wherein defendant agreed to buy and plaintiff agreed to sell his 1947 tomato crop. The Superior Court, San Joaquin County, Thomas B. Quinn, J., entered a judgment in favor of plaintiff, and defendants appealed. The District Court of Appeal, Peek, J., held that evidence supported finding that seller's tomatoes conformed to the contract requirement as to size, that evidence supported finding that buyer had not exercised reasonable care in furnishing boxes to seller as contemplated under the contract, and that purported letter of release was merely an authorization to the seller to sell to other canners.

Affirmed.

1. Sales ⇐181(12)

In action by seller of crop of tomatoes against buyer for damages for breach of written contract, evidence sustained determination that seller's tomatoes conformed to contract requirement as to size.

2. Sales ⇐179(4)

Where buyer of crop of tomatoes failed to timely reject any of seller's tomatoes for failure to conform to contract requirement as to size, and buyer accepted such tomatoes, buyer thereby waived strict performance in accordance with terms of contract. Civ.Code, § 1789.

3. Sales ⇐181(11)

In action by seller of crop of tomatoes against buyer for breach of written contract, evidence supported finding that buyer had not exercised reasonable care in furnishing boxes to seller as contemplated under contract.

4. Release ⇐1

Where buyer of crop of tomatoes wrote letter addressed to whom it may con-

cern stating that upon specified date buyer cleared seller from 1947 tomato contract which would permit seller to sell to any other canner, such letter did not amount to release but was rather an authorization to sell, and buyer was not released thereby from his obligation under contract.

5. Sales ⊂384(1)

Award of damages of $5,130 to seller upon buyer's breach of written contract to buy seller's 1947 tomato crop was supported by evidence.

Chester E. Watson, District Attorney, Stockton, John J. Jones, San Jose, Thomas E. Davis, San Francisco, for appellants.

Chadeayne & Wilkinson, Tracy, for respondent.

PEEK, Justice.

Defendants appeal from a judgment in favor of plaintiff awarding him damages in the sum of $5,130.00 occasioned by the breach by defendant St. Claire Packing Company, sometimes referred to hereinafter as the Buyer, of a written contract wherein said company agreed to buy and plaintiff agreed to sell his 1947 tomato crop. Defendant United Pacific Insurance Company, as bondsman for the buyer under the provisions of section 1300.1a of the Agricultural Code, was held liable in the sum of $5,000.00, the limit of its bond.

The provisions of the contract pertinent to the issues raised on appeal are that the plaintiff "sold" all of the tomatoes grown on his land and the packing company "bought" the same for $29.00 per ton; that the tomatoes would not be less than 2¼ inches in diameter and would be delivered at "roadside" in boxes furnished by buyer, but that buyer would not be liable for failure to do so beyond the exercise of reasonable care.

Plaintiff's complaint alleges that defendant buyer breached the foregoing contract in that it failed to provide the boxes as provided for in the agreement and failed to accept the tomatoes at the times and in the manner contemplated by the contract. Demurrers by each defendant were overruled. Thereafter separate answers were filed, each of which generally denied the allegations of the complaint and affirmatively alleged that the contract had been terminated by mutual agreement of the parties and that the tomatoes did not comply with the provisions of the contract as to size. The trial court adopted findings of fact favorable to plaintiff, and from the judgment which was accordingly entered defendants have appealed.

[1] Appellants' first attack upon the judgment is premised upon the proposition that respondent's tomatoes did not conform to the contract requirement as to size and therefore were subject to rejection, their argument in this regard being that conformity to such requirement was a condition precedent to the duty of the buyer to accept the tomatoes and that, in the absence of proof of compliance therewith, there was no liability on its part for nonacceptance. The record does not bear out this contention. The evidence in relation to such contention shows that until the buyer closed its cannery it accepted all of respondent's tomatoes, rejecting no deliveries for failure to conform to the minimum size requirements of the contract or for any other reason; that respondent's tomatoes were average in size; that the tomatoes under 2¼ inches in diameter were no more prevalent than those grown in adjacent fields, the percentage of such size tomatoes being variously estimated at from five to ten per cent of the entire crop, and that after defendant's cannery reopened it, as well as other canneries, accepted plaintiff's tomatoes without rejection.

[2] Even assuming the evidence to have been otherwise, appellant buyer, by failing to timely reject any of respondent's tomatoes for failure to conform to the contract requirement as to size, as it now contends, and by reason of its acceptance and conversion of such tomatoes in its canning processes, thereby waived strict performance in accordance with the terms of the contract. Sec. 1789, Civ.Code; Burrell v. So. Cal. Canning Co., 35 Cal.App. 162, 169 P. 405; See also, Brandenberg

v. Samuel Stores, 211 Iowa 1395, 235 N.W. 764, 77 A.L.R. 1165; Restatement of Contracts, sec. 298.

[3] Appellants further attack the sufficiency of the evidence to sustain the finding that it had not exercised reasonable care in furnishing boxes to plaintiff as contemplated under the contract. This finding is adequately supported by the testimony of a field man for the buyer, who testified that the cannery did not have sufficient boxes for the amount of tomatoes grown on the acreage which the buyer had under contract; that plaintiff was continually short of boxes and that the trucks which were supposed to bring back boxes to plaintiff on their return trips did so only for approximately two-thirds of the time and that there were times when, by reason of the want of boxes, plaintiff's picking crews could pick only for part of a day. Plaintiff testified to the same effect, as did the labor contractor who supplied the picking crews for plaintiff and who, in addition, testified that on one occasion he was compelled, because of the lack of boxes, to lay off his crew from a Thursday to the following Monday. Under such evidence the trial court could reasonably find as it did, that the buyer had not exercised reasonable care in furnishing boxes to plaintiff.

[4] Appellants further contend that the following letter written by the buyer to respondent constituted a rescission of the contract of the parties:

"To Whom It May Concern:

"Upon the above date St. Claire Packing Co., Inc., clears R. J. LaMiller from 1947 tomatoe contract which will permit him to sell to any other canners."

The foregoing letter was signed only by Mr. George W. Buttke, president of the Packing Company. It is appellants' contention that such writing contains all of the necessary elements required of a rescission by mutual consent, including consideration, mutuality and intent of the parties as evidenced by their testimony and conduct. Although his testimony relative to this phase of the case was contradicted by Buttke, plaintiff testified that he obtained such release to enable him to sell the tomatoes elsewhere and to minimize his damages resulting from the buyer's failure to furnish a sufficient number of boxes. This testimony was confirmed by plaintiff's witness Heinbockel. Plaintiff further testified that it was understood, and was so stated by Buttke, that if the cannery could again start packing it would take whatever tomatoes it could; that in fact some were shipped to the buyer, accepted and paid for by it following the execution of the writing above set forth.

We cannot agree with appellants' contention in this regard. The writing in question is more properly described, as did the trial judge in his memorandum opinion, as being not a release but more accurately "an authorization to sell." There is nothing contained therein which released the buyer from his obligation under the contract. All that was accomplished thereby was the right given to plaintiff to sell his tomatoes elsewhere, something which was necessary under the circumstances, in order that he could deal with other canneries.

[5] Appellants' final contention attacks the award of damages as being too uncertain and speculative to afford any legal basis therefor. We likewise find no merit in this contention. The record discloses substantial evidence to support the conclusion of the trial judge in his computation thereof, with which we agree, which computation as shown by his memorandum opinion, was as follows: "The evidence discloses that the crop ran at least eighteen tons per acre throughout producing a total of some 990 tons. Deducting therefrom the tonnage actually picked (690) tons the loss amounts to 300 tons. Deducting therefrom 30 tons representing undersized tomatoes on the basis of ten per cent of the total in accordance with the evidence the net loss amounts to 270 tons. Fixing the cost of picking at $10.00 per ton the money loss per ton is $19.00 or a total of $5130.00."

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

99 Cal.App.2d 512

MORGANTI v. MORGANTI.

Civ. 7746.

District Court of Appeal, Third District, California.

Sept. 20, 1950.

Assunta Morganti sued Domenico Morganti for divorce because of alleged incurable insanity of defendant. The Superior Court, Sonoma County, Donald Geary, J., granted plaintiff an interlocutory decree of divorce and relieved plaintiff of necessity of supporting defendant at state hospital and defendant appealed. The District Court of Appeal, Peek, J., held that statutory provision making allegation and proof of financial ability to support spouse a condition precedent to obtaining a divorce for incurable insanity of spouse is unconstitutional as constituting an arbitrary denial of equal protection of the laws.

Judgment affirmed as modified.

1. Divorce ⇐13

The Constitution does not prohibit legislature from specifying upon what grounds, if any, divorces are to be granted.

2. Divorce ⇐4, 13

The legislature may specify incurable insanity as a ground of divorce and may establish requirements as to the proof thereof. Civ.Code, § 108.

3. Divorce ⇐4

The legislature may require a person who obtains a divorce because of incurable insanity of spouse to support such insane spouse. Civ.Code, § 108.

4. Constitutional law ⇐249
Divorce ⇐4

Statutory provision making allegation and proof of financial ability to support spouse a condition precedent to obtaining a divorce for incurable insanity of spouse is unconstitutional as constituting an arbitrary denial of equal protection of the laws. Civ.Code, § 108; U.S.C.A.Const. Amend. 14; Const. art. 1, §§ 2, 21; art. 4.

5. Constitutional law ⇐48

All presumptions favor validity of statutes.

6. Constitutional law ⇐208(1)

A classification of persons adopted by legislature will not be overthrown as being unconstitutional unless palpably unreasonable.

7. Constitutional law ⇐208(1)

A statute is unconstitutional if it confers particular privileges upon a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted, and between whom and the persons favored no reasonable distinction or substantial difference can be found justifying the inclusion of one and exclusion of the other.

8. Statutes ⇐64(1)

When part of a statute is declared unconstitutional the remainder will stand if it is complete in itself and would have been adopted by legislature had legislature foreseen partial invalidity of statute.

9. Statutes ⇐64(2)

Unconstitutional portion of statute authorizing divorce for incurable insanity of spouse, which portion makes allegation and proof of financial ability to support spouse a condition precedent to obtaining a divorce for incurable insanity of spouse, does not render remainder of statute unconstitutional. Civ.Code, § 108.

Chas. McGoldrick, District Attorney, Arthur L. Tallman, Chief Deputy, Santa Rosa, for appellant.

Francis M. Passalacqua, Healdsburg, for respondent.

PEEK, Justice.

Plaintiff wife brought this action to obtain a divorce from her defendant husband upon the ground of his alleged incurable insanity. She did not allege that she had reasonable ability to support him for the remainder of his life expectancy or that he had sufficient property to provide such support as required by section 108 of the Civil Code. To the contrary it was affirmatively alleged that she did not have such financial ability. The defendant hus-

band, appearing through the district attorney, interposed a general demurrer to the complaint predicated upon the failure of the complaint to so allege. The trial court overruled the demurrer upon the ground that the foregoing requirement contained in said section is unconstitutional. The defendant then filed an answer denying the allegations set forth in the complaint and alleging as an affirmative defense that neither plaintiff nor defendant had property sufficient to provide for the support of defendant during the rest of his life expectancy. Upon the issues thus raised the cause proceeded to trial. At the conclusion of plaintiff's case defendant's motion for nonsuit was denied. The findings of fact were generally that the allegations of the complaint and of defendant's separate defense were true. Thereafter judgment was entered granting plaintiff an interlocutory decree of divorce, which decree further provided in the last paragraph thereof: "It Is Further Ordered, Adjudged, and Decreed that plaintiff shall not be required to support defendant at the Mendocino State Hospital."

The single issue which appellant argues on his appeal is the question of the constitutional validity of section 108 of the Civil Code insofar as it requires allegation and proof of financial ability to support.

The relevant statutory provisions are contained in sections 92 and 108 of the Civil Code. The section first mentioned provides under subsection 7 thereof that one of the grounds of divorce shall be "Incurable insanity". Section 108 provides that:

"A divorce may be granted on the grounds of incurable insanity only upon proof that the insane spouse has been confined to an institution under the provisions of Chapter 1, Part 1, Division 6 of the Welfare and Institutions Code or under the provisions of Section 1026 of the Penal Code or Chapter 6, Title 10, Part 2 of the Penal Code, for a period of at least three continuous years immediately preceding the filing of the action and upon the testimony of a member of the medical staff of said institution that such spouse is incurably insane.

"*Duty to support.* No decree granted on this ground shall relieve the spouse granted the divorce of any obligation imposed by law as a result of the marriage for the support of the spouse against whom the divorce is granted. *It shall be alleged in the complaint and proved at the trial of the cause either that there is reasonable ability to support the insane spouse for the remainder of the life expectancy or that such insane spouse has property sufficient to provide support for the remainder of the life expectancy, and the court shall make such order for support, or require a bond therefor, as the cicumstances require.*" (Italics added.)

Respondent's argument in support of the judgment is that said section 108 is unconstitutional as violative of the equal protection clause of the Fourteenth Amendment of the Federal Constitution and the various provisions of the California Constitution, to wit: Article 1, sections 2 and 21, and Article IV. Appellant, however, contends that as the legislature has the power to control the grounds of divorce upon whatever reasonable conditions it chooses, and as the conditions contained in said section 108 apply alike to all persons seeking a divorce upon the ground of incurable insanity, and since the equal protection clause guarantees only equal rights and not equality of enjoyment, therefore since the section in question confers equal rights, it is constitutional.

[1–3] The constitutional right of the legislature to specify upon what grounds, if any, divorces are to be granted cannot be doubted. See Grannis v. Superior Court of City and County of S. F., 146 Cal. 245, 79 P. 891, 106 Am.St.Rep. 23; Crouch v. Crouch, 28 Cal.2d 243, 169 P.2d 897; 9 Cal.Jur. 628. Hence the power of the legislature to specify incurable insanity as a ground of divorce and to establish requirement as to the proof thereof cannot be challenged. See State v. Brown, 213 Ind. 118, 11 N.E.2d 679, 113 A.L.R. 1243. Equally well established is the power to

continue the duty of support. Grannis v. Superior Court, supra; Galland v. Galland, 38 Cal. 265.

In the present case had the legislature concluded its labors with the declaration of incurable insanity as a cause for divorce, with a declaration as to the manner of proof and with a further declaration as to the duty of support, there could be little question as to the constitutionality thereof. But the legislature did not stop at that point. It went further and declared, as a condition precedent to the granting of a decree upon such ground, that the financial requirements contained in said section 108 must be met by allegation in the complaint and proof at the trial.

[4] In other words there can be no question but that the plain effect of such provision is that unless the requirements as to the proof thereof are met no divorce shall be granted to the person seeking it unless he or she is able to comply with the financial conditions imposed by said section. Reduced to a most elementary illustration it simply means that if A and B have insane spouses and can prove such fact, and A is financially able to provide support and B is not, then A may obtain a divorce and B cannot. Thus, while the amendment to section 92 adding incurable insanity as a ground of divorce created a new classification, uniformly applying to all persons falling within its scope, nevertheless by the italicized provision of said section 108 the ground of divorce so created was by the latter provision restricted only to those who could comply with the financial provisions thereof. Obviously it cannot be said that such provision bears "equally upon each person so classified". In re Lake, 89 Cal.App. 390, 265 P. 325, i. e. to whom divorce on the ground of incurable insanity is made available. Neither can it be said, as the trial court so aptly stated, that those who cannot comply with the financial conditions imposed by paragraph 2 of said section are possessed of some natural or intrinsic or constitutional distinction which so differentiates them as a class as to bring them within the exception of the rule as noted in the early case of City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604, and reiterated in numerous cases that follow. We must conclude that such a classification is violative of both the federal and state constitutions.

[5–7] In so holding, we are not unmindful of the rule that all presumptions are in favor of the validity of statutes and that a classification adopted by the legislature will not be overthrown unless palpably unreasonable. County of Los Angeles v. Southern Cal. Tel. Co., 32 Cal.2d 378, 196 P.2d 773; Asbury Hospital v. Cass County, 326 U.S. 207, 66 S.Ct. 61, 90 L.Ed. 6. But it is equally well settled that a statute is unconstitutional "if it confers particular privileges upon a class arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted, and between whom and the persons not so favored no reasonable distinction or substantial difference can be found justifying the inclusion of the one and the exclusion of the other." Franchise Motor Freight Ass'n v. Seavey et al., 196 Cal. 77, 235 P. 1000, 1002. In other words, as the Supreme Court stated in the recent case of Takahashi v. Fish & Game Comm., 30 Cal.2d 719, 185 P.2d 805, 810, "The rule is that the classification must not be arbitrary, but must be based upon some difference in the classes having a substantial relation to a legitimate object to be accomplished."

It would seem apparent that the purposes of section 108 are (1) to provide the manner of proof where the ground for divorce is the incurable insanity of the defendant spouse, and (2) to provide a means of securing continuing financial support for the insane spouse. Applying the "substantial relation" test enunciated in Takahashi v. Fish & Game Comm., supra, to the present case, it cannot be said that the financial status of the parties bears any more relation to the first object of section 108 stated above than does the race of the applicant bear to the issuance of a marriage license. See Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17.

Furthermore proof of financial liability as set forth in the second sentence of the second paragraph of said section becomes wholly superfluous to the attainment of the

second object thereof, since by reason of the specific terms of the preceding sentence no decree granted on the ground of incurable insanity can relieve a spouse of "any obligation imposed by law as a result of the marriage for the support" of the insane spouse. See section 155, Civil Code and sections 5077 and 5105.6, Welfare and Institutions Code. It follows that the requirement contained in section 108 of the Civil Code, that it must be alleged in the complaint and proved at the trial that there is either reasonable ability to support the insane spouse or that such insane spouse has property sufficient to provide support, constitutes a classification based on financial ability which is without reasonable relation to either of the legislative objects of (1) providing a manner of proof where the ground for divorce is incurable insanity, or (2) securing financial support for the insane spouse, and that such classification is, in effect, an arbitrary denial of equal protection and is, therefore, invalid.

[8, 9] There remains, however, the question as to the severability of the invalid requirement from the remainder of section 108. The rule is well established that when part of a statute is declared unconstitutional, the remainder will stand if it is complete in itself and would have been adopted by the legislature had the latter foreseen the partial invalidation of the statute. In re Bell, 19 Cal.2d 488, 122 P.2d 22; 5 Cal.Jur. 644. Thus since section 108 is complete without the invalid financial requirement, the question becomes one of legislative intent. Hale v. McGettigan, 114 Cal. 112, 45 P. 1049. In 5 Cal.Jur. at page 646, it is stated that "The distinction of an act into sections is purely artificial, and the real point is whether the provisions are essentially and inseparably connected in substance. The saving of the particular provision is therefore a matter of legislative intent, for the legislature is presumed to intend that notwithstanding the invalidity of the other parts of the act, still the valid parts stand." As we have pointed out above, the objects of section 108 are in no way thwarted or frustrated by the deletion of the invalid requirement, hence it cannot be said that the legislature would not have adopted section 108 except for the inclusion of that requirement. We conclude that the remainder of section 108 may be given effect and a divorce granted on the ground of incurable insanity.

For the reasons stated herein the judgment of the trial court granting an interlocutory decree to plaintiff is affirmed. However, since section 108 imposed upon the spouse to whom a decree is granted the obligation of a continuing responsibility for the support of the insane spouse, said decree is modified by striking therefrom that portion purporting to relieve plaintiff herein from such obligation of support. As so modified the judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.



99 Cal.App.2d 500

REITES et al. v. WILKERSON et al.

Civ. 17637.

District Court of Appeal, Second District, Division 1, California.

Sept. 19, 1950.

Jennie Reites and another filed a petition against Russel B. Wilkerson and others and Walter C. Peterson, as city clerk of the City of Los Angeles, to require the city clerk to examine all names affixed to a supplemental petition for the recall of the Mayor of the City of Los Angeles. Petitioners made a motion that city clerk appear and show cause why he should not be cited for contempt of court for allegedly failing and refusing to comply with terms of a peremptory writ of mandate issued by District Court of Appeal. The District Court of Appeal, Per Curiam, held that it was the duty of the Los Angeles city clerk to examine all signatures signed to a supplemental petition for the recall of the mayor, subsequent to date of original petition, and clerk could not examine only those signatures signed during ten day extended

period after original petition was found insufficient.

Motion ordered off calendar and order issued directing examination of recall petition.

1. Officers ⇐70½
Statutes ⇐302, 342

The legislation affording people a right to initiate legislation, repeal legislation, or recall public officials is to be given same liberal construction as that extended to election statutes generally.

2. Municipal corporations ⇐159(1)

Under Los Angeles charter providing that a recall petition may be amended by filing a supplemental petition within ten days after certification of insufficiency of original petition, city clerk was required to examine all signatures signed to supplemental petition subsequent to date of original petition and not just those signatures signed during ten day extended period.

3. Mandamus ⇐186

Where city clerk refused to examine any signatures to a recall petition other than those signed during 10 day extended period because of an opinion rendered by Los Angeles City Attorney, clerk's conduct was not such as to render him subject to a contempt citation for refusal to obey District Court of Appeal mandate requiring him to examine petition.

Enger & Hiller and Louis Thomas Hiller, all of Los Angeles, for petitioners.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, and Roger Arnebergh, Assistant City Attorney, all of Los Angeles, for respondents.

PER CURIAM.

Petitioners herein made a motion in this court that respondent Walter C. Peterson, City Clerk of the City of Los Angeles, appear and show cause why he should not be cited for contempt of this court for allegedly failing and refusing to comply with the terms of a peremptory writ of mandate issued out of this court on the 25th day of April, 1950.

This proceeding concerns the examination and certification by respondent City Clerk of certain petitions filed with him for the recall of Honorable Fletcher Bowron as Mayor of the City of Los Angeles.

Insofar as here pertinent the facts are that on January 5, 1950 the original petitions for such recall election were filed with respondent City Clerk. On August 22, 1950 in conformity with the provisions of the Los Angeles City Charter as interpreted by this court in the foregoing writ of mandate, respondent City Clerk duly certified to the Council of said city that said petitions did not contain sufficient names to require the holding of an election for the recall of Mayor Bowron.

Section 273 of the Los Angeles City Charter provides in part that when such a recall petition is found to be insufficient and so certified to the Council, "it may be amended by filing a supplemental petition or petitions, in form, a duplicate of original petition bearing additional signatures, within ten days from the date of such certificate * * *".

Within the ten days after said certification of insufficiency, and as provided in the foregoing charter provision, to-wit, on August 30, 1950, there was filed with respondent City Clerk a supplemental petition consisting of 1,236 sections and containing 73,649 names of claimed registered voters of the City of Los Angeles. Some 3,979 of such names had been signed to said petition prior to January 5, 1950, the date when the first original recall petition was filed. The remainder of said names were signed subsequent to January 5, 1950, but only 915 names were affixed to said petition within ten days subsequent to August 22, 1950, or in other words, within ten days after the foregoing certificate of insufficiency was filed with the Council by respondent City Clerk.

Acting upon the advice of the City Attorney of Los Angeles, respondent City Clerk refused to examine any of the names on such supplemental petition other than the 915 names affixed thereto within ten days after August 22, 1950.

Contending that respondent City Clerk was required to examine all names affixed to said supplemental petition after January 5, 1950 (date of the original petition) petitioners commenced the instant proceeding.

Upon the hearing of the within motion praying that respondent City Clerk show cause why he should not be cited for contempt of court, he appeared and defended his action on the ground that only signatures obtained during the extended period of ten days following a certificate of insufficiency may be considered by him in examining a supplemental recall petition.

There being no dispute as to the facts, the issue before us presents solely the problem of proper construction and application of the foregoing language quoted from Section 273 of the municipal charter of Los Angeles, particularly the language therein contained which reads: "It (the recall petition) may be amended by *filing* a supplemental petition or petitions * * * within ten days from the date of such certificate * * *" (Emphasis added) of insufficiency of the original petition.

[1] The courts are ever mindful of the desirability of having recall petitions presented to the people through election without delay or excessive expenditure of time, money and effort. Gage v. Jordan, 23 Cal. 2d 794, 799, 147 P.2d 387. And legislation affording the people a right to initiate legislation, repeal legislation or recall public officials is to be given the same liberal construction as that extended to election statutes generally.

The charter of the City of Los Angeles nowhere declares that a supplemental petition must be "circulated" within the ten days following certificate of insufficiency of the original petition. The charter plainly states that such supplemental petition may be "filed" within such time. Since no express or implied prohibition against solicitation of signatures prior to the ten-day period following certificate of insufficiency appears, if we are to adopt a liberal construction it must be held that such practice is permissible. To hold otherwise would require us to write into the charter language not now present therein. This we cannot do because we may not place restrictions upon the charter provisions and procedure for holding recall elections which are not now found therein.

We are not here confronted with a situation wherein we are called upon to construe language in the charter that is fairly susceptible of two constructions. The charter provision is definite and certain. It permits the *filing*, but does not require the circulation of supplemental petitions within the extended ten-day period.

It is obvious of course that a supplemental petition may not be signed prior to the filing of the original petition, since to label it a "supplemental" petition would be a misnomer for it would in fact be part of and included in the original petition and must be filed therewith. But once the original petition is filed, we find no prohibition in the charter against the circulation of a supplemental petition to be filed in the event of insufficiency of the original one.

Respondent City Clerk places great reliance on the case of Thompson v. Kerr, 16 Cal.2d 130, 133, 104 P.2d 1021. This however was a proceeding wherein the question presented and the decision rendered concerned the validity of signatures obtained prior to the filing of the original petition. The issue in that case did not involve signatures obtained during the twenty-day period within which, in that case, the county clerk checks the signatures on the original petition. We therefore regard as pure dictum, unnecessary to the decision, the following language appearing on page 133 of 16 Cal.2d, 104 P.2d page 1022: "and in view of the further provision therein that a supplemental petition is to be circulated 'within forty days from the transmission of the said (original) petition', obviously only the names of voters signed to a 'supplemental' petition during the extended period may be included among those required to qualify the initiative measure."

Furthermore, the foregoing statement of the court does not appear to us quite accurate, since an examination of the constitutional provision there under consider-

ation, Art. IV, sec. 1, par. 10, reveals that it restricts only the *filing* of the supplemental petition and does not contain any language that would confine the *circulation* of the supplemental petition to the extended forty-day period.

The same conclusion applies to the case of Gage v. Jordan, supra, 23 Cal.2d 802, 147 P.2d 391, in construing the aforesaid constitutional provision, Art. IV, sec. 1, par. 10, the court says: "Hence in each respective county where petitions are circulated, the process must be completed within 70 days from the first filing of sections of any petition with the county clerk or registrar, to wit: 20 days to check first sections, 40 days to *secure* supplemental names, and 10 days to check supplemental names" (Emphasis added.) But the pertinent constitutional provision does not use the word "secure" names to a supplemental petition. The word used in the constitution is "filed" with the clerk or Registrar of Voters.

The very evident purpose of a supplemental petition under the provisions of the Los Angeles City Charter here under consideration is to supply any deficiency that may be found by the City Clerk in the original petition after it has been presented to him. In other words, if the original petition is found insufficient, the proponents of the recall are afforded ten days within which to *file* a supplemental petition or petitions. But nowhere in the city charter does there appear anything which expressly or impliedly prohibits the proponents from making advance preparation for such a contingency, by commencing the circulation of supplemental petitions immediately after they have filed the original petition or petitions. Indeed, it is but natural to assume that such would be the precaution taken by the proponents of any initiative or recall petition.

[2] The peremptory writ of mandate issued by this court directed respondent City Clerk within ten days after his certification of insufficiency of the original petition or petitions, to permit the proponents to file a supplementary petition or petitions, "in conformity with the charter provisions". This the proponents have done, and for the foregoing reasons it now becomes the duty of respondent City Clerk to examine all signatures signed to said supplemental petition or petitions subsequent to January 5, 1950, the date when the original petition or petitions were lodged with him.

[3] Since respondent City Clerk refused to examine any signatures other than those signed during the ten-day extended period because of an opinion rendered him by the City Attorney, we are not disposed to regard his conduct as requiring the issuance at this time of an order to show cause in re contempt.

It is therefore ordered that petitioners' motion for the issuance of an order directing respondent City Clerk to show cause why he should not be cited for contempt may go off calendar, and it is further ordered that pursuant to the peremptory writ of mandate heretofore issued by this court that respondent City Clerk proceed forthwith to examine all names signed to said supplemental petition or petitions subsequent to the 5th day of January, 1950 (the day of presentation of the original petition or petitions) and August 30, 1950 (the date when the supplemental petition or petitions were presented), and that such of said names as are found to be the signatures of registered voters of the City of Los Angeles, be counted as valid signatures. That within ten days from and after the filing of this decision, respondent City Clerk shall make examination of such supplemental petition or petitions in the manner aforesaid (Charter of the City of Los Angeles, sec. 273) and certify to the result of such examination as provided by the terms of said city charter.

99 Cal.App.2d 365

MURPHY et ux. v. SAN GABRIEL MFG. CO. et al.

Civ. 17589.

District Court of Appeal, Second District, Division 3, California.

Sept. 11, 1950.

Peter J. Murphy and wife brought an action against San Gabriel Manufacturing Company and others, for rescission of a contract for the sale of two lots. The Superior Court, Los Angeles County, Kenneth G. Newell, J., entered judgment in favor of the plaintiffs and the named defendant appealed. The District Court of Appeal, Shinn, P. J., held that the contract of sale used was materially different from the contract form filed with the real estate division and was therefore unlawful, and that plaintiffs had established a clear right to the return of the money they had paid on such void contract.

Affirmed.

1. Fraud ⇐68

Business and Professions Code requirement that subdivision plan be submitted to real estate commissioner and authority given commissioner to forbid sales or leases were designed to protect buyer public, and law is valid. Business and Professions Code, §§ 11000–11020.

2. Fraud ⇐68

Where subdivider changes form of contract without notifying real estate division of proposed change, and effect of such change is to materially change set-up of offering, use of substituted contract violates Business and Professions Code. Business and Professions Code, §§ 11010(e), 11012, 11020.

3. Fraud ⇐68

Where contract form filed by subdivider with state commission prohibited nonresidential usage, and sales contract actually used by subdivider without informing commission of change contained no such prohibition, but did contain provisions reserving mineral, oil and gas rights and rights of way for transmission purposes which were not contained in contract filed, sales contract used varied in material respects from one filed with commissioner and its use was violation of Act. Business and Professions Code, §§ 11010(e), 11012, 11020.

4. Fraud ⇐68

Requirement of Business and Professions Code that real estate division be notified of any material change in set up of offering is mandatory, and violation of it is criminal offense. Business and Professions Code, §§ 11012, 11020.

5. Evidence ⇐65

Vendor of lots could not plead ignorance of illegality of contract under which it was marketing lots. Business and Professions Code, §§ 11010(e), 11012, 11020.

6. Principal and agent ⇐159(1)

Where vendor's selling agent had actual knowledge of illegality of contract under which lots were marketed, his principal could not escape responsibility if sales were made unlawfully. Business and Professional Code, §§ 11010(e), 11012, 11020.

7. Contracts ⇐139

Where money has been paid in consideration of an executory contract which is illegal, party who has paid it may repudiate agreement at any time before it is executed and reclaim his money, and in such case it is duty of court to aid one not in pari delicto, though to some extent involved in illegality, and to permit him to recover back money paid on contract.

8. Appeal and error ⇐1122(2)

Where trial court did not make finding essential to judgment in favor of respondent, though evidence required such finding, District Court of Appeal on appeal made finding to conform to evidence and affirmed judgment. Code Civ.Proc. § 956a.

9. Contracts ⇐139
Vendor and purchaser ⇐39

In action by purchaser against vendor for rescission of contract on grounds of fraud, where sales contract used was found to vary materially from contract filed by subdivider with real estate division, such contract was void and purchaser was entitled to return of money paid on such

contract. Business and Professions Code, §§ 11010(e), 11012, 11019, 11020.

A. J. O'Connor, Los Angeles, for appellant.

Jacob Chaitkin, Pasadena, for respondents.

SHINN, Presiding Justice.

In November of 1947 plaintiffs Murphy agreed to purchase two lots in a real estate subdivision from San Gabriel Manufacturing Co. They made a down payment and certain progress payments in the total amount of $2,078. Thereafter they gave notice of rescission, offered to surrender their agreement and demanded the return of their money upon the ground that certain agents of San Gabriel had induced them to enter into the agreement by false and fraudulent representations. Return of the money having been denied they instituted this action in which judgment was given in their favor for $2,078. San Gabriel appeals.

There was evidence that a broker, John M. Pon, was San Gabriel's agent for sale of the property and that George C. Petersen, who was unlicensed as a broker or salesman, assisted Pon in making the sale to plaintiffs and was paid by Pon one half of a commission of $600. Pon accepted the services of Petersen in negotiating the sale. It was Petersen who was charged with false representations which were unknown to Pon and San Gabriel. On the appeal the sufficiency of the evidence to prove that false representations were made by Petersen and that plaintiffs' purchase was induced thereby is not questioned. It is contended, however, that San Gabriel was not responsible for the actions of Petersen and it is also claimed that plaintiffs were guilty of delay in attempting a rescission which, as a matter of law, bars their right to equitable relief. These contentions need not be discussed further for the reason that there is an independent ground upon which the judgment must be affirmed.

[1] The real property which was subdivided was owned by John M. Pon and his wife. They complied with the provisions of Business and Professions Code, sections 11000 to 11020, which require that the plan of subdivision shall be submitted to the Real Estate Commissioner. The purpose of the scheme of State regulation is to protect the buying public and the commissioner may forbid sales or leases under the offering to prevent fraud. Sec. 11019. It is a valid law. In re Siderbotham, 12 Cal.2d 434, 85 P.2d 453. Section 11010 provides that the subdivider shall notify the commissioner in writing of his intention to sell such offering which notice shall contain among other things: "(e) A true statement of the terms and conditions on which it is intended to dispose of the land, together with copies of any contracts intended to be used." A copy of the proposed contract was filed with the commissioner in compliance with this requirement. Thereafter Pon and wife conveyed the property to San Gabriel Manufacturing Company but Pon remained as selling agent of the property and made numerous sales of lots. Section 11012 of the Code reads: "It is unlawful for the owner, his agent, or subdivider, of the project, after it is submitted to the Real Estate Division, to materially change the setup of such offering without first notifying the Real Estate Division in writing of such intended change." Section 11020 provides that one who wilfully violates or fails to comply with any of the provisions of the chapter, secs. 11000–11020, is guilty of a public offense and punishable by fine or imprisonment.

[2, 3] The agreement between plaintiffs and San Gabriel was not in the form of the contract previously filed with the Real Estate Commissioner. No information was given to the Real Estate Division of a proposed change from the contract form submitted to the one that was used. Therefore, if the effect of the change was "to materially change the setup of such offering" the use of the substituted contract was a violation of the act. There can be no doubt that the contract that was used varied in material respects from the one filed with the commissioner. The contract which plaintiffs signed reserved

rights-of-way over the lots for poles with cross-arms for the transmission of electrical energy, for telephone lines and for water, gas, sewage, electrical and telephone conduits, the sole right being reserved in the seller to convey such rights-of-way. The proposed contract did not contain these reservations. It did, however, contain the provision "that no store, launderette, restaurant, saloon, cigar, fruit or candy stand or any blacksmith or manufacturing, dairying or livery business nor any unlawful business shall at any time be maintained or carried on upon said premises or any part thereof." It was thus represented to the commissioner to be offered as a strictly residential subdivision. The contract that was used contained no such restrictions. It did, however, reserve to the seller all mineral, oil and gas rights and the right to natural underground storage space without a reservation of the right of entry upon the surface for drilling purposes. The submitted contract contained no such reservation. The contract with plaintiffs provided that it should become wholly void and terminated if either party caused the same to be recorded in the office of any county recorder. The submitted form contained no such provision. There were other variances which we deem to be of less importance. If the form of contract to be used in the marketing of a subdivision had not been deemed by the legislature to be an important feature of the offering it would not have been specified as an item of information to be furnished by the seller. It is sufficient to say with reference to the change of plan, that one who had contracted to buy a lot in this subdivision under the form of agreement that was submitted to the commissioner would not have been required to accept a deed which followed the form of the agreement which these plaintiffs signed. Such a deed would have failed in material respects to fulfill the seller's obligations with respect to the title agreed to be conveyed.

[4-6] The requirements of section 11012 are mandatory. They are for the protection of the buying public and a violation of them is a criminal offense. Therefore the wilful use by San Gabriel of the form of contract which plaintiffs signed was unlawful. It is argued that there was no evidence that San Gabriel had knowledge of the representations made to the commissioner. But San Gabriel could not plead ignorance of the illegality of the contract under which they were marketing the lots. Moreover, Pon had actual knowledge; he was San Gabriel's selling agent, and the only one through whom sales were made. If his sales were made unlawfully, his principal cannot escape responsibility.

[7] The rule of law which governs in such a case was stated in Smith v. Bach, 183 Cal. 259, 263, 191 P. 14, 15, as follows: "By the weight of authority, where money has been paid in consideration of an executory contract which is illegal, the party who has paid it may repudiate the agreement at any time before it is executed and reclaim the money. In such a case it is the duty of the court in furtherance of justice to aid one not in *pari delicto*, though to some extent involved in the illegality, but who, as here, is comparatively the more innocent, and to permit him to recover back money paid on a contract as the circumstances of the case may require." See also, McAllister v. Drapeau, 14 Cal.2d 102, 112, 92 P.2d 911, 125 A.L.R. 800; Morrison v. Landers, 56 Cal.App.2d 607, 133 P.2d 34; Severance v. Knight-Counihan Co., 29 Cal.2d 561, 568, 177 P.2d 4, 172 A.L.R. 1107; Carter v. Seaboard Finance Co., 33 Cal.2d 564, 573, 203 P.2d 758; Orlinoff v. Campbell, 91 Cal.App.2d 382, 388, 205 P.2d 67; White v. Jacobs, 204 Cal. 334, 336, 267 P. 1087; Goodspeed v. Associated Almond Growers, 208 Cal. 121, 122, 280 P. 530.

[8, 9] The facts with relation to the contract forms were alleged in the complaint and a copy of the one filed with the commissioner was attached as an exhibit. The one that the parties entered into was received as an exhibit. Although the answer of San Gabriel denied that the contract form was the only one that had been filed with the commissioner they offered no evidence on the point. A deputy commissioner identified the form alleged in the complaint, and testified that no notice had been given the commission of the in-

tended use of any other form. The court failed to make a finding upon this issue. We therefore find that the facts as to the two forms of contract are as we have stated them. Code Civ.Proc. sec. 956a; Downs v. Benatar's Cut Rate Drug Stores, 75 Cal.App.2d 61, 68, 170 P.2d 88; Horsman v. Maden, 69 Cal.App.2d 11, 17, 157 P.2d 882; Replogle v. Ray, 48 Cal.App.2d 291, 311, 119 P.2d 980.

Plaintiffs established a clear right to the return of the money they had paid on a void contract.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.



PEOPLE by Howser, ex rel. LEVIN v. SANTA CLARA COUNTY et al. (WICKETT, Intervenor).

Civ. 14548.

District Court of Appeal, First District, Division 2, California.

Sept. 22, 1950.

Hearing Granted Nov. 20, 1950.*

The People of the State of California through its Attorney General, Frederick N. Howser, on relation of Albert J. Levin, brought an action against the County of Santa Clara, the Board of Supervisors of said County of Santa Clara, and others, to determine the validity of a charter adopted by the electors and duly approved by the legislature. Fred A. Wickett, an interested elector and chairman of the Board of Freeholders, was granted leave to intervene in support of charter. The Superior Court in and for the County of Santa Clara, James L. Atteridge, J., entered judgment in favor of applicant and intervenor appealed. The District Court of Appeals, Nourse, P. J., held that where 5 of 10 publications advertising a proposed new charter for a county had transposed language in 3 or 4 sections without any omissions of or additions to language proposed, whether disputed publications were sufficient to meet constitutional requirements became a question of fact for legislature and not the courts.

Judgment reversed with directions.

1. Appeal and error ⇐842(2)

Conclusions of law not based upon conflicting evidence or possible inferences are open to review.

2. Constitutional law ⇐70(1)

Where in 5 of 10 publications advertising a proposed new charter for a county there were some transposition of language of 3 or 4 sections without any omissions of or additions to language proposed by freeholders, whether disputed publications were sufficient to meet constitutional requirement became a question of fact for legislature and not for court. Const. art. 11, § 7½.

3. Counties ⇐3

Where in 5 of 10 publications advertising a proposed new charter for a county there was some transposition of language of 3 or 4 sections without any omissions of or additions to language proposed, legislature exercised its proper function in approving charter when it reached conclusion that errors were of no consequence and that provisions of constitution were substantially complied with. Const. art. 11, § 7½.

4. Appeal and error ⇐187(4)

Where right to intervene was granted in trial court and was had without objection, respondent could not contend on appeal that appellant was without right to intervene.

Campbell, Hayes & Custer and Edwin J. Owens, all of San Jose, for intervenor and appellant.

Fred N. Howser, Attorney General, J. B. Peckham, John H. Machado and Peter J. Mancuso, all of San Jose, for plaintiffs and respondents.

NOURSE, Presiding Justice.

The People of the State through its attorney general commenced this action to determine the validity of a charter adopted

* Subsequent opinion 231 P.2d 826.

by the electors of Santa Clara County, and duly approved by the State Legislature. Fred A. Wickett, an interested elector and chairman of the Board of Freeholders, was granted leave to intervene in support of the charter. Judgment went in favor of the applicant and the intervenor prosecutes this appeal. The county counsel also took an appeal but later, with the cooperation of the Board of Supervisors, he withdrew his appeal.

The attack upon the charter is based on the sole ground that in five numbers of the newspaper publication the language of four sections was transposed (without, however, any change in meaning or text). Briefly the facts are: The Constitution requires ten publications in a newspaper. Ten were made of which five were literally correct. In the remaining five a portion of section 202 relating to requirements of eligibility for election to the Board of Supervisors appeared at the end of section 402, and a portion of section 303 fixing the salary of the County Executive appeared at the end of section 402. It is undisputed that all the provisions of the proposed charter were fully published for the ten times required by the Constitution, the only complaint being that in five of those publications some of the language appeared under the wrong section number—but without any change in the meaning. The legislature presumably considered these imperfections of no importance and, on June 15, 1949, approved the charter as submitted pursuant to the provisions of Art. XI, Sec. 7½ of the Constitution.

[1] There is no dispute as to the facts upon which the judgment is based, and, notwithstanding the lengthy findings which are merely conclusions of law the controlling question is whether the publication substantially complied with the terms of the Constitution. And this is a question of law. If it is necessary to refer to the facts to determine that question we are not limited to the findings of the trial court since they are not based on conflicting evidence or possible inferences. Here the case is like one based on a stipulation of facts and the conclusions of law based on the undisputed facts are open to review. E. J. Stanton & Sons v. County of Los Angeles, 78 Cal.App.2d 181, 193, 177 P.2d 804; In re Estate of Fleming, 31 Cal.2d 514, 523, 190 P.2d 611.

Arguing that the approval of the charter by the legislature forecloses judicial review of the procedural steps leading to the approval appellant cites Taylor v. Cole, 201 Cal. 327, 257 P. 40, holding that such legislative approval was a final and conclusive determination that no material unconstitutional irregularities occurred. The later case of People v. City of San Buenaventura, 213 Cal. 637, 3 P.2d 3, did not follow the Taylor case and did not overrule it. It should be noted that in the San Buenaventura case the city authorities made no attempt to comply with the Constitution and that no publication at all was made. In the later case of Santa Clara County v. Superior Court, 33 Cal.2d 552, 203 P.2d 1, these two cases were discussed in both the majority and the minority opinion and we must conclude that from the failure of the court to overrule either both must still be deemed to be authority. A fair analysis of the two opinions is that when there is a substantial failure to comply with the constitutional requirements which is apparent on the face of the proceedings, the San Buenaventura case, the recital of the legislature is not conclusive, but, where some trivial departure from such requirements occurs, in the Taylor case the city council failed to notify the electors that copies of the prepared charter amendments could be had on application, or when the alleged departure from the strict course is a matter of doubt, or one not prejudicially affecting the rights of the people then the doctrine of substantial compliance clothes the certificate of approval of the legislature with the mantle of a conclusive finding that the proceedings leading to the adoption and approval of the charter conformed with the constitutional requirements. In the Taylor case the Supreme Court specifically held, 201 Cal. page 333, 257 P. page 42, that petitioners were correct in their contention that the act of the legislature in "confirming the amendments by resolution, after a consideration thereof, conclusively presupposes that the validity of

said election proceedings was examined, proof taken thereon, and findings made that said election was in all respects regular".

It is apparent that when there has been no compliance with the constitutional requirements and the failure is conceded the approval by the legislature could not possibly rest on the doctrine of substantial compliance. This explains some of the confusion in these decisions which is referred to in the dissenting opinion in the Santa Clara case, 33 Cal.2d 552, 203 P.2d 1. It should be noted however that that case was not fairly presented to the Supreme Court. The dissenting opinion emphasizes the allegation of the complaint reading, 33 Cal.2d page 562, 203 P.2d 7: " 'that said newspaper failed to publish said proposed charter any greater number than five times before such election; and no such publishing for ten times was made in any such newspaper. * * *'" If that allegation were true the Santa Clara case would be squarely within the facts of the San Buenaventura case where no publication was made because if only five publications had been made when the Constitution required ten no question of substantial compliance could arise. If the true facts had been before the court in the Santa Clara case it is fair to assume that there would have been no dissent as the only question then in the case would have been the one of proper remedy.

[2] In the proceeding here the conceded facts are that all ten publications were made, that in five of them there was some transposition of the language of three or four sections without any omissions of or additions to the language proposed by the freeholders. Whether these disputed publications were sufficient to meet the constitutional requirements thus became a question of fact for the legislature and not for the courts. In this respect we are bound by the express rule of the Taylor case.

[3] Here it is pertinent to add in reference to the substantial compliance theory that full notice was given the electors of all the provisions of the proposed charter. The Constitution does not require perfection in publication beyond the element of human error. If this were not so the will of the People could be thwarted in every instance by the carelessness of a printer or compositor in altering the number of a single section. The constitutional section was enacted in the interest of the people as a whole and their rights should not be denied by hypertechnical judicial construction. There is no super human agency supervising the conduct of public officials in the performance of their official duties. Statutes are enacted, both mandatory and directory, which fix the required standards but error occurs, either innocently or by design, and in such cases the courts always seek to preserve the rights of the public as against those of the individual. As in the case of errors occurring in judicial proceedings those which are found nonprejudicial are disregarded. So here the errors in publication complained of could not have prejudiced the voting public in any particular. We conclude that the legislature exercised its proper function when it reached the conclusion that these errors were of no consequence and that the provisions of the Constitution were substantially complied with.

[4] There is no merit in respondent's contention that appellant was without right to intervene. That right was granted in the trial court and the trial was had without objection.

Likewise the contention that the question is moot because steps are being taken to propose a new charter. The proposal may not be submitted to the electors, and if it is the voters may reject it.

We are not impressed with the suggestion of respondent that this appeal should be dismissed because the Board of Supervisors, represented by the county counsel, did not continue with their appeal. If there is any doubt of the right of a citizen and taxpayer to intervene in a case of this character the proceedings here fully dispel that doubt. Indeed in such an instance the intervention would seem to be all the more warranted.

The judgment is reversed with directions to enter judgment in accordance with the prayer of the intervenor.

GOODELL and DOOLING, JJ., concur.



99 Cal.App.2d 569

TAYLOR v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

Civ. 17479.

District Court of Appeal, Second District, Division 1, California.

Sept. 22, 1950.

Roy Taylor, as business agent and a member of, and for and on behalf of Furniture Workers Union No. 3161, United Brotherhood of Carpenters and Joiners of America, a voluntary unincorporated association, and all of its members, brought an action against Security-First National Bank of Los Angeles, a national banking corporation, to recover $5,000. The Superior Court, Los Angeles County, Benjamin J. Scheinman, J., entered judgment on a directed verdict in favor of the defendant, and the plaintiff appealed. The District Court of Appeal, Drapeau, J., held that the evidence sustained the trial court's action in directing the verdict.

Affirmed.

1. Banks and banking ⇐154(8)

In action by labor union against bank to recover $5,000, evidence, including examination of manager of bank branch, sustained trial court's finding that duly accredited officer of union withdrew money and that union had proved no cause of action. Code Civ.Proc. § 2055.

2. Trial ⇐142

In action by labor union against bank to recover $5,000, where only inference that could be drawn from all of testimony was that duly accredited officer of union withdrew money and that union had failed to prove cause of action, trial court properly directed verdict in favor of bank.

3. Trial ⇐89

Striking testimony not responsive to question asked was not error.

4. Trade unions ⇐8

If union treasurer, with authority to sign checks, presented check drawn by union in favor of drawee bank, bank would be fully authorized to issue its cashier's check for union's check upon request of union's treasurer even though such check were endorsed payable to the bank.

5. Banks and banking ⇐154(7)

In action by labor union against bank to recover $5,000, trial court did not err in sustaining objections to questions intended to show that bank knew that party to whom $5,000 was paid by bank was indebted to it, and that he was a man of small means and manual worker who would have no reason to receive $5,000 from union.

Arthur Garrett, Los Angeles, for appellant.

Jennings & Belcher, Los Angeles, Stevens Fargo and Louis E. Kearney, Los Angeles, of counsel, for respondent.

DRAPEAU, Justice.

Furniture Workers Union No. 3161 had a checking account with the Vernon branch of the defendant bank. The treasurer of the union observed that the statement of account furnished by the bank was "over." It showed a credit to the union of $5,000 which was not due.

So the treasurer made out a check to the order of the bank for $5,000, and presented it to the president of the union for his signature. The president and the treasurer were authorized by the union to sign checks. On file with the bank was the usual signature card showing this authorization. And the treasurer had for a long time conducted the union's financial business with the bank.

After the president signed the check, the treasurer made the following notation

upon its upper left-hand corner: "Payable cashier's check to Frank Abrams." He took the check to the bank and requested that a cashier's check be made out to his order. This was done. Then Mr. Abrams endorsed the cashier's check and deposited it in his own personal account in the same bank. He later withdrew and spent the money, "trying to act like a big shot."

When the $5,000 check was returned to the union, with the bank's monthly statement, Mr. Abrams with chemical ink remover obliterated the words "Payable cashier's check, etc." and wrote on the check instead: "refund to bank for error in credit to us."

In due time the defalcation came to light. Mr. Abrams was convicted of grand theft. His deposition was taken in the California Institution for Men at Chino.

This action was brought by the union against the bank for recovery of $5,000. Trial was by jury which, by direction of the court, rendered its verdict for defendant. The union appeals from the judgment which followed.

The essential inquiry, then, is whether there is any substantial evidence in the record supporting plaintiff's case.

Plaintiff called but one witness, the manager of the Vernon branch, and examined him under the provisions of section 2055 of the Code of Civil Procedure. Upon the identification of this witness, the following documentary evidence was received: Ledger cards of a savings account and a commercial account of the union with the bank; signature cards authorizing any two of the president, vice-president, and treasurer of the union to sign checks on these accounts; and several checks and deposit slips affecting the two accounts. The witness also testified that the union had demanded payment of $5,000 which was refused.

From this testimony may be gleaned the circumstances which occasioned the $5,000 overage. A check was signed by the president and the treasurer, shifting $5,000 from the checking to the savings account. The bank charged this check to the commercial account, and by mistake on the same day credited it back to the same account.

[1, 2] It appears from the record that there is only one inference to be drawn from all of the testimony, and no substantial evidence to the contrary: that a duly accredited officer of the union withdrew the money; that the union proved no cause of action. Therefore, the trial court properly directed the verdict. Farmer v. Fairbanks, 71 Cal.App.2d 70, 162 P.2d 26.

The union complains of a number of rulings on questions of evidence. The most seriously argued of these stems from the following: On the back of the $5,000 check appears the endorsement: "Pay to the order of Security-First National Bank of Los Angeles, Furniture Workers Union, Local 3161."

[3, 4] The teller who made out the cashier's check testified that this endorsement was not on it when he received it. On cross-examination he said: "I don't believe I would have acted on the check if it had been endorsed on the back." This statement was stricken by the court, because it was not responsive to the question asked. The ruling was correct, because the answer was not responsive to the question. And, in any event, assuming the endorsement to have been on the check when it was presented, the bank would have been fully authorized to issue its cashier's check for it upon request of the treasurer of the union. Union Bank & Trust Co. v. Security-First Nat. Bank, 8 Cal.2d 303, 65 P. 2d 355.

[5] Other rulings of the court, including those sustaining objections to questions intended to show that the bank knew that Mr. Abrams was indebted to it, that he was a man of small means and a manual worker, and would have no reason to receive $5,000 from the union, have been reviewed, and no error appears.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

99 Cal.App.2d 464

COHEN v. HUNTER

Civ. 3992.

District Court of Appeal, Fourth District, California.

Sept. 18, 1950.

Action by Helen Cohen against Samuel C. Hunter, for personal injuries sustained by plaintiff when baby carriage which she was pushing across an arterial boulevard collided with automobile operated by defendant. The Superior Court, San Diego County, Joe L. Shell, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that evidence supported implied finding of jury that plaintiff was contributorily negligent.

Affirmed.

1. Appeal and error ⇐1001(1)
Automobiles ⇐244(50)

In action for personal injuries sustained by plaintiff when baby carriage which she was pushing across arterial boulevard collided with left rear fender and hubcap of automobile operated by defendant, evidence supported implied finding of jury that plaintiff was contributorily negligent, and such finding would not be disturbed on appeal.

2. Automobiles ⇐217(1), 245(6, 72)

It is duty of pedestrian to exercise reasonable care while crossing street of heavy traffic and such duty continues throughout his passage, and whether he did so and whether motorist who struck him exercised proper amount of vigilance are questions for jury's determination.

3. Appeal and error ⇐996, 1001(1)

Implied finding of jury will not be disturbed on appeal where there is substantial evidence or reasonable inferences to support it.

4. Appeal and error ⇐996

To establish defense of contributory negligence as against verdict of jury, evidence must be such that appellate court can say that there is no substantial conflict on facts, and that from facts reasonable man can draw but one inference, which inference points unerringly to negligence of plaintiff proximately contributing to his own injury.

5. Trial ⇐139(1), 142

Weight and sufficiency of evidence, construction to be put upon it and inferences to be drawn therefrom are matters for jury.

Price, Nottbusch, Cory & Schwartz, San Diego, for appellant.

John W. Holler, San Diego, for respondent.

MUSSELL, Justice.

Plaintiff appeals from an adverse judgment in an action for personal injuries sustained by her when a baby carriage which she was pushing across Midway Drive in San Diego collided with an automobile operated by defendant.

[1] The sole question presented is whether the evidence supports the implied finding of the jury that plaintiff was contributorily negligent. This question must be answered in the affirmative.

Midway Drive is an arterial boulevard which, at the place of the accident, runs generally north and south, is approximately 51 feet wide and is divided into four marked traffic lanes. The two traffic lanes on the east were divided by a single white line and the east and west traffic lanes were separated by a double white line in the center of the drive. Fordham Street intersects Midway Drive at right angles. It is 46½ feet wide west of Midway Drive and 25½ feet wide easterly thereof. There were well defined pedestrian crosswalks crossing Midway Drive on both the northerly and southerly sides of the intersection.

At the time of the accident (about 7:30 p. m.), December 21, 1947, the intersection was well lighted, the weather was clear, the pavement dry and the visibility good.

The plaintiff, with a companion, was crossing Midway Drive from west to east in the north crosswalk. She was pushing a baby carriage, with her grandson in it.

When she had crossed the double line in Midway Drive and was approximately on the center line between the two easterly lanes of traffic, the baby carriage collided with the left rear fender and hubcap of an automobile being driven by the defendant northerly in the east traffic lane of Midway Drive. Plaintiff was not struck by the automobile, but received injuries in the accident of which she now complains.

The defendant approached the intersection at a speed of from 15 to 20 miles per hour, slowing down as he approached the south crosswalk. He testified that as he approached the intersection, he did not see any cars stopped near the crosswalk and did not see any one in it as he came up to and entered the intersection; that when he first saw the pedestrians, he was approximately at the north curb line of Fordham Street; that he applied the brakes and stopped his car within a length or two thereof after the impact.

The plaintiff testified that before she entered Midway Drive she looked to her left to see if there was any traffic going south, and there being none, she stepped off the curb and proceeded to cross Midway Drive in the center of the painted crosswalk and was wheeling her grandson in a baby buggy before her; that as she neared the center of Midway Drive, she looked to see if there was any traffic coming north, when she saw a car that had stopped in the southerly crosswalk to let her go on; that as the car stopped, she looked again, continued walking, and that when she had crossed three lanes and was in the fourth lane, she was struck by the automobile; that she did not see the defendant's car at all until the collision.

A traffic officer, at the time of the accident, was sitting at the northwest corner of the intersection and saw the defendant's automobile before the collision occurred. He testified that he had no trouble in seeing it; that "it had lights on it and was plainly visible". He stated that there were two north bound cars stopped south of the intersection in the westerly north bound traffic lane of Midway Drive. However, the defendant and the passenger riding with him testified that they at no time saw these cars or either of them. The traffic officer further testified that he saw the left front of the vehicle strike the front of the baby buggy. This statement was contradicted by that of the defendant, his passenger, and the marks on the left rear fender and hubcap of the automobile.

An examination of the diagram, attached to appellant's opening brief, and of the reporter's transcript impels us to conclude that the plaintiff, had she looked to her right at any time after she arrived at the center of Midway Drive, could have seen the defendant's headlights and the approaching automobile. She was familiar with the intersection and knew it to be heavily traveled; she knew or should have known, that after arriving at the middle of Midway Drive, danger was to be anticipated from vehicles approaching from the south. There was no stop sign at the southeast corner of the intersection and defendant was proceeding northerly in his proper lane of traffic.

The jury evidently concluded that the plaintiff failed to exercise reasonable care in that she failed to see defendant's approaching automobile and pushed the baby carriage against it; that she could have avoided the accident by the exercise of reasonable care, and that her failure to exercise such care proximately contributed to the injuries which she sustained.

Under the circumstances shown by the record, the question of whether the plaintiff was guilty of contributory negligence was one of fact for the jury and its finding in that connection will not here be disturbed.

[2] As was said in O'Brien v. Schellenberg, 59 Cal.App.2d 764, 768, 140 P.2d 159, 161: "It is the duty of every pedestrian before entering a highway to make reasonably careful observations to ascertain traffic conditions to be encountered. It is his duty to look in the direction from which an approaching motorist might endanger his safety, to exercise reasonable care at all times within the marked crosswalk, and to continue to be alert to safeguard against injury. (Citing cases.) It is the duty of

a pedestrian to exercise reasonable care while crossing a street of heavy traffic and such duty continues throughout his passage. * * * Whether he did so and whether the motorist who struck him exercised the proper amount of vigilance are questions for the jury's determination. * * *"

[3] In Salsberry v. Smith, 85 Cal.App.2d 122, 126, 192 P.2d 73, 75, this court said: "Whether, under the circumstances, plaintiff looked in the direction from which danger would be reasonably apprehended, and as often and as carefully as would a person of ordinary prudence under like circumstances, were factual questions for the jury. An implied finding of the jury on that question will not be disturbed on appeal where there is, as here, substantial evidence or reasonable inferences to support it." (Citing cases.)

[4] As was said in Cooper v. Southern Pacific Co., 43 Cal.App.2d 693, 696, 111 P.2d 689, 691: "'* * * when a verdict is attached as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. * * * To establish the defense of contributory negligence as against the verdict of a jury, the evidence must be such that the appellate court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference, which inference points unerringly to the negligence of the plaintiff proximately contributing to his own injury.' Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184."

A similar statement of this rule is found in Re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

[5] The weight and sufficiency of the evidence, the construction to be put upon it and the inferences to be drawn therefrom were matters for the jury. Dillard v. McKnight, 34 Cal.2d 209, 209 P.2d 387, 11 A.L.R.2d 835.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



99 Cal.App.2d 579

PEOPLE v. TERRY.

Cr. 2186.

District Court of Appeal, Third District, California.

Sept. 22, 1950.

Lee Roy Terry was convicted in the Superior Court, Shasta County, of violating statute prohibiting the wilful and lewd commission of a lewd or lascivious act upon a child under the age of 14 years with intent to arouse, appeal to or gratify the lust or passions or sexual desires of such child, and he appealed. The District Court of Appeal, Peek, J., held, inter alia, that evidence was sufficient to establish the corpus delicti.

Judgment affirmed.

1. Criminal law ⇐641(1)

The right of an accused to be represented by counsel may be waived.

2. Criminal law ⇐1114(1)

On appeal from conviction for crime, reviewing court is limited to the transcript on appeal.

3. Criminal law ⇐260(11)

Contention of defendant on appeal from conviction for violating statute prohibiting the wilful and lewd commission of lewd or lascivious act upon a child under age of 14 years with intent to arouse, appeal to or gratify lust or passions or sexual desires of child, that corpus delicti was not established, was essentially a reargument as to weight of evidence, and

conclusion of trial court thereon would not be disturbed on appeal in absence of some showing as to falsity or inherent improbability thereof. Pen.Code, § 288.

4. Criminal law ⇐507(7)

In order to sustain conviction of an adult under statute prohibiting wilful and lewd commission of lewd or lascivious act upon a child under age of 14 years with intent to arouse, appeal to or gratify lust or passions or sexual desires of child, testimony of a complaining witness under age of 14 years need not be corroborated, since children under that age are not deemed to be accomplices to crime. Pen.Code, § 288.

5. Infants ⇐20

In prosecution for violating statute prohibiting wilful and lewd commission of lewd or lascivious act upon a child under age of 14 years with intent to arouse, appeal to or gratify lust or passions or sexual desires of child, evidence was sufficient to establish the corpus delicti. Pen.Code, § 288.

6. Criminal law ⇐260(11)

In prosecution for violating statute prohibiting wilful and lewd commission of lewd or lascivious act upon a child under age of 14 years with intent to arouse, appeal to or gratify lust or passions or sexual desires of child, alleged erroneous admission of testimony given by chief of police concerning statements made by defendant to chief was not prejudicial to defendant where such testimony was stricken out and there was no jury to be misled. Pen.Code, § 288; Const. art. 6, § 4½.

7. Criminal law ⇐1186(4)

In prosecution for wilful and lewd commission of lewd or lascivious act upon a child under age of 14 years with intent to arouse, appeal to or gratify lust or passions or sexual desires of child, hearsay evidence allegedly erroneously admitted related only to immaterial facts and was in effect so inconsequential that defendant's rights could not have been prejudiced. Pen.Code, § 288; Const. art. 6, § 4½.

8. Witnesses ⇐277(3, 4, 5)

Attorney for prosecution may cross-examine an accused upon any material matter elicited on direct examination for purpose of showing conduct or testimony inconsistent with his direct testimony.

9. Criminal law ⇐1186(4)

In prosecution for violating statute prohibiting wilful and lewd commission of lewd or lascivious act upon a child under age of 14 years with intent to arouse, appeal to or gratify lust or passions or sexual desires of child, action of district attorney in cross-examining defendant by asking question which related to defendant's past record was not misconduct prejudicial to defendant where question followed defendant's testimony on direct examination concerning defendant's relationship with children and testimony relative to defendant's sobriety shortly after alleged offense. Pen.Code, § 288; Const. art. 6, § 4½.

10. Criminal law ⇐635

Fact that trial of an accused was heard in a room ordinarily used by Board of Supervisors rather than in regular courtroom did not justify conclusion that trial was violative of constitutional rights of accused to a trial open to public. Const. art. 1, § 13.

11. Criminal law ⇐635

The constitutional requirement of a public trial of an accused is for benefit of accused, that public may see that accused is fairly dealt with and not unjustly condemned, and that presence of interested spectators may keep his triers keenly alive to sense of their responsibilities and to importance of their functions. Const. art. 1, § 13.

12. Criminal law ⇐635

Record did not establish that a defendant convicted of violating statute prohibiting wilful and lewd commission of lewd or lascivious act upon a child under age of 14 years with intent to arouse, appeal to or gratify lust or passions or sexual desires of child did not receive a trial open to public pursuant to constitutional requirement. Pen.Code, § 288; Const. art. 1, § 13.

13. Judges ⇐51(1)

An accused cannot at his pleasure select the judge who will preside at his prosecution.

14. Criminal law ⇐1030(1)

An accused cannot remain silent, gambling upon his chances for a favorable verdict, and then, when verdict has gone against him, raise objections which he knew of and which could have been raised during trial.

15. Criminal law ⇐260(11)

Fact that accused waived right to jury trial only upon assurance of his counsel that a specified judge would preside, and that another judge heard cause, did not justify reversal of conviction for violation of statute prohibiting wilful and lewd commission of lewd or lascivious act upon a child under age of 14 years with intent to arouse, appeal to or gratify lust or passions or sexual desires of child, in view of fact that accused did not withdraw waiver, and since accused cannot at his pleasure select a judge who will preside. Pen.Code, § 288.

16. Criminal law ⇐1153(2)

After trial court has heard a child under 10 years of age give his testimony and has determined that child was a competent witness in prosecution for violation of statute prohibiting wilful and lewd commission of lewd or lascivious act upon a child under 14 years of age with intent to arouse, appeal to or gratify lust or passions or sexual desires of child, such determination is not a matter of review any more than ruling of trial judge upon capacity of any other witness. Pen.Code, § 288.

Charles F. Gray, Jr., Sacramento, for appellant.

Fred N. Howser, Attorney General, for respondent.

PEEK, Justice.

By an information defendant was charged with violation of section 288 of the Penal Code. Following his plea of not guilty the cause proceeded to trial before the court sitting without a jury. At the conclusion thereof defendant was found guilty and was sentenced to imprisonment for the term prescribed by law. He now appeals from said judgment of conviction.

Resolving, as we must, all conflicts in the evidence in favor of respondent and indulging in all reasonable and legitimate inferences in favor of respondent, the record may be summarized as follows:

Prior to the alleged offense the complaining witness, who was eight years of age, and her brother, aged five, visited the defendant at a cabin which was located only a few feet from the home of a great-aunt where the children were staying. As they stood outside the cabin the defendant, grabbing the prosecutrix by the hand, took her inside the cabin where he committed the acts constituting the basis of the charge. Her testimony concerning what occurred outside the cabin and her actions upon leaving were corroborated by her five year old brother. Immediate complaint was made by her to her aunt and to her parents when they arrived home some time later. The defendant, when confronted by the child's parents and her aunt, denied he had molested the child. Testifying in his own behalf he gave testimony wholly different from that of the complaining witness and in addition stated that his first knowledge of any complaint was when he was accosted by the children's aunt and their parents. On cross-examination he admitted to a degree some of the acts as charged. However, on re-direct examination he stated that in his conversation with the police he had told them the same story he told in court but when a detective threatened him he changed his story, and that on the morning of his preliminary examination he had refused to sign a statement presented to him by the chief of police on the ground it was not true. Subsequently the testimony of the police officer as to the purported admissions and confessions of the defendant was stricken from the record.

We find no merit in any of the numerous contentions appellant has now raised on appeal.

He first contends that the committing magistrate failed to inform him of the charge and of his right to counsel. The record of the preliminary examination was not introduced in evidence at the time of the trial or is it now before this court. Moreover no objection upon this ground was raised by defendant's counsel at the time of the trial in the Superior Court. Furthermore it appears from a purported quotation from the transcript of the preliminary examination, contained in defendant's brief, that the court informed defendant "* * * of his rights * * *" that he was "entitled to be represented by an attorney", that he indicated "he didn't want to have an attorney", but that nevertheless "the defendant is entitled to the services of an attorney and even though it inconveniences the court to continue it the continuance will be granted." It further appears in the transcript before us that the defendant, on cross-examination, testified that he remembered that at the time he was arraigned on the preliminary examination he was advised of his rights and his right to counsel. Even if we could consider the alleged irregularities so complained of by defendant, see People v. O'Neill, 78 Cal.App.2d 888, 892, 179 P.2d 10, his own purported quotation from the transcript of the preliminary hearing refutes such contention.

[1, 2] His second contention is predicated in part upon his first—the lack of counsel at the preliminary hearing. It is well established that the right to counsel is a right which may be waived. In re Connor, 16 Cal.2d 701, 108 P.2d 10. Equally well established is the rule that the reviewing court is limited to the transcript on appeal. People v. Gonzales, 69 Cal.App. 609, 231 P. 1014. Again, even assuming the validity of the purported quotation from the transcript of the preliminary hearing as set forth in defendant's brief, such excerpt, rather than sustaining defendant's contention, supports his conviction, since it is there shown that after the magistrate had continued the hearing for one week in order to enable defendant to secure counsel, and when the case was finally called defendant indicated he was ready to continue without counsel.

[3-5] Defendant's next contention, that the corpus delicti was not established, is essentially a reargument as to the weight of the evidence, which we assume was likewise made to the trial court. Its conclusion thereon will not be disturbed on appeal in the absence of some showing as to the falsity or inherent improbability thereof, neither of which appear in the case. As previously noted the testimony of the complaining witness was corroborated to a degree by her brother. Also there is the testimony of her parents and her aunt concerning the complaint which she made to them. It is the rule that to sustain a conviction of an adult of the crime denounced by section 288 of the Penal Code it is not necessary that the testimony of a complaining witness under the age of 14 years be corroborated, since children under that age are not deemed to be accomplices to the crime. People v. Showers, 90 Cal.App.2d 248, 253, 202 P. 2d 814.

[6] Defendant's next contention is predicated upon the alleged erroneous admission of testimony given by the chief of police concerning statements made by defendant to that officer. However, as the attacked testimony was stricken and as there was no jury to be misled we can perceive no basis whereby defendant's rights were prejudiced.

[7] Defendant also contends that his court-appointed counsel was incompetent and permitted improper hearsay evidence to be introduced. Our examination of the record does not bear out defendant's contention. Even if it can be said that some of the attacked testimony was hearsay it only related to immaterial facts and was in effect so inconsequential that defendant's rights could have been prejudiced in no way. Const. Art. VI, Sec. 4½.

In defendant's next contention he attacks the testimony of the chief of police relative to admissions made by defendant to such officer. Suffice it to say, as has been noted previously, the attacked testi-

mony was stricken from the record and it is not apparent how defendant was prejudiced thereby.

[8, 9] Defendant further contends the conduct of the district attorney in propounding improper questions on cross-examination was so prejudicial as to warrant a reversal of the judgment. The record discloses that the particular question related to defendant's past record and followed his testimony on direct examination concerning his relationship with children and certain testimony relative to his sobriety shortly after the alleged offense. Since it was proper for the district attorney to cross-examine the defendant upon any material matter elicited on direct examination for the purposes of showing conduct or testimony inconsistent with his direct testimony, People v. Westek, 31 Cal. 2d 469, 476, 190 P.2d 9, it cannot be said that such testimony constituted prejudicial misconduct.

In support of his statement that he was deprived of his constitutional right to a public trial, defendant urges that he waived a jury trial only upon the assurance by his counsel that the cause would go to trial before the Honorable Albert F. Ross, Judge of the Superior Court of Shasta County; that the cause was not heard by Judge Ross but by the Honorable Ben R. Ragain, assigned to preside over an extra session of the Superior Court of said county, and that said trial was secret and not open to the public as provided by the Constitution, Article I, section 13, as it was not heard in a regular court room of the Superior Court of said county but was held in a room ordinarily used by the Board of Supervisors.

[10-12] There is absolutely nothing in the record before us that even remotely suggests that defendant was not given a public trial in the common accepted sense of the term. People v. Hartman, 103 Cal. 242, 37 P. 153, 42 Am.St.Rep. 108; See also 7 Cal.Jur. 936. In the absence of some showing to the contrary the mere fact of holding a session of court in a room other than a regular court room is entirely insufficient to warrant a conclusion, that the trial was secret and violative of the rights of defendant. See Roberts v. State, 100 Neb. 199, 158 N.W. 930, Ann. Cas.1917E, 1050. As has so frequently been stated, the requirement of a public trial is for the benefit of the accused, that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to the sense of their responsibilities and to the importance of their functions. No showing is made nor does anything appear in the record before us that this requirement was not fairly observed. People v. Hartman, supra.

[13-15] The second point raised by defendant in his last contention relates to the waiver of a trial by jury based on his counsel's statement that the matter would be heard before Judge Ross, and is likewise without merit. At the outset we know of no rule permitting a defendant, at his pleasure, to select the judge who will preside in his case. Secondly it is again to be noted that the record is barren of any action on his part to withdraw such waiver. And lastly, a defendant cannot remain silent, gambling upon his chances for a favorable verdict, and then, as in the present case, when the verdict has gone against him, raise objections which he admittedly knew of and which could have been raised during the progress of the trial.

[16] Defendant's final contention attacks the action of the court in admitting the testimony of the complaining witness and her young brother upon the ground that both were incompetent as witnesses. In support thereof he again refers to the testimony given at the preliminary hearing. As we have previously stated herein, that record was not made a part of the record at the trial and is not now before this court, hence we cannot consider the same. However, our examination of the record in the Superior Court discloses that both witnesses were examined by the trial judge who determined them to be competent to testify. As stated in People v. Arcia, 85 Cal.App.2d 127, 192 P.2d 31, 32: "After a judge has heard the child give his testimony and has determined that he

was a competent witness, such determination is not a matter of review any more than his ruling upon the capacity of any other witness."

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.



99 Cal.App.2d 552

In re WALTERS' ESTATE.

BREWSTER v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 14421.

District Court of Appeal, First District, Division 1, California.

Sept. 22, 1950.

Rehearing Denied Oct. 21, 1950.

Hearing Denied Nov. 20, 1950.

Proceeding in the matter of the estate of Maria R. Walters, alias, deceased, wherein Rose Brewster filed a contest to revoke probate of the will, which was opposed by Bank of America National Trust & Savings Association, etc., and another. The Superior Court in and for the City and County of San Francisco, T. I. Fitzpatrick, J., entered an order striking the contest from the files and a decree of ratable distribution and contestant appealed. The District Court of Appeal, Peters, P. J., held that contest was properly stricken on ground that it had been filed too late and that appeal from order was frivolous and warranted imposition of a penalty.

Order and decree affirmed and penalty assessed against appellant for taking a frivolous appeal.

1. Wills ⇐259

Will contest filed more than three years after will had been admitted to probate and after a timely contest by another had been dismissed was properly stricken from the files on ground that it had been filed too late. Probate Code, §§ 380, 384.

2. Wills ⇐259

Order admitting will to probate is conclusive unless will contest is filed within six months thereafter. Probate Code, §§ 380, 384.

3. Wills ⇐268

Where will contest properly filed within six months after will was admitted to probate is still pending, any heir may petition to intervene in such contest even after expiration of the six-month period and a voluntary dismissal of original contest after petition in intervention has been filed cannot defeat the intervenor's rights. Probate Code, §§ 380, 384.

4. Wills ⇐371½

Affidavit of merits averring the good faith of counsel for appellant and purporting to set forth facts dehors the record, which allegedly would show that appeal from order striking tardy will contest from files had not unduly delayed probate of estate, should not be considered by appellate court in determining whether appeal was frivolous, since the question was whether any reasonable person would agree that point relied on for reversal was totally and completely devoid of merit and not whether counsel acted in honest belief that he had grounds for appeal. Rules on Appeal, rule 26(a); Code Civ.Proc. § 957.

5. Appeal and error ⇐770(1)

Inexcusable negligence in failing to prepare and file supplemental brief until more than one month after obtaining permission to file such brief within ten days justified refusal to permit the filing of brief.

6. Wills ⇐371½

Where contention that the mere filing of will contest within six months after will had been admitted to probate, though contest was subsequently dismissed, kept alive until entry of decree of final distribution the right of any person to contest admission of will to probate was the only point urged for reversal, appeal from order striking from files will contest filed more than three years after admission of will to probate and after timely contest filed by another had been dismissed was frivolous.

Rules on Appeal, rule 26(a); Code Civ. Proc. § 957; Probate Code, §§ 380, 384.

7. Costs ⇐260(4)

Where reasonable minds cannot but agree that the points argued by appellant are completely without any semblance of substance, a penalty may properly be imposed for taking a frivolous appeal. Rules on Appeal, rule 26(a); Code Civ.Proc. § 957.

8. Costs ⇐263

Where frivolous appeal imposed an unnecessary burden on respondent, and, by improperly consuming the time of busy court, adversely affected the rights of other litigants, $100 was assessed against appellant and added to the costs as a penalty for taking a frivolous appeal. Rules on Appeal, rule 26(a); Code Civ.Proc. § 957.

Robert E. Hatch, San Francisco, for appellant.

Norman Elkington, San Francisco, for respondent, Peter J. Crann.

Sylvester Andriano, San Francisco, for respondent, Bank of America Nat. Trust & Savings Ass'n.

PETERS, Presiding Justice.

This is a frivolous appeal.

Maria R. Walters died testate on December 22, 1945, her will having been executed on November 19, 1945. On January 11, 1946, her will was admitted to probate, and the respondent bank appointed executor. On March 5, 1946, respondent Peter Crann filed a will contest alleging that he was a devisee under a prior will executed by Maria, and that she was mentally incompetent when the will of November, 1945, was executed. On January 28, 1947, the beneficiaries named in the will admitted to probate and Crann compromised their respective claims, and, pursuant to such compromise, the parties stipulated that the Crann contest should be dismissed.

Four days before this dismissal was entered, that is, on January 24, 1947, one Bernard Stimmel, without leave of court, filed a document entitled "Joinder in Petition for Revocation of Probate of Will." In this petition Stimmel requested that he "be permitted to join in the contest" then pending, and that the probate of the will be revoked. In April of 1947, Crann moved to strike this document from the files on the ground that it had been filed without leave of court and without authority of law. The motion was granted. Stimmel appealed, one of his attorneys on such appeal being Robert Hatch, the attorney for appellant on the present appeal, the order of dismissal was unanimously affirmed by Division Two of this court. A petition for hearing was denied by the Supreme Court, one Justice dissenting. In re Estate of Walters, 89 Cal.App.2d 797, 202 P.2d 89. This opinion was filed in January, 1949, and became final in March of that year.

On May 31, 1949, at a time when both the Crann and Stimmel contests were no longer pending, both having been dismissed, appellant Rose Brewster, with Hatch as her attorney, filed what purports to be a contest to revoke the probate of the will. She alleged that she was one of the heirs of Maria Walters, that the will admitted to probate some three years and five months before the contest was filed had been improperly executed, and had been executed while the decedent was of unsound mind, and while she was under the undue influence of certain persons. Upon motion of respondent Crann, the Brewster contest was stricken from the files, and, on the same day, the court entered a decree of rateable distribution. Brewster appeals from the order and from the decree.

[1] There can be no doubt at all that the court properly struck from the files the Brewster contest, on the ground that it had been filed much too late. Section 380 of the Probate Code provides: "When a will has been admitted to probate, any interested person, other than a party to a contest before probate and other than a person who had actual notice of such previous contest in time to have joined therein, may, at any time within six months after such probate, contest the same or the validity of the will * * *."

Section 384 of the Probate Code states: "If no person contests the validity of a will or of the probate thereof within the time specified in this article, the probate of the will is conclusive, saving to infants and persons of unsound mind who were not made parties to the proceeding a like period of six months after their respective disabilities are removed."

[2, 3] Under these sections a contest must be filed within six months of the date the will is admitted to probate, or the order admitting to probate is conclusive. The language of the sections is susceptible of no other interpretation. But, says appellant, Crann filed a contest within the six-month period, and, although that contest was dismissed on January 28, 1947, the mere filing of such a contest kept alive, until the entry of the decree of final distribution, the right of any person to contest the admission of the will to probate. In support of this startling contention, which would vitiate the provisions above quoted and interminably prolong the probate of estates, the sole authority relied upon is Voyce v. Superior Court, 20 Cal.2d 479, 127 P.2d 536. That case stands for no such proposition. In that case a timely contest after probate was filed. While that contest was still pending, but after six months from the date the will was admitted to probate, a contestant sought leave to intervene and to contest the will on the identical grounds urged in the first contest. After this petition for intervention had been filed, the first contestant voluntarily dismissed her contest. Thereupon, a motion was made to dismiss the petition in intervention. When this motion was denied, prohibition was sought to prohbit the trial of the contest. The Supreme Court properly denied the writ. The basis of its holding was that when a contest is properly filed within the six-month period, and such contest is still pending, any heir may petition to intervene in that contest even after the six-month period has elapsed. A voluntary dismissal of the original contest, after the petition in intervention has been filed, cannot defeat the intervenor's rights. That holding is undoubtedly sound and correct. But it cannot be distorted into a holding, as appellant contends, that where a contest after probate has been filed within the six-month period, and then dismissed, that any other heir may file a contest after the dismissal and years after the six-month period has elapsed, any time before final distribution. Such a construction is directly contrary to the plain and obvious purposes of sections 380 and 384 of the Probate Code and would render those sections in many cases practically ineffective as statutes of repose. See Scott v. Superior Court, 125 Cal.App. 513, 14 P. 2d 99.

That this is the proper construction of the statutes and of the Voyce case is demonstrated by the plain language of that decision, by the express provisions of the code sections involved, and also is the direct and unequivocal holding in In re Estate of Walters, 89 Cal.App.2d 797, 202 P.2d 89 the prior appeal in this estate. In that case Mr. Justice Goodell, speaking for a unanimous court, stated 89 Cal.App.2d at page 798, 202 P.2d at page 90:

"As far as appellant's rights are concerned, it is clear that he could have pursued any one of three recognized methods of contesting this will. He could have filed a contest (1) before probate (Sec. 370, Pro. Code), or (2) within six months after probate (Id. 380) as did Crann, or (3) he could have become a party to the Crann contest by intervening therein pursuant to sec. 387, Code Civ.Proc., even after the six months had run, his grounds having been the same as those in the basic contest. Voyce v. Superior Court, 20 Cal.2d 479, 127 P.2d 536.

"He availed himself of none of these plain remedies. Instead, he filed the 'Joinder' without any leave of court, and thereby sought to establish himself in the same legal position as he would have occupied had he followed the Voyce case and intervened. He makes no claim that his was an informal intervention, for he says: 'The principles of these two cases (Voyce and this case) are analogous. The only distinction is that in the former the contestant proceeded by way of intervention, obtaining a court order rather than just filing the

usual contest, as appellant did.' The answer to this is that appellant's 'Joinder' was not 'the usual contest'; it was neither a contest within the six months' period nor an intervention.

"The right to contest a will is created by statute and a contestant has such rights, and only such rights, as the statutes give him. [Citing cases.]

"As far as the procedural question now under discussion is concerned the Voyce case goes no further than to hold that a 'person interested' in a pending will contest may become a participant therein *by way of intervention under sec. 387, Code Civ.Proc.*, even after the six months' period has elapsed. Appellant did not see fit to follow that procedure, and as he did not file a contest under section 370 before probate, or under section 380 within six months thereafter, it is clear that he has not followed *any statutory procedure* for joining his contest to that of Crann, or identifying himself with it, nor has he cited any authority countenancing the procedure which he adopted. The Voyce case lends no support to it, nor does that case hold that as long as any contest is filed within the six months the statutory limitation is removed as to other contestants who may decide to come in later without leave to intervene."

This holding was made in a case in which the attorney for appellant in the instant case was one of the attorneys for the losing party. The construction of the statutes and of the Voyce case was undoubtedly sound. There can be no doubt that, under the rule announced in the Voyce case, supra, appellant could have intervened in the Crann contest, even after six months after the will was admitted to probate, at any time while the Crann contest was pending. But that contest was voluntarily dismissed on January 28, 1947. The Stimmel contest was filed too late. That has been judicially determined. When the Crann contest was dismissed over two years prior to the filing of the present contest, it was as if, so far as appellant is concerned, no contest had ever been filed. When appellant filed her contest three years and five months after the will had been admitted to probate, there was no contest then pending in which she could intervene or otherwise join. The extension of time permitted by the Voyce case can only apply when the late contest is filed at a time when a timely contest is pending. This is the clear and unambiguous holdings of the Voyce and Walter cases, supra. The construction contended for by appellant is directly contrary to the rule of the Walters case, supra, and is palpably an incorrect and strained construction of the sections.

This appeal was set for oral argument on June 26, 1950. At that time counsel for appellant was told that the Court believed the appeal to be frivolous. After argument on this and other issues, the cause was submitted. Eleven days later, under date of July 7, 1950, the Court received a letter from Mr. Hatch in which he tendered for filing a so-called affidavit of merits purporting to set forth certain alleged facts relating to the litigation, and not contained in the record on the appeal, which facts, if considered by the Court, would, it was claimed, show that this litigation had not delayed the probate of the estate. In the same letter there was "tendered" a "Supplemental Brief," but the brief was not enclosed, the letter stating that: "The brief, about three pages long, will be presented by the printer," thus implying that the brief was already prepared and would be submitted in the immediate future. This letter was presented to the Presiding Justice on July 10, 1950. On that date he wrote to counsel for appellant informing him that the Court would not permit the affidavit of merits to be filed ex parte, because it dealt with many matters *dehors* the record, and informing counsel that if he was of the opinion that such a document could be filed, he should proceed by duly noticed motion. In this same letter counsel was informed that the supplemental brief could be filed within ten days and that respondent would be granted ten days to reply. On the same date the submission was vacated and an order made granting appellant ten days to file the brief, and respondent ten days to reply.

[4, 5] No brief was filed within the time limited in the order. Under date of July

27, 1950, counsel for respondent by letter, a copy of which was sent to Mr. Hatch, called the attention of the court to Hatch's failure to file the brief and requested that the cause be submitted. Nothing was heard from counsel for appellant until August 4, 1950, when a letter was received from Mr. Hatch stating that the court's letter of July 10th was received, and the ten days granted expired, while Hatch was on vacation, and stating: "I hereby request my time to be considered extended accordingly." This request was impliedly denied by an order dated August 7, 1950, ordering the cause submitted. Thereafter, on August 14, 1950, there was filed a notice of motion for leave to file the supplemental brief (which, in the meantime had been printed and was tendered for filing, and which was not the three-page brief originally requested in the letter of July 7, 1950, but a ten-page brief) and the affidavit of merits. The motions came on for hearing on August 28, 1950. At that time both motions were denied. The affidavit of merits averred the good faith of counsel for appellant and purported to set forth various facts, all *dehors* the record, which, it was claimed, would show that the present appeal had not unduly delayed the probate of the estate. Such a document should not be considered. The problem involved in determining whether the appeal is or is not frivolous is not whether Mr. Hatch acted in the honest belief he had grounds for appeal, but whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore, frivolous. The tendered supplemental brief was refused filing because the Court felt that counsel for appellant had been inexcusably negligent in failing to prepare and submit the brief at an earlier date. While this court has always been lenient in permitting the filing of supplemental briefs and the late filing of briefs, the Court must consider the rights of both parties to the appeal, and not permit one side to delay unreasonably the determination of the appeal. We think it was inexcusable for counsel to write to this court and request permission to file a brief, to imply that the brief was written, and then go out of town without making arrangements for the preparation of the brief, and then expect his time to be extended after his return. Such was, in our opinion, unfair to respondent and to this Court.

[6–8] As already pointed out, there can be no doubt at all that the points raised by appellant are frivolous. The language of the Voyce case cannot be distorted into the meaning urged by appellant. The Walters' case directly refutes every contention of appellant. If the rules announced in these cases are the law, reasonable minds cannot but agree that the points urged by appellant are completely without any semblance of substance. Such is a proper case to impose damages as provided by Rule 26(a), Rules on Appeal and section 957 of the Code of Civil Procedure. See, generally, 2 Cal. Jur. p. 977, § 577. While the courts are reluctant to hold that an appeal is frivolous, we should not permit the appellate processes to be abused. The present appeal has imposed a completely unnecessary burden on respondent, and, by improperly consuming the time of a busy court, has adversely affected the rights of other litigants. This warrants the imposing of a penalty. Hendricks v. Pappas, 82 Cal.App.2d 774, 187 P.2d 436; Danziger v. Peebler, 88 Cal.App. 2d 307, 313, 198 P.2d 719; Toohey v. Toohey, 97 Cal.App.2d 84, 217 P.2d 108.

The order and decree are affirmed, and, pursuant to the provisions of Rule 26(a) and section 957 of the Code of Civil Procedure, the sum of $100 is assessed against appellant and added to the costs as a penalty for the taking of a frivolous appeal.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.

99 Cal.App.2d 564

FUHRMAN et ux. v. FARKAS et ux.

Civ. 17463.

District Court of Appeal, Second District, Division 1, California.

Sept. 22, 1950.

Action by Benjamin Fuhrman and Ethel Fuhrman, husband and wife, against Abraham Farkas and Sarah Farkas, husband and wife, to rescind a contract of sale under which plaintiffs purchased from defendants certain hotel property. The Superior Court, Los Angeles County, H. J. Borde, J., entered judgment for the plaintiffs and the defendants appealed. The District Court of Appeal, Doran, J., held that evidence sustained finding that defendants made misrepresentations to plaintiffs as to income from hotel property on which plaintiffs relied in purchasing the property.

Judgment affirmed.

Vendor and purchaser ⇐44

In action by purchasers to rescind purchase of certain hotel property, evidence sustained finding that vendors made misrepresentations to purchasers as to legitimate monthly income from property and that purchasers relied thereon in purchasing the property.

Julius Blank, and James G. Cooney, Los Angeles, for appellant.

Harvey & Viereck, Los Angeles (B. M. Cooperman, Los Angeles, of counsel), for respondents.

DORAN, Justice.

The respondents instituted the present action seeking to rescind a contract of sale under which respondents purchased from appellants certain hotel property situated at No. 14 Ozone Avenue, Ocean Park, California. The parties commenced negotiations in April, 1948; ultimately a sale price of $18,500.00 was agreed upon and escrow instructions signed on May 12, 1948. Respondents paid $3,500.00 in cash, assumed payment of a $10,000.00 first trust deed, and gave back to appellants a second trust deed in the sum of $5,000.00. Rents were to be pro-rated as of the close of escrow on the basis of a statement approved by respondents. Possession of the property was taken by the respondents on July 1, 1948, and the escrow closed on July 13, 1948.

On November 22, 1948 respondents Fuhrman served on appellants Farkas a written "Notice of Rescission ond Offer of Restoration", predicated "on the ground that you induced us to enter into said contract by your false and fraudulent misrepresentations as to the legitimate monthly income from said property. That in writing you assured us that the legitimate monthly income was over $400.00 when you knew at said time and place that you were overcharging the tenants and that the ceiling monthly rates were not more than $218.00, that the sales price, to-wit, $18,500, was based upon the monthly income which you falsely and fraudulently misrepresented to us". The notice then tendered a return of the property and demanded a return of $5,900.00, "plus our expenses in connection with the escrow, less whatever is the reasonable value of the use of the apartment occupied by us".

The complaint which followed recites the above facts and alleges that "defendants falsely and fraudulently represented to the plaintiffs in writing that the legitimate monthly income was $407", segregating the rentals received from each room, apartment, etc. The complaint then avers that "in support of their false and fraudulent representations as above outlined, defendants submitted to the plaintiffs their receipt books and records concerning the alleged legitimate income and plaintiffs relying upon said representations agreed to purchase * * * said premises and paid them the purchase money". It is also charged that "defendants well knew that said income was not legal and that the legitimate ceiling income was approximately one-half (½) of the amount represented to the plaintiffs."

The complaint further alleges that on November 21, 1948, "plaintiffs for the

first time became aware" of the misrepresentations, and gave notice of rescission. A second cause of action alleged that plaintiffs feared that defendants would foreclose the second trust deed for failure to make payments thereunder, and sought an injunction against the defendants transferring said trust deed and restraining defendants from foreclosing same.

The trial court sitting without a jury, found that the misrepresentations were made as alleged and that plaintiffs relied thereon in purchasing the property. Judgment was entered in favor of plaintiffs in the sum of $5,900.00, together with cancellation of the second trust deed. Pending final settlement, plaintiffs were directed to pay to the holder of the first trust deed the monthly sum of $100.00, and "authorized to retain for the up-keep of the premises and as compensation to themselves the balance of any of the monthly income received from the rental of the said premises without making any accounting for the same to the defendants." The present appeal followed.

It is contended by appellants that "The decision is in error as a matter of law because it is in direct conflict with the testimony and evidence adduced at the trial and the law applicable to the case". Under this head appellants maintain that respondents as plaintiffs failed to carry the burden of proving the affirmative allegations made, and point to the fact that a rental statement furnished by appellants to the escrow on June 28, 1948, "could not have induced a purchase of property for which the escrow was opened upon May 12, 1948". It is also argued that the escrow "neither contained or required any representation as to the amount of rents".

Respondents' brief points out that both parties introduced evidence directly bearing upon the question whether appellants made false representations as to the legitimate monthly income derived from the property. Both written and oral misrepresentations were offered in evidence, and the case was tried on this theory. Rent receipt books exhibited to respondents by appellants were also placed in evidence and the plaintiffs' case was not made to depend upon the rental statement furnished in escrow, although such statement doubtless corroborated the other representations made. That the record contains substantial evidence in support of the trial court's findings and judgment can hardly be doubted.

As evidenced by respondent's Exhibit I, the Office of Housing Expeditor had, in March of 1946, laid down ceiling rates for each of the units in the building, a copy of which schedule was in the possession of the appellants. These ceiling rates depended upon the number of persons occupying the unit and upon whether it was rented on a daily, weekly or monthly basis. For example, the maximum legal rate for Room 1 when rented to two people by the day is $1.50; by the week $5.50; by the month such rental is set at $22.00.

Abraham Farkas, appellant herein, testified to giving Mr. Fuhrman a paper prepared by Farkas' daughter specifying the rentals which were being collected. The record discloses the following testimony given by Farkas under Section 2055 of the Code of Civil Procedure: "Q. Now, at the time you gave it (the paper) to him, was it true that you were collecting from Room 1, $60.00 a month or $15.00 a week. Is that true? A. That is the daily rate; on a daily rate." Respondent Fuhrman testified: "The earning capacity they (the appellants) said was $408.00 * * * per month", and that respondents relied on such statement. Respondents then purchased the property and continued to charge the same rentals as represented by appellants, supposing the same to be legal, until in November when the O. P. A. gave notice that such charges were unlawful, and that about $250.00 per month was all that could be charged.

There was testimony by an O. P. A. attorney that daily rentals "could not be required in advance", although "a tenant might pay for his own convenience". There was evidence to the effect that appellants, prior to the sale, did collect daily rentals in advance, and that respondents, relying on appellants' representations as to

rentals, continued such advance collections until notified by the O. P. A. office.

The appellants' brief endeavors to explain the matter by affirming that the O. P. A. schedules provide a "maximum potential earning power" of the premises to be $532.50 per month; further, that "The insistence of the plaintiff in collecting rentals by the month and in advance was the sole reason for the reduction of income earned by the premises", rather than any fraud on the part of appellants. However, as pointed out by respondents, the "potential earning power" is not an issue on this appeal; the question involved is that of appellants' misrepresentations.

As concerns appellants' second contention mentioned above, the record indicates that in collecting rentals after purchasing the property, respondents merely carried on in the manner indicated by the appellants' representations. Again, there is evidence supporting the trial court's conclusion that the loss in monthly rentals reasonably anticipated when respondents purchased the premises, was directly due to the appellants' misrepresentations as to the amounts which could legally be collected. In place of $408.00 which respondents were led to believe could be legally collected each month, respondents soon found that the law would only permit the collection of about $250.00 per month. To attribute this loss to respondents' activities rather than to appellants' admitted statements concerning rentals, in reliance of which the sale was consummated, would require a trial or an appellate court to either ignore or discredit much of the evidence in the record. This, the trial court refused to do. It cannot be said that such conclusion was wrong.

The appellants' contentions are without merit, and no reversible error has been pointed out.

The attempted appeal from the order denying a new trial is dismissed, and the judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

MOELLER v. DE ROSE et al.

Civ. 14446.

District Court of Appeal, First District, Division 1, California.

Sept. 19, 1950.

Hearing Granted Nov. 16, 1950.*

Peel L. Moeller sued Ernest Carmen De Rose and Hayes Company for injuries resulting when defendant De Rose who was a wholesale and retail newspaper distributor for defendant Hayes Company struck plaintiff pedestrian with an automobile at intersection. The Superior Court in and for the County of Santa Clara, M. G. Del Mutolo, J., rendered a judgment adverse to defendants and defendant Hayes Company appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that whether defendant distributor as regarded his duties as retail distributor was an employee of defendant newspaper or was an independent contractor was for jury under the evidence.

Judgment affirmed.

1. Appeal and error ⇐989

In reviewing judgment of trial court in action wherein whether a person was an employee or independent contractor was in issue, test is not what District Court of Appeal would have found under facts but is whether finding of trial court is supported by any substantial evidence, including reasonable inferences from that evidence.

2. Master and servant ⇐332(3)

Only where but one inference can reasonably be drawn from evidence does question of whether one is an employee or an independent contractor become a question of law for court.

3. Master and servant ⇐330(3)

Belief of parties to contract as to whether relationship between them was that of employer and employee, or was that of independent contractor, as indicated by their actions, was entitled to some weight in determining nature of relationship.

4. Master and servant ⇐5

The fact that a certain amount of freedom is inherent in nature of work of

* Dismissed March 7, 1951.

an employee does not make the employee an independent contractor where employer has general supervision and control over employee.

5. Courts ⇐90(1)

A later decision of an appellate court controls to extent earlier decisions are inconsistent.

6. Automobiles ⇐245(32)

In action for injuries resulting when retail and wholesale newspaper distributor struck a pedestrian at intersection with automobile, whether distributor as regarded his duties as retail distributor was an employee of newspaper publisher or was an independent contractor was for jury under evidence.

7. Master and servant ⇐332(1)

Where facts are undisputed, question of liability of employer for injury caused by employee is for jury.

8. Master and servant ⇐302(1)

The rule that an employee is not acting in course and scope of his employment while going to or coming from work is applicable where employee is required to perform duties at a fixed place on particular premises, and has no application where duties are to be performed over a wide territory and the hours and place of employment are more or less discretionary with employee.

9. Master and servant ⇐1

Where use of motor vehicle by employee is required by employment, duties of employee do not cease until vehicle arrives at home of employee, regardless of whether vehicle is furnished by employer or by employee.

10. Master and servant ⇐1

A commercial traveler who uses his own automobile acts in course of his employment so long as he travels in his employer's business, including the whole period of time between starting from and returning to his place of business or home.

11. Automobiles ⇐245(30)

In action for injuries resulting when retail and wholesale newspaper distributor struck a pedestrian at intersection with automobile required in his work, whether distributor deviated from course of his employment in taking home his girl friend who had made retail collection trip with distributor, or in turning from the most direct route to his home after taking his girl friend home, in order to buy magazines, was for jury under evidence.

12. Master and servant ⇐332(2)

Whether employee's deviation from straight course of duty has been so material or substantial as to constitute a complete departure is usually a fact question.

13. Master and servant ⇐302(6)

Where an employee is engaged on a trip which combines his personal business with business of his employer, employer may be liable for employee's tortious acts.

14. Automobiles ⇐194(1)

If newspaper distributor in returning from collection trip deviated in his automobile or departed from ordinary or direct route which his mission required him to pursue, and deviation was of such character as was contemplated by employment or should have been foreseen by employer newspaper publisher or was such that employer would have consented to had employer known thereof, and if distributor was liable to plaintiff who was struck by distributor's automobile during such deviation, newspaper publisher was also liable.

15. Master and servant ⇐302(1)

Statement that an act of a servant or an agent is not within scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed, embodies a correct statement of general law.

16. Trial ⇐260(8)

In action for injuries resulting when retail and wholesale newspaper distributor struck a pedestrian at intersection with automobile, failure of trial court to give instruction proffered by defendant newspaper publisher to effect that an act of a servant is not within scope of employment if it is done with no intent to perform it as a part of or incident to a service on account of which he is employed, was not error

where issue of scope of employment was covered by plaintiff's given instruction.

17. Master and servant ⇐302(1)

For an employee to be "within the scope of employment" does not require the employee to be literally on the job or doing work for the employer at the precise time of accident.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Within the Scope of Employment".

18. Automobiles ⇐242(6)

In action against employer for injuries caused by employee while driving automobile, plaintiff had burden to show that employee was acting in the scope of his employment.

19. Master and servant ⇐330(1, 3)

In action against employer for injuries caused by employee, a prima facie case is established by showing that alleged employee at time of challenged occurrence was performing work and labor for claimed employer, and upon such a showing burden of going forward with evidence shifts to employer.

Campbell, Hayes & Custer, Robert E. Hayes, San Jose, Edward J. Niland, Santa Clara, of counsel, for appellant.

Emery J. Delmas, San Jose, for respondent.

PETERS, Presiding Justice.

Plaintiff, a pedestrian, was injured by an automobile owned and operated by De Rose, a newspaper distributor for the San Jose Mercury Herald, published by the Hayes Company. Plaintiff brought this action against De Rose and the Hayes Company, the latter being joined on the theory that De Rose was an employee of the Hayes Company and was acting in the course and scope of his employment at the time of the accident. The jury returned a verdict of $25,000 against both defendants. Hayes Company alone appeals. Since De Rose has not appealed, it must be presumed, and appellant concedes, that the evidence shows that the accident was proximately caused by the negligence of De Rose. The contentions of appellant are that the evidence shows, as a matter of law, that De Rose, at the time of the accident, was not an employee of the Hayes Company but was an independent contractor; that, even if he was an employee, he was not then acting in the course and scope of his employment; that the trial court erroneously instructed the jury in certain particulars; and that the trial court erroneously refused to give certain instructions proffered by appellant. There is no merit in any of the points urged.

The accident occurred on December 5, 1947. On that date, and for about seven years prior thereto, De Rose was employed as a newspaper distributor by the San Jose Mecury Herald. He was a member of the Teamsters' Union and designated in the governing labor contract as a "rural motor deliveryman." As such, he made both wholesale and retail deliveries of newspapers every day. In so far as the wholesale route was concerned he was clearly an employee of the newspaper, and no contention is made to the contrary. This route extended from San Jose to Salinas. De Rose, each morning, would pick up about 2,500 newspapers in his own pickup truck at about 1 a. m. and would then drive to Salinas making deliveries to retail distributors in each town along the way. The Mercury Herald billed the agencies receiving these papers and collected from them. De Rose's sole duty as to these papers was to deliver them.

In addition to these wholesale deliveries De Rose operated, and was required to operate as part of his job, a retail route of forty-one customers which was embraced, geographically, within the wholesale route. He purchased these papers from the appellant and then sold them to the retail customers for a profit, the wholesale and resale prices being fixed by appellant. De Rose collected from these retail customers, and any loss sustained was his loss, and not that of the company. De Rose kept the records of these accounts and took care of the billing and bookkeeping. Because he made the deliveries on his

wholesale and retail routes very early in the morning, he could not make the collections on his retail route at the time he delivered the papers, and, using his own car, customarily made these collections at night when the farmer customers were at home.

The method of payment to De Rose for these services is not in dispute. He used his own car in making deliveries and collections. He was allowed eight cents a mile for the use of his car while making the wholesale deliveries, and included, geographically, were the retail deliveries. But no mileage allowance was paid for the use of his car while making collections. The retail route was much shorter than the wholesale route, extending but sixteen miles from San Jose. The normal time required to make wholesale and retail deliveries was five and a half to six hours. He normally started to work at 1 a. m. and was home by 6:30 or 7 a. m. Nevertheless, he was paid, pursuant to the terms of the union contract, $1.51 per hour for eight hours each week day, and on Saturday and Sunday he received time and a half for eight hours for not more than six hours of work. These extra two or two and a half hours of wages were paid to De Rose, according to his testimony, as compensation for making the collections on the retail route. Farmer, the circulation manager of the Mercury, and De Rose's immediate superior, admitted that this extra compensation was to pay De Rose for making the collections on his retail route, and to induce him to undertake promotion work for the newspaper.

Under the rules of the newspaper, De Rose was billed each month for the purchase price of the newspapers he delivered to the retail customers, and was required to remit this sum to the newspaper by no later than the 20th of each month. Farmer testified that the retail portion of the route was assigned to De Rose by the Mercury; that this was an integral part of the distributor's job and required of him by the company; that it was his (Farmer's) duty to assign routes; that the retail or wholesale route of any driver could be changed by the company at any time; that drivers were informed by him of the proper and most effective ways of handling the route, including collections; that he did not care when De Rose made his collections, or, in fact, whether De Rose ever collected on these accounts, as long as the company was paid for the papers. De Rose testified that he had to make four to six collection trips each month to collect from all of his customers, and that he was never told by the Mercury what methods he should use in collecting.

De Rose was covered by workmen's compensation insurance through the company, and deductions were made from his total eight hours daily salary for social security and unemployment insurance, and for a group health and death policy. No deductions for these purposes were made from the profits he made on the resale of papers.

The accident in which plaintiff was injured occurred around 9 p. m. on December 5, 1947. At about 5 p. m. on that night De Rose telephoned to a girl friend and arranged to take her with him that evening while he made some collections on his retail route. This friend, in the past, had frequently accompanied De Rose on such trips, and assisted him while they were driving along by picking out the overdue accounts from the file maintained by De Rose. Pursuant to the prearranged plan, De Rose picked his friend up in his automobile, and they drove along the retail route, making about five or six collection calls. De Rose then returned his friend to her home, where he stayed for about fifteen minutes. He left her home at about 8:45 p. m. He testified that he was then intending to go home. He started in that direction, but at the corner of Park Avenue and Sunol Street in San Jose he decided to take a left turn, which was directly opposite to the most direct route to his home. He testified that he turned in this direction because he was "probably" going to get a couple of magazines. It was while making this turn, and while still in the intersection, that he ran down the plaintiff under circumstances which admittedly support the implied finding that the accident was proximately caused by his negligence.

Farmer testified that he had never told any of the drivers not to take passengers with them on collection trips, and De Rose testified that that was not any of the company's business.

The first and major contention of appellant is that at the time and place of the accident De Rose was not an employee of the appellant but was, as a matter of law, an independent contractor. Various tests have been suggested by the cases to determine this issue, see, Restatement of Agency, § 220, but, as was said in Schaller v. Industrial Acc. Comm., 11 Cal.2d 46, 52, 77 P.2d 836, 839: "While these tests are recognized as helpful, yet no special test, or fact, or circumstance has been found to give a conclusive answer to the question, and in the last analysis each case must turn upon its own peculiar facts and circumstances."

[1, 2] The nature of the relationship, except in unusual cases, is primarily a question of fact. The test, as in the case of other factual questions, is not what this court would have found under the facts, but whether the finding of the trial court is supported by any substantial evidence, including reasonable inferences from that evidence. Washko v. Stewart, 20 Cal.App.2d 345, 349, 67 P.2d 151; Malvich v. Rockwell, 91 Cal.App.2d 463, 468, 205 P.2d 389; Pacific Lumber Co. v. Industrial Acc. Comm., 22 Cal.2d 410, 422, 139 P.2d 892; Candido v. California Emp., etc., Comm., 95 Cal.App.2d 338, 212 P.2d 558. "It is only where but one inference can reasonably be drawn from the evidence that the question of whether one is an employee or an independent contractor becomes one of law for the court." Burlingham v. Gray, 22 Cal.2d 87, 100, 137 P.2d 9, 16; to the same effect see National Auto., etc., Co. v. Ind. Acc. Comm., 80 Cal.App.2d 769, 772, 182 P.2d 634; Perguica v. Ind. Acc. Comm., 29 Cal.2d 857, 859, 179 P.2d 812.

In our opinion the record contains ample and substantial evidence to support the implied finding that De Rose, in making the collections, was an employee of the appellant. This evidence can be classified in two main categories:

1. There was substantial evidence that appellant had the right to control De Rose in the manner in which he made collections. "A material and often conclusive factor is the right of an employer to exercise complete and authoritative control of the mode and manner in which the work is performed. The existence of such right of control, and not the extent of its exercise, gives rise to the employer-employee relationship." Perguica v. Ind. Acc. Comm., 29 Cal.2d 857, 859, 179 P.2d 812, 813. Farmer, the circulation manager of appellant, testified that if he had given De Rose instructions as to his collections, that is "how to do it or when to do it," he would have expected those instructions to be followed. Admittedly, the retail route, including collections, was an integral part of the job, and De Rose was required to take it as part of his job. Admittedly, the retail route was assigned to De Rose by the appellant, and admittedly that company could change or increase or decrease that route at any time. Farmer testified that the retail distribution was assigned to De Rose for the convenience of the paper; that De Rose had been informed that the "collections and promotions on that [retail] route are up to him as an employee," and that De Rose was informed by appellant of the proper and most effective ways of handling that business. Farmer also testified that, although the main interest of appellant was in seeing to it that De Rose paid his bill to the paper and not in whether the retail customers paid De Rose, nevertheless it was to the interest of the company that these collections be made regularly; that De Rose would not have been a satisfactory employee unless he collected regularly; and that unless he collected regularly he would not have been permitted to keep his job.

[3] 2. The next important factor that must be considered is the manner of payment. Admittedly, the delivery of papers on both the wholesale and retail routes took but five and a half or six hours, yet De Rose was paid at an hourly rate for a full eight hours. De Rose testified that this extra compensation was to pay him for the time consumed in making the collections on

his retail route, and Farmer admitted the extra pay was for the purpose of allowing De Rose to do collection and promotion work. It must be remembered that this extra compensation was paid pursuant to appellant's contract with the union, and that neither in that agreement, nor outside of it, was there any differentiation made between wholesale and retail routes. It must also be remembered that from the full eight hours of wages, deductions were made by appellant for federal income taxes, federal unemployment insurance, social security taxes, and a group health insurance plan. Such deductions are normally made only from the wages of an employee, and not from those of an independent contractor. Farmer testified that deductions were made only from employees' wages and not from the income of independent contractors, and that the company considered only the retail distributors on the wholesale route as independent contractors. This belief of the parties as to the nature of the relationship as indicated by their actions is entitled to some weight. Perguica v. Ind. Acc. Comm., 29 Cal.2d 857, 860, 179 P.2d 812; Restatement of Agency, § 220(i).

Under this evidence it clearly was a jury question as to whether De Rose was an employee or an independent contractor. In the case of Burlingham v. Gray, 22 Cal. 2d 87, 137 P.2d 9, where the facts in support of the employer-employee relationship were much weaker than those here involved, this rule was established. In that case the trial court had ruled that, as a matter of law, one Gray and one Porter were not employees of the newspaper, and directed its verdict accordingly. This was unanimously reversed by the Supreme Court, it being held that the issue was a jury question. The evidence shows that one Porter, under contract with the newspaper, was a distributor of the paper in a portion of the county. Gray was hired by Porter as one of the carriers to distribute the papers to Porter's customers within his district, and was paid by Porter $50 a month. The basic question was whether Porter, the distributor, was an employee or independent contractor. The written contract between the newspaper and Porter designated him as an independent contractor. Under that contract Porter's income came from the difference between the wholesale price he paid the newspaper company for the papers, and the retail price he charged his customers, less expenses. In addition, pursuant to a separate oral agreement between Porter and the newspaper, Porter was paid $2.00 per week, less social security benefits, by means of a regular payroll check of the company, for picking up a bundle of papers at Anaheim and delivering them to an agent at Orange. At the time of the accident, Gray, the carrier, was delivering copies of the newspaper to subscribers and also had in his possession the bundle of papers required to be delivered at Orange. The Supreme Court looked beyond the precise terms of the contract between Porter and the newspaper, see, also, Pacific Lbr. Co. v. Ind. Acc. Comm., 22 Cal.2d 410, 139 P.2d 892; Candido v. California Emp., etc., Comm., 95 Cal.App.2d 338, 212 P.2d 558; Lewis v. Constitution Life Co., 96 Cal.App. 2d 191, 215 P.2d 55, and emphasized the fact that the evidence showed that Porter always seemed to carry out the suggestions of the company. The Court also emphasized the fact that (as in the instant case) it was the newspaper that fixed the wholesale price it charged Porter, and also the price Porter charged his customers. Other matters mentioned by the Court as tending to show an employer-employee relationship were that Porter received $2.00 a week, less social security deductions, from the company; that he was a member of a group hospitalization plan for employees of the newspaper; that Porter received an annual vacation with pay; that the newspaper reserved the right to terminate Porter's agency at any time; and that the newspaper supervised Porter's activities. The Court held that, under these facts, a jury might have inferred "that the company's right of control over Porter as dealer was complete and that any instructions given to Porter would be obeyed." 22 Cal.2d at page 101, 137 P.2d at page 16. The Court said that if Porter had failed to comply with the company's "suggestions," it could have discharged him. It might also have compelled him to follow their suggestions by

changing the wholesale and retail prices. "In the light of the foregoing discussion, it is difficult to conceive of a much more complete control of an employee doing work of a character inherently embodying some freedom of action than that which the company had the power to exercise over the dealer Porter." 22 Cal.2d at Page 102, 137 P.2d at page 17. The Court concluded that the provision of the contract allowing discharge if Porter was unsatisfactory in any manner, plus the fact that Porter accorded implicit obedience to the suggestions of the company, indicated a power of control by the employer over the means as well as the ultimate result. The Court concluded by holding that the problem was a jury question and reversed the directed verdict.

The case stands for the proposition that doubtful cases involving this issue must be submitted to the trier of the facts. The factual situation there involved was much weaker than that in the instant case, and it would appear that the decision is controlling here. See, also, Pacific Lbr. Co. v. Ind. Acc. Comm., 22 Cal.2d 410, 139 P.2d 892; Candido v. California Emp., etc., Comm., 95 Cal.App.2d 338, 212 P.2d 558; Lewis v. Constitution Life Co., 96 Cal.App. 2d 191, 215 P.2d 55.

[4] Appellant lays stress on the fact that De Rose testified that he made collections when he wanted to; that he made them in the evening because it was most convenient for him and his customers at that time; that he regarded it as nobody's business if he took passengers with him; and that he felt free on such trips to make deviations from the most direct route if he so desired. Aside from the fact that if this evidence does support the argument that De Rose was an independent contractor it merely creates a conflict with other evidence, it is our belief that such evidence is not inconsistent with De Rose being an employee while making these collections. In the very nature of things De Rose had to make the collections when his customers were home, and he and not the newspaper knew that fact. Moreover, as was said in the Burlingham case, 22 Cal.2d at page 100, 137 P.2d at page 16: "* * * the fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it." This is well-settled law.

It is true that there are other cases holding that, under certain circumstances, a newspaper distributor may be an independent contractor as a matter of law, but the facts of all of these cases are readily distinguishable from those involved here. Thus, in Rathbun v. Payne, 21 Cal.App.2d 49, 68 P.2d 291, where this appellate court, in reversing a judgment for plaintiff, held, as a matter of law, that one Asbitt was an independent contractor and was not an employee of the newspaper, the reversal was based on the lack of any evidence of the right to control the means to be used by the distributor. Asbitt's sole duty was to deliver papers on a retail route, and he received no hourly wages, his profits being dependent on commissions. The same can be said of Bohanon v. James McClatchy Pub. Co., 16 Cal.App.2d 188, 60 P.2d 510, relied upon in the Rathbun opinion. There, too, the appellate court reversed a judgment against a newspaper, but that case involved almost entirely the proper interpretation of a written contract between the parties. The court gave great weight to the fact that, unlike the instant case, no fixed compensation was paid the distributor for his services, and the distributor there involved was solely a retail distributor.

In the Bohanon case the court relied upon State Comp. Ins. Fund v. Indus. Acc. Comm., 216 Cal. 351, 14 P.2d 306, as controlling. A reading of that opinion demonstrates that the court held that the decisive factor was that the distributor, who hired boys to distribute the papers he purchased wholesale, was not paid any fixed wages or compensation by the newspaper for his services. That serves to distinguish that case from the instant one. The court emphasized, citing Globe Indemnity Co. v. Industrial Acc. Comm., 208 Cal. 715, 284 P. 661, and Call Pub. Co. v. Industrial Acc. Comm., 89 Cal.App. 194, 264 P. 300, that if the distributor were paid a regular salary or compensation, as in the instant case, the rule might be different.

[5, 6] There is undoubtedly general language in these cases somewhat inconsistent with that employed by the court in the Burlingham case, but all of these cases, factually, are distinguishable from the Burlingham case and from the instant one. Moreover, to the extent that these earlier decisions are inconsistent with the Burlingham case the latter, being later in time, must control. We think the proper rule is and should be that if the issue is reasonably debatable (as is certainly true in the instant case), the question is a jury question and not one for the court as a matter of law.

[7] The next main question is whether De Rose had deviated from the course of his employment at the time of the accident. Appellant seems to contend that, because De Rose was on his way home at the time of the accident, he was not acting in the course and scope of his employment. This would seem to be a question of fact and not a question of law. See note in 33 Cal. L.Rev. 646. While there is substantial authority for the rule that, where the facts are undisputed, the question of liability is one of law and not of fact, the rule of law in this state, as expressed by the majority of the court in Loper v. Morrison, 23 Cal.2d 600, 145 P.2d 1, is that in such cases the question is one of fact for the jury and not one of law for the court. This conclusion seems to us sound, and is in accordance with the general rule elsewhere. 57 C.J.S., Master & Servant, page 408, § 617; 3 Cooley on Torts, p. 68, § 396; Restatement of Agency, § 228(2); but see 35 Am.Jur. p. 1040, § 600.

[8-10] In considering this problem, the so-called "going and coming rule"—i.e., that an employee is not acting in the course and scope of his employment while going to or coming from work—is not involved. That rule is applicable where the employee is required to perform services at a fixed place on particular premises, and has no application where the duties are to be performed over a wide territory, and the hours and place of employment are more or less discretionary with the employee. Makins v. Industrial Acc. Comm., 198 Cal. 698, 703, 247 P. 202, 49 A.L.R. 411; Truck Ins. Exchange v. Ind. Acc. Comm., 27 Cal. 2d 813, 818, 167 P.2d 705; 1 Campbell on Workmen's Compensation, p. 191, § 200. This exception is strengthened where the use of a motor vehicle is required by the employment and is not furnished by the employer. Campbell, p. 193, § 201. In such cases, whether the car is furnished by the employer or employee, where the car is kept at the employee's home, the duties of the employee do not cease until the automobile arrives at the home of the employee. Campbell, p. 174, § 185. De Rose can be compared to the commercial traveler who uses his own car. Such employees "may be regarded as acting in the course of their employment so long as they are traveling in their employer's business, including the whole period of time between their starting from and returning to their place of business or home." California C. I. Exch. v. Indus. Acc. Comm., 5 Cal.2d 185, 186, 53 P.2d 758, 759.

[11, 12] But, says appellant, De Rose deviated from the course of his employment either in taking his girl friend home, or, after he did so, in turning away from the most direct route to his home to purchase some magazines. Under the facts these were jury questions. As was said in Loper v. Morrison, 23 Cal.2d 600, 605, 145 P.2d 1, 3: "The general rule in these cases is stated in Kruse v. White Bros., 81 Cal.App. 86, 93, 253 P. 178, recently quoted with approval in Westberg v. Willde, 14 Cal.2d 360, 373, 94 P.2d 590, 597; 'Whether there has been a deviation so material or substantial as to constitute a complete departure is usually a question of fact. In some cases the deviation may be so marked, and in others so slight relatively, that the court can say that no conclusion other than that the act was or was not a departure could reasonably be supported; while in still others the deviation may be so uncertain in extent and degree in view of the facts and circumstances as to make the question of what inferences should be drawn from the evidence properly one for the jury.'" See, also, Lockheed Aircraft Corp. v. Ind. Acc. Comm., 28 Cal.2d 756, particularly at pages 758-760, 172 P.2d 1; 57 C.J.S., Master &

Servant, p. 408, § 617. There can be no doubt that under the facts the jury was entitled to infer that the company knew that distributors customarily took passengers on their collection trips, and not only did not object but impliedly consented. This being so, it was not a deviation from the employment as a matter of law for De Rose to take his passenger home after such a collection trip. The same must be held as to the turn away from the most direct route home to purchase some magazines. Whether that was so substantial a deviation as to take it out of the employment, or whether it was so slight a deviation as to be impliedly included therein, was properly submitted to the jury, and its determination, under the facts, cannot be disturbed.

Objection is made to several of the instructions. At the request of respondent the court instructed "that if you find that the defendant Ernest Carmen De Rose deviated or departed from the ordinary or direct route which his mission required him to pursue you must then find whether such deviation or departure was of such a character,

"1. As was contemplated by the employment, or ought to have been foreseen by the defendant Hayes Company, or

"2. That it was such that the defendant Hayes Company would have consented to had it known thereof.

"In the event that you find that such deviation or departure comes within either of the above two subdivisions then you must find the defendant Hayes Company liable to plaintiff if you find the defendant De Rose liable to plaintiff."

After several hours of deliberation the jury asked for a re-reading of this instruction and it was twice re-read to the jury. Appellant argues that such instruction was incorrect because an employer may consent to a deviation without authorizing it. The sole authority cited in support of this contention is the Restatement of Agency, § 229, comment c, which declares that acts of a personal nature permitted by the employer to make the employment more desirable are not necessarily within the scope of the employment.

[13, 14] The instruction contains a correct statement of law. It is almost a verbatim quotation from 2 Cal.Jur.Supp. p. 515, § 333, which cites many cases in support of the rule that a recovery is sustainable on proof of either of the two factors mentioned in the instruction. The rule in this state is that where an employee is engaged on a trip which combines his personal business with that of his employer, the employer may be liable for the employee's tortious acts. Gayton v. Pacific Fruit Express Co., 127 Cal.App. 50, 15 P.2d 217; Aubel v. Sosso, 72 Cal.App. 57, 236 P. 319; Dolinar v. Pedone, 63 Cal.App.2d 169, 146 P.2d 237. In Kruse v. White Brothers, 81 Cal.App. 86, 92, 253 P. 178, 181, the Court stated that where the master's business is the controlling purpose of the trip "usual or incidental personal acts * * * not amounting to a turning aside completely from the master's business so as to be inconsistent with its pursuit, are often only what might be reasonably expected, to which, therefore, the master's assent may be fairly assumed". See, also, Loper v. Morrison, 23 Cal.2d 600, 606, 145 P.2d 1.

Appellant also objects to the failure of the trial court to give its instruction 58-A. The proffered instruction was as follows.

"I instruct you that 'an act of a servant or an agent is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.' If you find that at the precise time and place of the accident in suit the defendant De Rose was entertaining no intention to serve his employer, he was not acting within the scope of his employment as a matter of law and you cannot find otherwise.

"I further instruct you that if the defendant De Rose had no such intention at the time and place of the accident in suit, you are to return a verdict in favor of the defendant Hayes Company."

[15] The instruction, as applied to some facts, undoubtedly embodies a correct statement of the law and is set forth in the Restatement of Agency, § 235. That section reads: "An act of a servant is not within the scope of employment if it is done with

no intention to perform it as a part of or incident to a service on account of which he is employed." The comment on the rule says that: "* * * It is the state of the servant's mind which is material."

[16] While the instruction undoubtedly embodies a correct statement of general law, it is doubtful whether that principle is applicable at all to a deviation case. Once it is determined that the collection trip was a part of and incident to De Rose's employment, the fact that the collections were completed and De Rose was on the way home is immaterial, because going home was an incident of the employment, so that the intention of De Rose at the "precise" time of the accident is a false factor. Moreover, another and complete answer to this contention is that the court fully, fairly and completely covered the issue of scope of employment by giving respondent's instructions 26 and 29 and appellant's instruction 55. These instructions adequately covered this issue.

The last major contention of appellant is that the trial court erred in failing to give appellant's proffered instruction on burden of proof. The instruction refused by the court reads as follows: "If you find in plaintiff's favor on the issues of negligence and contributory negligence, as against the defendant Hayes Company, you have another issue to determine, namely, was defendant De Rose within the scope of his employment, that is, 'on the job' or doing work for the Hayes Company at the time and place of the accident. Legally we call this being 'within the scope' or 'without the scope' of employment. The burden is on plaintiff to prove by a preponderance of the evidence that issue also. If you find that the defendant De Rose was not within the scope of his employment for the Hayes Company at the precise time of the accident in suit, your verdict must be in favor of the Hayes Company."

[17-19] This instruction was properly refused. To be within "the scope of employment" does not require the employee to be literally "on the job," or "doing work for" the company at the precise time of the accident. As already pointed out, there is substantial evidence to support the implied finding that De Rose, after finishing his collections, was on his way home from that trip and was still within the scope of his employment, although he was not then technically "on the job" or "doing work for" the company. Moreover, if going home, in such cases, can be considered as "doing work for" the employer, while the burden is on the plaintiff to show that the servant was acting within the scope of his employment, it is also true that a prima facie case is established by a showing that the alleged servant at the time of the challenged occurrence was performing work and labor for his claimed employer. Upon such a showing the burden of going forward with the evidence shifts to the employer. See cases collected 16 Cal.Jur. p. 1110, § 67; see, also, Lewis v. Constitution Life Co., 96 Cal.App.2d 191, 215 P.2d 55; Restatement of Agency, § 228, comment b. Thus, the proffered instruction would have been highly confusing and misleading, and was properly refused.

It should be mentioned that the court did give the usual instruction that the burden of proof was on the plaintiff and that the plaintiff must prove his case by a preponderance of the evidence. Under the circumstances, and no proper instruction having been offered by appellant, the instructions given were sufficient.

The judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

99 Cal.App.2d 476

PEOPLE v. JAMES.

Cr. 821.

District Court of Appeal, Fourth District, California.

Sept. 18, 1950.

O. D. James was convicted of first degree murder in 1944. In 1950 defendant filed motion to vacate judgment of conviction and from order denying motion, defendant appealed. The District Court of Appeal, Mussell, J., held that defendant's contention that his constitutional rights were violated and his plea of guilty was vitiated by lack of effective aid of counsel at trial would not be determined by proceedings in nature of a petition for writ of coram nobis, and that delay of 5½ years between time of trial and time of filing of proceedings to vacate judgment was unreasonable.

Order affirmed.

1. Criminal law ⇐997

Motion to vacate a judgment of conviction and withdraw a plea of guilty is in nature of a writ of coram nobis.

2. Criminal law ⇐997

Defendant's contention that his constitutional rights were violated and his plea of guilty to a charge of murder was vitiated by lack of effective aid of counsel at trial, could not be determined by proceedings in the nature of a petition for writ of coram nobis.

3. Criminal law ⇐997

Motion to vacate a judgment in the nature of a petition for writ of coram nobis is a remedy of a narrow scope, and its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if trial court had known it and which through no negligence or fault of defendant was not then known to court.

4. Criminal law ⇐997

Applicant for writ of coram nobis must show that facts upon which he relies were not known to him and could not in exercise of due diligence have been discovered by him at any time substantially earlier than time of his motion for the writ or he has stated no grounds for relief.

5. Criminal law ⇐997

Writ of coram nobis does not lie to correct an error in judgment of the court, nor to contradict or put in issue any fact directly passed upon and affirmed by judgment itself, and where remedies of a right to appeal and to make a motion for new trial are provided for by statute, to that extent an application for writ of coram nobis cannot be entertained.

6. Criminal law ⇐997

The grounds upon which a court may issue a writ of error coram nobis are more narrowly restricted than those which allow relief by habeas corpus.

7. Criminal law ⇐997

Generally, the writ of error coram nobis does not lie to correct an issue of fact which has been adjudicated, even though wrongly determined, nor for alleged false testimony at trial, nor on ground that a juror swore falsely as to his qualifications, nor for newly discovered evidence.

8. Criminal law ⇐997

All matters of fact reviewable by appeal, or upon motion, must be presented by motion for a new trial, and cannot be made grounds on application for writ coram nobis.

9. Criminal law ⇐997

In prosecution for murder, where defendant dropped a previous plea of not guilty and entered a plea of guilty, and was imprisoned, and had not appealed from judgment of conviction or made motion for new trial, but 5½ years after conviction sought to vacate judgment on grounds of lack of effective aid of counsel, defendant had not proceeded with due diligence in seeking relief by motion for writ of coram nobis.

10. Criminal law ⇐997

Showing of diligence is essential to granting of relief by way of coram nobis.

11. Criminal law ⇐997

Where defendant seeks to vacate judgment of conviction it is necessary to aver not only probative facts upon which basic claim rests but also time and circumstances under which facts were discovered, in order that court can determine as matter of law whether litigant proceeded with due diligence.

12. Criminal law ⇐997

Where defendant entered a plea of guilty to a charge of murder, and deputy district attorney read a statement of facts concerning crime, and defendant stated that such statement was correct, and court fixed crime as murder in first degree and sentenced defendant, any error in fixing degree under such circumstances was an error of law and could not be reached by proceedings to vacate judgment in the nature of a writ of coram nobis.

13. Criminal law ⇐997

Writ of coram nobis does not lie to correct errors of law and is not intended to authorize any court to review and revise its opinions, nor to redress an irregularity occurring at trial that could be corrected on motion for new trial or by appeal.

14. Habeas corpus ⇐29

An application for a writ of habeas corpus is the proper remedy to attack collaterally a judgment of conviction which has been obtained in violation of fundamental constitutional rights.

15. Criminal law ⇐997

On motion to vacate a judgment of conviction of murder, where defendant contended that he was induced to plead guilty upon promises of a lesser sentence than might otherwise be imposed if he pleaded not guilty, evidence failed to establish that defendant's change of plea from not guilty to guilty was brought about because of inducement by assistant district attorney.

16. Criminal law ⇐997

Whether there was sufficient or probable cause to hold defendant to answer charge of murder was question of law and writ of error coram nobis would not lie to correct such error.

17. Criminal law ⇐997

On motion to vacate the judgment of conviction of murder, defendant was precluded from challenging alleged inadequacy of evidence or irregularities of procedure of preliminary examination by his failure to move to quash the information. Pen. Code, § 995.

18. Criminal law ⇐238

Testimony at preliminary examination established probable cause to hold defendant for trial on charge of murder.

Adams & Reynolds, San Francisco, for appellant.

Fred N. Howser, Attorney General, and Gilbert Harelson, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged with having murdered one Charlie Thomas on December 2, 1944. After preliminary examination and information filed in the superior court, defendant appeared for arraignment and, not being represented by counsel, the court appointed an attorney to represent him for the purpose of the arraignment. Defendant's counsel then waived reading of the information, the defendant was informed of his rights and, upon being asked if he wished to enter a plea at that time, entered a plea of not guilty to the charge. He stated that he had no money to pay for a lawyer and that he wished to have one appointed for him. The court then continued the matter one week for the purpose of setting the case for trial and appointment of an attorney. On December 19th defendant was again brought into court and a statement was made to the court by a deputy district attorney that the defendant desired to withdraw his plea of not guilty and enter a plea of guilty. Defendant was then asked if he wished to withdraw his plea of not guilty theretofore entered, to which he made the following reply: "Yes, sir. I want to plead guilty. I am guilty of it." Permission was granted to withdraw the plea of not guilty and

the court informed the defendant that he was charged with a felony, to wit: murder, in that on or about the 2nd day of December, 1944, he had murdered one Charlie Thomas. Defendant then entered a plea of guilty.

For the purpose of fixing the degree of the crime, a statement was then made by the deputy district attorney as follows: "In brief, the facts are that this defendant and the deceased were playing dice at Giffen Ranch No. 2. Some altercation arose over the fact that the deceased person grabbed the money from the dice game—that money did not belong to this defendant, by the way—this defendant started after him, and the deceased man ran out the side door, followed by the defendant. The defendant stated to me that then and there he dropped his hat and as he reached to get it, the deceased, Charles Thomas, pulled a knife on him; that this defendant took the knife away from him, and thereupon proceeded to stab him, and that stab wound caused the death."

The court asked the defendant if he had any statement to make as to the facts related and he replied that he did not and that the statement was right. The court then fixed the crime as murder in the first degree and on December 22nd, after informing the defendant of the filing of the information, the arraignment, the plea and the fixing of the degree of murder as that of murder in the first degree, asked if there was any legal cause to offer why judgment should not then be pronounced against him. Receiving a negative reply, judgment was pronounced that the defendant be punished by imprisonment in the state prison at San Quentin until legally discharged.

On March 2, 1950, defendant filed a motion in the trial court to vacate the judgment upon the grounds (1) that defendant's constitutional rights were violated and his plea of guilty was vitiated by lack of effective aid of counsel; (2) that defendant was induced to plead guilty upon promises of a lesser sentence than might otherwise be imposed; and (3) that defendant was held for trial without sufficient or probable cause. The motion was heard by the trial court on the affidavit of defendant, the transcript of the preliminary hearing and proceedings had in the trial court and the testimony of the deputy district attorney who was in charge of the case at the time of the preliminary examination, and the subsequent proceedings in the superior court. The motion was denied and defendant appeals from the order denying it. The grounds of appeal are substantially the same as those set forth by the defendant in his motion to vacate the judgment in the trial court.

[1] The motion to vacate the judgment and withdraw the plea of guilty is in the nature of a writ of *coram nobis*. People v. Gilbert, 25 Cal.2d 422, 424, 439, 154 P.2d 657; People v. Adamson, 33 Cal.2d 286–287–288, 201 P.2d 537; People v. Adamson, 34 Cal.2d 320, 210 P.2d 13.

[2–4] Defendant's contention that his constitutional rights have been violated and his plea of guilty vitiated by lack of effective aid of counsel cannot here be determined by the proceedings in the nature of a petition for writ of *coram nobis*.

As was said in People v. Adamson, supra, 34 Cal.2d 320, 210 P.2d 13, 15: "In this state a motion to vacate a judgment in the nature of a petition for *coram nobis* is a remedy of narrow scope. (See People v. Darcy (1947), 79 Cal.App.2d 683, 693, 180 P.2d 752; People v. Martinez (1948), 88 Cal.App.2d 767, 774, 199 P.2d 375.) Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court. (People v. Gilbert (1944), 25 Cal.2d 422, 442, 154 P.2d 657; In re Lindley (1947), 29 Cal.2d 709, 725–726, 177 P.2d 918; People v. Tuthill (1948), 32 Cal.2d 819, 821, 198 P.2d 505.) The applicant for the writ 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier

than the time of his motion for the writ; otherwise he has stated no ground for relief.' (People v. Shorts (1948), 32 Cal.2d 502, 513, 197 P.2d 330, 336.)"

[5] The writ does not lie to correct an error in the judgment of the court nor to contradict or put in issue any fact directly passed upon and affirmed by the judgment itself, and where the remedies of the right to appeal and to make a motion for a new trial are provided for by statute, to that extent an application for a writ of *coram nobis* cannot be entertained. People v. Mooney, 178 Cal. 525, 528, 529, 174 P. 325; People v. Reid, 195 Cal. 249, 257, 232 P. 457, 36 A.L.R. 1435.

[6–8] As was said In re Lindley, 29 Cal.2d 709, 724, 177 P.2d 918, 928: "The grounds upon which a court may issue a writ of error *coram nobis* * * * are more narrowly restricted than those which allow relief by habeas corpus." The court there said, 29 Cal.2d at page 725, 177 P.2d at page 928, quoting from Keane v. State, 164 Md. 685, 166 A. 410, 411, 412, 413: "'In the original as well as in the modern practice [the purpose of these writs] was not to permit a review of the evidence given in connection with the issues actually tried to determine whether witnesses who actually testified before a jury sworn on those issues testified falsely, but to determine whether facts existed which were not known to the court at the trial and not in issue under the pleadings, but which, if known, would have prevented the judgment which actually was entered from being entered.'"

And 29 Cal.2d on page 726, 177 P.2d on page 928, quoting from the Keane case, supra: "'Accordingly it is stated as a general rule that "the writ of error *coram nobis* does not lie to correct an issue of fact which has been adjudicated, even though wrongly determined; nor for alleged false testimony at the trial; nor on the ground that a juror swore falsely as to his qualifications; nor for newly discovered evidence. * * *"'" (Citing cases.)

The court further stated, 29 Cal.2d on page 726, 177 P.2d on page 928: "This restricted scope of the writ of *coram nobis* has been recognized by the California courts. As stated in People v. Reid, 195 Cal. 249, 256, 232 P. 457, 460, 36 A.L.R. 1435, quoting from Sanders v. State, 85 Ind. 318, 44 Am.Rep. 29: 'It is our opinion that the courts have the power to issue writs in the nature of the writ *coram nobis*, but that the writ cannot be so comprehensive as at common law, for remedies are given by our statute which did not exist at common law—the motion for a new trial and the right of appeal—and these very materially abridge the office and functions of the old writ. These afford an accused ample opportunity to present for review questions of fact, arising upon or prior to the trial, as well as questions of law; while at common law the writ of error allowed him to present to the appellate court only questions of law. Under our system all matters of fact reviewable by appeal, or upon motion, must be presented by motion for a new trial, and cannot be made the grounds of an application for the writ *coram nobis*. Within this rule must fall the defense of insanity as well as all other defenses existing at the time of the commission of the crime. Within this rule, too, must fall all cases of accident and surprise, of verdicts against evidence, of newly discovered evidence, and all like matters.' Quoted with approval in People v. Lumbley, 8 Cal.2d 752, 759, 68 P.2d 354; People v. Superior Court, 4 Cal.2d 136, 149, 47 P.2d 724."

[9–11] In the instant case the defendant failed to appeal from the judgment or move for a new trial. These remedies, at least, were available to him and the facts upon which defendant relies to establish his contention that he lacked the effective aid of counsel were known to him and to the trial court throughout all of the proceedings had therein. There was no showing that the facts upon which defendant relies with reference to this contention were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. The defendant well knew that he was entitled to and did

not have an attorney to represent him at the time of the entry of his plea. Five and one-half years elapsed between the time of trial and the time of the filing of the proceedings to vacate the judgment. The record does not set forth a reasonable explanation for the delay. A showing of diligence is prerequisite to the availability of relief by motion for *coram nobis*. People v. Shorts, 32 Cal.2d 502, 512, 197 P.2d 330. As was there said, 32 Cal.2d at page 513, 197 P.2d at page 336: "We are of the view that where a defendant seeks to vacate a solemn judgment of conviction, particularly where such judgment has been affirmed on appeal, the showing of diligence essential to the granting of relief by way of *coram nobis* should be no less than the similar showing required in civil cases where relief is sought against lately discovered fraud. In such cases it is necessary to aver not only the probative facts upon which the basic claim rests, but also the time and circumstances under which the facts were discovered, in order that the court can determine as a matter of law whether the litigant proceeded with due diligence; a mere allegation of the ultimate facts, or of the legal conclusion of diligence, is insufficient." (Citing cases.)

In People v. Coates, 95 Cal.App.2d 78, 212 P.2d 263, it was held that due diligence was not shown where the facts upon which the defendant relied were known to him and his plea of guilty which he sought to set aside was entered more than four years before applying for the writ.

As was said in People v. Martinez, 88 Cal.App.2d 767, 773, 199 P.2d 375, 379: "* * * An application for a writ of error *coram nobis* should be made within a reasonable time. Diligence is required. A convicted person is not permitted to allow years to pass during which witnesses die, disappear or forget, and his own imagination grows and expands. * * *"

In People v. Black, 114 Cal.App. 468, 473, 300 P. 43, it was held that the writ of *coram nobis* should be applied for at or near the time of moving for a new trial and in People v. Vernon, 9 Cal.App.2d 138, 142, 49 P. 2d 326, it was stated that the motion to vacate a judgment must be made within a reasonable time after such judgment has been rendered and in that case the court concluded that a delay of four and one-half years was unreasonable.

[12] The record herein does not set forth any facts not known to the trial court at the time it fixed the degree of the crime. An error in fixing the degree under the circumstances shown is an error of law and cannot be reached by the present proceedings.

[13, 14] As was said in People v. Tuthill, 32 Cal.2d 819, 822, 198 P.2d 505, 506: "The writ does not lie to correct errors of law; it 'is not intended to authorize any court to review and revise its opinions'." (Citing cases.)

And in People v. Martinez, supra, 88 Cal. 2d at page 771, 199 P.2d at page 378, it is said: "The writ of error *coram nobis* never issues to correct an error of law, nor to redress an irregularity occurring at the trial that could be corrected on motion for new trial or by appeal."

In this connection it may be observed that a writ of habeas corpus has been held to be available in situations where defendant was not given the opportunity to have the advice of counsel and did not waive such right. In re Jones, 88 Cal.App.2d 167, 198 P.2d 520. And in People v. Adamson, supra, 34 Cal.2d 320, 210 P.2d 13, cases are cited under the statement of the rule that an application for a writ of habeas corpus has become the proper remedy to attack collaterally a judgment of conviction which has been obtained in violation of fundamental constitutional rights. However, in the case at bar, we are not passing upon the question of the availability of the remedy of a writ of habeas corpus under the circumstances shown by the record before us.

[15] The defendant contends that his plea of guilty should be set aside because the assistant district attorney induced him to plead guilty because of a promise of a lesser sentence than might otherwise be imposed. In his affidavit the defendant stated that the assistant district attorney voluntarily visited him in the Fresno county jail

and told him that unless he changed his plea from not guilty to guilty, he would be found guilty by a jury and executed, but that if he would spare the state the expense of a jury trial, defendant would receive a short sentence in the county jail or on the road camp and that, in fear of his life, he entered into an agreement to and did change his plea from not guilty to guilty. These statements were contradicted by the testimony of the assistant district attorney and his chief. The assistant district attorney denied that he had ever told the defendant he would see to it that all he got was a short jail sentence and further stated that he never promised the defendant anything if he would plead guilty. The affidavit and the foregoing testimony created a conflict in the evidence and the court's implied finding contrary to the contentions made in defendant's affidavit cannot here be disturbed. We cannot say that the evidence established as a matter of law that defendant's change of plea was brought about because of inducement by the assistant district attorney.

In People v. Coates, supra, 95 Cal.App.2d 78, 212 P.2d 263, it was held that even if there was merit in the defendant's claim that his plea was induced by promise of probation (which fact was not alleged) he was not entitled to a reversal of the judgment of conviction in proceedings for a writ of error *coram nobis*.

[16–18] Defendant further contends that the motion to vacate the judgment should be granted because he was held to answer without sufficient or probable cause. Whether there was sufficient or probable cause to hold the defendant to answer was a question of law and not of fact and, as noted, the writ of error *coram nobis* does not lie to correct errors of law. People v. Tuthill, supra. The defendant is precluded from challenging the alleged inadequacy of the evidence or irregularities of procedure of the preliminary examination by his failure to move to quash the information under section 995 of the Penal Code. In re Rogers, 91 Cal.App.2d 394, 400, 205 P.2d 667. From an examination of the testimony taken at the preliminary examination, we conclude that there was probable cause to hold the defendant to answer under the rule stated in People v. McRae, 31 Cal.2d 184, 187, 187 P.2d 741.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



99 Cal.App.2d 404

GERM v. CITY AND COUNTY OF SAN FRANCISCO et al.

No. 14285.

District Court of Appeal, First District, Division 1, California.

Sept. 15, 1950.

Rehearing Denied Sept. 14, 1950.

Hearing Denied Nov. 13, 1950.

Joseph Germ sued the City and County of San Francisco, a municipal corporation, Yellow Cab Company of San Francisco, a corporation, and Albert A. Brodose and others, for injuries resulting when plaintiff was struck by a taxicab. The Superior Court of the State of California, in and for the City and County of San Francisco, George W. Schonfeld, J., rendered a judgment against plaintiff in favor of defendant Yellow Cab Company and its driver, Albert A. Brodose, and in favor of plaintiff against the City and County of San Francisco, and the City and County of San Francisco appealed. The District Court of Appeal, Bray, J., held that evidence sustained judgment for plaintiff against the City and County on ground that while plaintiff pedestrian was standing near intersection in safety zone for streetcar, a streetcar struck a taxicab which was stopped near streetcar tracks and knocked the taxicab into plaintiff, and that taxicab had not already struck plaintiff before streetcar arrived at safety zone.

Judgment affirmed.

1. Appeal and error ⇐930(1)

On appeal from judgment for plaintiff in personal injury action, evidence and inferences reasonably deducible therefrom was required to be taken most strongly in favor of plaintiff.

2. Street railroads ⇐114(2)

In action for injuries, evidence sustained judgment for plaintiff against city on ground that while plaintiff was standing near intersection in safety zone for streetcar, a streetcar struck a taxicab which was stopped near streetcar tracks and knocked taxicab into plaintiff, and that taxicab had not already struck plaintiff before streetcar arrived at safety zone.

3. Street railroads ⇐118(4)

In personal injury action involving a streetcar accident, an instruction that streetcar operator has duty to anticipate that he might have obstructions in his path, such as a stopped motor vehicle, and must keep proper lookout and keep streetcar under such control as will enable him to avoid collision with stopped motor vehicle, and must slow up and stop if situation requires it, and that a failure on part of operator to use such care to avoid such collision is negligence, should not have been given without modification.

4. Street railroads ⇐118(4)

In personal injury action involving a streetcar accident, instruction that streetcar operator should not assume that street is or will remain clear, and must anticipate and expect presence of others, including motor vehicles and pedestrians lawfully using street, and that fact that operator did not know a pedestrian was on street, does not excuse conduct which would have amounted to recklessness if operator had known a pedestrian was on street, should not be given since standing alone instruction implies that operator, regardless of whether he sees a pedestrian on street, is reckless if he fails to anticipate that pedestrian might step onto streetcar tracks.

5. Trial ⇐295(1)

In reviewing instructions all instructions must be considered together and no one or two considered as an isolated whole.

6. Street railroads ⇐118(4)

In action for injuries allegedly resulting when streetcar knocked taxicab into pedestrian standing in streetcar safety zone, giving of instruction that streetcar operator must anticipate obstructions in path, and must keep proper lookout and keep streetcar under such control as would enable him to avoid collision with stopped motor vehicle, and must slow up and stop if situation requires it, and of instruction implying that streetcar operator, regardless of whether he sees pedestrian on street, is reckless if he fails to anticipate that pedestrian might step onto streetcar tracks, was not error prejudicial to defendant city under the circumstances and in view of other instructions. Const. art. 6, § 4½.

7. Trial ⇐203(1)

In personal injury action involving a streetcar, plaintiff was entitled to have instructions given on plaintiff's theory of case.

8. Intoxicating liquors ⇐131
Negligence ⇐4

The taking of drinks of alcoholic nature is not illegal and does not constitute negligence per se.

9. Automobiles ⇐220(4)
Street railroads ⇐98(1)

If a pedestrian is standing in streetcar safety zone when struck by taxicab, and if taxicab driver or owner of taxicab, or streetcar operator, are guilty of negligence which proximately caused injuries, and if pedestrian was free from contributory negligence, whether pedestrian had been drinking alcoholic beverages is immaterial.

10. Municipal corporations ⇐741(1)

The chief purpose of requirement of provision of San Francisco Charter that a verified claim be presented as foundation for personal injury action against city, is to enable city to investigate claim and to settle without litigation. St.1935, p. 2421, § 87.

11. Municipal corporations ⇐741(2)

The purpose of requirement of verification imposed by San Francisco Charter requirement that a verified claim be presented as foundation for personal injury action against city, is to hold claimant responsible for false statements made in claim. St.1935, p. 2421, § 87.

12. Municipal corporations ⇐741(2)

Where plaintiff at no time appeared before notary to verify claim against defendant city, but plaintiff signed claim and notary verified claim on assurance of plaintiff's attorney that signature was that of plaintiff, requirement of city charter that a verified claim be presented as foundation for personal injury action against city was substantially complied with. St. 1935, p. 2421, § 87.

13. Appeal and error ⇐1046(5)

Comment of trial judge in personal injury action against city, intimating that testimony of a witness was not impeached by his deposition, was cured by repeated statements of trial judge that jury was sole judge of evidence and credibility of witnesses.

14. Appeal and error ⇐1046(5)

Erroneous statement of trial judge in personal injury action against city that a witness could not be cross examined from his unsigned deposition was cured where trial judge after making such statement permitted such cross examination.

15. Trial ⇐29(4)

A judge should be temporate and courteous and his attitude should not reflect undue impatience or severity toward either counsel.

16. Appeal and error ⇐1046(5)

Heated, discourteous, and intemperate statements made by trial judge during trial of personal injury action against city, were not prejudicial to city where such statements were somewhat impartially distributed between counsel and trial judge frequently admonished jury to disregard such statements and told jury that jury was sole judge of facts and veracity of witnesses. Const. art. 6, § 4½.

17. Appeal and error ⇐1046(5), 1048(1)

In personal injury action against city, alleged error of trial judge in sustaining an objection to question asked police officer by counsel for city on direct examination relative to conversation between officer and driver of taxicab involved in accident, and error in improper remark of trial judge that city police did not need assistance by leading questions, was cured where counsel was permitted thereafter to go thoroughly into the conversation and to use leading questions.

18. Appeal and error ⇐1048(1)

In personal injury action against city, error of trial judge in sustaining objections to questions asked police officer by counsel for city on ground that questions were leading was not prejudicial to city where subject involved was completely covered in subsequent questions.

19. Witnesses ⇐240(4), 242

A question asked witness in personal injury action against city, as to whether plaintiff had told witness that plaintiff was standing in streetcar safety zone, and a taxicab which allegedly struck plaintiff after taxicab was struck by streetcar came up to within 5 feet of plaintiff and that plaintiff stood there 15 or 20 seconds, was leading and suggestive.

20. Trial ⇐41(4)

Fact that person called as witness in personal injury action against city was in court during trial before he was called as a witness, despite order excluding all witnesses which was made at beginning of trial, did not render such witness incompetent to testify.

21. Trial ⇐41(4)

Improper refusal of trial judge in personal injury action against city to permit a witness for city to testify because witness had disobeyed order excluding all witnesses from courtroom during trial, was not prejudicial to city where city did not show damage, or that testimony city desired to obtain from such witness was vital.

22. Evidence ⇐471(19)

Question asked driver of taxicab which allegedly while stopped was struck by streetcar and knocked into pedestrian standing in front of taxicab in streetcar safety zone, as to whether driver after accident looked to see if there were any marks made on street by taxicab while taxicab was being pushed by streetcar and while driver was holding taxicab brakes,

was objectionable as calling for an opinion as to when skid marks were made.

23. Evidence ⇐471(19)

Question asked driver of taxicab which allegedly while stopped was struck by streetcar and knocked into pedestrian standing in front of taxicab in streetcar safety zone, as to whether driver could identify on a photograph in evidence the marks driver saw on street and made by taxicab after taxicab was struck by streetcar, was objectionable as calling for an opinion as to when skid marks were made.

24. Appeal and error ⇐1170(7)

In personal injury action against city, improperly permitting an answer to question as to whether driver after accident looked to see if there were any marks made on street by taxicab while taxicab was being knocked by streetcar into plaintiff pedestrian who was standing in streetcar safety zone, and to question as to whether taxicab driver could identify on a photograph in evidence the marks driver saw on street and made by taxicab after taxicab was struck by streetcar, which questions were objectionable as calling for conclusion as to when skid marks were made, was not prejudicial to city. Const. art. 6, § 4½.

25. Appeal and error ⇐1170(7)
Evidence ⇐471(19)

Testimony of taxicab driver whose stopped taxicab was allegedly struck by streetcar and knocked into plaintiff pedestrian who was standing in streetcar safety zone, that driver knew skid marks were made in street after taxicab was struck by streetcar, which testimony was based upon driving experience of driver that his tires would not skid at speed he was going when he slowed down because plaintiff was in front of him, was objectionable as being opinion of taxicab driver, but its admission in evidence in personal injury action against city which claimed streetcar struck taxicab after taxicab had struck plaintiff was not prejudicial to city. Const. art. 6, § 4½.

26. Appeal and error ⇐1170(7)

Fact that a juror during trial of personal injury action against city spoke to a taxicab driver who was a defendant in case and whose taxicab allegedly was knocked by streetcar into pedestrian standing in streetcar safety zone, was not prejudicial to defendant city where conversation related only to whether juror and driver had known each other previously and the case was not mentioned. Const. art. 6, § 4½.

27. Appeal and error ⇐1060(1)

In action against city and driver and owner of taxicab for injuries allegedly resulting when streetcar struck taxicab which had stopped about a foot from streetcar track, and in front of plaintiff who was standing in streetcar safety zone, and taxicab then struck plaintiff, remark of counsel for defendant taxicab driver and owner, made despite fact that there was no evidence as to condition of street, tracks or streetcar, that when city took over streetcar company the equipment was not in best condition and tracks were in deplorable condition, was not prejudicial to city where there was a photograph of the track in evidence.

28. Appeal and error ⇐1004(1)

Award of damages for injuries will not be upset on appeal unless the award appears to be so excessive as to indicate that jury was motivated by prejudice or passion, particularly where trial judge on motion for new trial has passed upon award.

29. Damages ⇐173(1)

In personal injury action, earnings of plaintiff for eight years preceding injury were admissible as evidence of extent to which earning capacity of plaintiff was impaired by injuries.

30. Damages ⇐38

Fact that injured person was not employed at time of accident does not necessarily deprive him of right to compensation for loss of earning capacity.

31. Damages ⇐134(3)

$63,044.20 award for injuries suffered by 56 year old plaintiff with life expectancy of 23.24 years, which included a dislocation of right hip joint, and compound, comminuted fracture of both bones

in left leg, and which would require future employment of plaintiff to be sedentary in nature, was not excessive.

32. Witnesses ⇐226

Whether during cross examination a party will be permitted to make the witness his own is discretionary with trial judge.

33. Witnesses ⇐226

In action against city and driver and owner of taxicab, for injuries allegedly resulting when streetcar struck taxicab which had stopped about a foot from streetcar track, and in front of plaintiff who was standing in streetcar safety zone, and taxicab then struck plaintiff, trial judge did not abuse discretion in refusing to allow city to call a witness as witness for city when on cross examination trial judge sustained objection to question put to witness as not being proper cross examination.

34. Witnesses ⇐290

Where trial of personal injury action against city dragged almost interminably because of delaying tactics engaged in by city, trial judge could try to speed up trial by limiting cross examination of witnesses by city as to matters which had been previously covered.

35. Trial ⇐133(6)

Accusation by counsel that counsel for another party was trying to keep truth out of case in personal injury action did not justify reversal of judgment where trial judge promptly and at much length admonished jury to disregard remark.

Dion R. Holm, City Attorney, George E. Baglin, Deputy City Attorney, San Francisco, for appellant.

John Wynne Herron, San Francisco, for respondent.

BRAY, Justice.

In an action for personal injuries, a jury verdict was rendered against plaintiff in favor of defendant Yellow Cab Company and its driver, Albert A. Brodose, and in favor of plaintiff against the City and County of San Francisco[1] in the sum of $63,044.20. From the judgment thereon the city appealed.

Questions Presented.

1. Alleged insufficiency of the evidence. 2. Alleged error in instructions. 3. Was the claim presented by plaintiff to the city a verified one? Alleged error in exclusion of testimony concerning it. 4. Alleged misconduct of the trial judge. 5. Alleged error in exclusion and admission of testimony. 6. Alleged error in misconduct of a juror. 7. Alleged misconduct of counsel for Yellow Cab Company. 8. Alleged excessive damages.

Facts.

[1, 2] On a dark Sunday evening about 9:30, at a point on Mission Street in San Francisco south of 15th Street, plaintiff was struck by a cab of defendant Yellow Cab Company, driven by defendant Brodose. Plaintiff and defendants Yellow Cab Company and Brodose claimed that the cab had stopped near plaintiff and that the city's streetcar negligently struck the cab, pushing it into plaintiff. The city's theory was that the streetcar mildly bumped into the taxi after it had already run into plaintiff and inflicted his injuries. The accident happened in 1945. The trial was not had until four years afterward. The evidence was highly conflicting. While the city has meticulously combed the evidence and pointed out many facts supporting its theory, including contradictory statements by some of plaintiff's witnesses, still, taking the evidence and the inferences reasonably deducible therefrom most strongly in favor of plaintiff, as we are required to do, the evidence is sufficient to support the verdict. This evidence follows:

Plaintiff, an unemployed laborer 50 years old, walked from the east side of Mission Street out to the safety zone for streetcar passengers boarding northbound cars at 15th Street. He saw a streetcar coming from the south, from 16th Street, and a

1. Hereinafter referred to as "the city."

Yellow Cab which was about 80 feet away when he left the curb. The cab swerved to a stop facing plaintiff where he was standing at the end (south) of the zone between two of the three raised markers; the front of the cab was at a "V" painted on the street preceding the zone. The cab was at a slight angle to the southbound tracks, with its left rear fender about a foot from the nearest rail. Plaintiff and the cab remained stopped for from 15 to 20 seconds, when the streetcar came on down the block and struck the cab with great force, pushing it into plaintiff, who was thrown five feet into the air, landed on the hood of the cab, and then rolled off under the cab. The cab driver held his brakes and was pushed along for several feet, and then his foot was knocked off the brake. The streetcar pushed the cab to within 15 feet of the south crosswalk of 15th Street. Skid marks were left on the pavement where the cab had been pushed, that of the left rear tire being about 40 feet long, and parallel to the tracks for a little distance, then swerved over the tracks, and that of the right wheel being about 15 feet long and turning toward the rails and passing over two of the raised safety zone markers.

1. Sufficiency of Evidence.

It is not necessary to detail the evidence given by the various witnesses. While there is strong evidence to support the city's contentions, the testimony of plaintiff, Brodose, Serenia Murphy, Cecil B. Murphy, and Ross Williams, if believed (and it evidently was), was sufficient to support the verdict.

The city contends that certain physical facts conclusively support its contention that the cab had already hit plaintiff before the car arrived. This contention is based upon the assumption that its interpretation of these facts is the only possible one, and upon the conclusion that the jury must necessarily believe its witnesses. For example, its interpretation placed upon the location of the skid marks is not the only reasonable one deducible therefrom; also, it was for the jury to determine the credibility of the city's employees who testified that the damage to the streetcar was extremely slight. In this latter behalf it is significant that while the city produced photographs of the damaged cab it did not produce any of the condition of the streetcar. The city characterizes the injury to the rear of the cab as slight. However, from an examination of the photographs the jury could very well find that the damage was considerable and must have been caused by more than slight force. After an examination of all the evidence, we cannot say that there is any undisputed physical fact which refutes the positive testimony of plaintiff's eye-witnesses to the accident.

2. Instructions.

Among the instructions given were two which for convenience we have lettered (a) and (b).

(a) "You are hereby instructed that it is the duty of the streetcar operator to anticipate that he might have obstructions, such as a stopped motor vehicle, in his path, and he must keep a proper lookout and keep his streetcar under such control as will enable him to avoid a collision with such stopped motor vehicle, and if the situation requires it, he must slow up and stop. A failure if any, on his part, to use this car[e] to avoid such a collision, is negligence."

(b) "You are instructed that the operator of a streetcar has no right to assume that a street is clear or will remain clear, but he must anticipate and expect the presence of others, including motor vehicles and pedestrians, lawfully using such street. Accordingly, the fact, if it be a fact, that the operator of a streetcar did not know that a pedestrian was on the street, is no excuse for conduct which would have amounted to recklessness if he had known that a pedestrian was on such street."

These instructions are patterned after instructions approved in Meyers v. Bradford, 54 Cal.App. 157, 201 P. 471, which was an action involving a collision between two automobiles. The instructions in the Meyers case have been variously criticized and explained. For example, in

Anderson v. Freis, 61 Cal.App.2d 159, 142 P.2d 330, the court considered a similar instruction and found it ambiguous, but as was done in other cases, held that there was no prejudice in giving it as the subject of negligence was fully covered in the other instructions. As to instruction (a), a similar instruction was refused in Blythe v. City & County of San Francisco, 83 Cal.App.2d 125, 188 P.2d 40, 46, which was a case involving a collision between a streetcar and an auto stalled on the tracks. The instruction there read: "You are instructed that it was the duty of the motorman in operating the streetcar down the hill toward the corner where this accident occurred, to keep his streetcar in such control as would enable him to stop at any time to avoid injury to persons or property lawfully upon the highway, and if the motorman failed in this duty then the defendant, City and County of San Francisco, was guilty of negligence." This court said: "The proferred instruction was properly refused because it does not correctly state the law. It was not the legal duty of the motorman to operate and control his streetcar so as to 'enable him to stop at any time to avoid injury to persons or property lawfully upon the highway.' If such were the law it would be the duty of a motorman, proceeding carefully, to stop regardless of the time at which the person or property came upon the tracks. Negligence cannot be based upon such an exacting formula completely divorced from the variables of time, place and surrounding circumstances." 83 Cal.App.2d at page 135, 188 P.2d at page 46.

[3, 4] Instruction (a) should not be given without modification in an action involving a streetcar accident. Instruction (b), likewise, should not be given in this type of action, as, standing alone, it implies that a motorman, whether he sees a pedestrian on the street, or whether he does not see him, is reckless if he fails to anticipate that the pedestrian might step on to the car tracks. The giving of these instructions was erroneous.

[5, 6] But, under the circumstances of this case, and in view of the provisions of section 4½ of Article VI of the Constitution, we cannot say that it was prejudicial. All of the instructions must be considered together and no one or two considered as an isolated whole. Blackmore v. Brennan, 43 Cal.App.2d 280, 287, 110 P.2d 723. The court further instructed: "In the absence of knowledge or reason to know to the contrary, the motorman of a streetcar, so long as he is exercising ordinary care, may operate his streetcar forward on the assumption that the driver of an automobile which is traveling in front of the streetcar and in the same direction, will not suddenly stop his automobile on the streetcar track so close to the oncoming streetcar as not to afford the motorman a reasonable opportunity to stop." "If you find that the plaintiff in this action, by a failure to exercise reasonable care, caused the taxicab suddenly to stop near the streetcar tracks, and thereafter negligently blocked the passage of the taxicab and the streetcar, and as a proximate result of such conduct on his part the accident occurred, the plaintiff cannot recover in this action." "The operator of a streetcar is only obliged to exercise ordinary care and caution in the operation of the car to avoid inflicting injury upon persons on the street." Under the evidence, the jury had to decide which of the witnesses it was going to believe: those who testified in support of plaintiff's contention that the cab stopped to permit him to cross to the safety zone and that such a time elapsed between the stopping of the cab that the motorman saw or should have seen it in time to avoid striking it, and yet the car struck the cab knocking it into plaintiff; or those who testified that the cab hit the plaintiff before the car struck the cab. In view of the instructions as a whole and these issues raised by the evidence, it is difficult to see how the jury could have been misled by instructions (a) and (b). The jury was positively instructed that the motorman was obliged to use only ordinary care. If it believed the city's witnesses, he had done so; if it believed plaintiff's and the cab company's witnesses, he had not done so.

Many of the city's objections to these instructions are based upon the claim that

they ignore or do not incorporate the city's version of the facts. Thus, the city contends that the instructions assume that the streetcar struck the cab before the latter hit plaintiff. Of course, the court is required to instruct on the theories of both parties rather than on that of one party alone. It is true that the motorman testified that he saw plaintiff on the street. However, the jury did not necessarily have to believe him; hence the city's contention that an instruction on the motorman's failure to see plaintiff should not have been given, is not well founded.

[7-9] The city contends that two of the instructions on intoxication were erroneous. It was the city's theory that plaintiff was intoxicated and by reason of that fact walked into the path of the oncoming cab, causing it to get into the path of the oncoming car. The theory of plaintiff and defendants Yellow Cab Company and Brodose was that plaintiff was standing in the safety zone, and hence, although they claim plaintiff was sober, it was immaterial whether he was intoxicated. The first instruction was to the effect that it is not illegal and does not constitute negligence per se for a person to take drinks of an alcoholic nature. The second instruction was to the effect that if plaintiff was standing within the safety zone when struck, and if plaintiff was free from contributory negligence, and if the defendants or any of them were guilty of negligence which proximately caused plaintiff's injuries, then the question of whether or not plaintiff had been drinking was immaterial. Plaintiff was entitled to have instructions given on his theory of the case. These two instruction were only a part of the instructions given on intoxication. Among these were instructions to the effect that the jury might consider intoxication of plaintiff, if proved; that intoxication is no excuse for failure to act as a reasonably prudent person would; that an intoxicated person is held to the same standard of care for his own safety as a sober person; and that if intoxication prevented plaintiff from acting as a reasonably prudent person would and as a proximate result thereof he was injured, he could not recover. These instructions properly stated the law and were not erroneous.

3. Plaintiff's Claim.

The San Francisco Charter requires, as the foundation for an action of this kind against the city, that a claim be presented and that such claim be verified. Stats.1935, p. 2421, § 87. Plaintiff alleged in his complaint that he had filed such a claim. This allegation was denied by the city. At the trial, the original claim presented to the city was offered in evidence by plaintiff and admitted without objection by the city. On its face it appeared to be signed by plaintiff and verified by his oath before Notary Public Marie H. Stanley. The city called Mrs. Stanley as a witness. She testified, in effect, that she had no recollection of going to the San Francisco Hospital where admittedly plaintiff was confined on the day the claim was verified, but that either she did go there, or that plaintiff's then attorney brought the claim to her already signed and informed her that the signature was plaintiff's; that she frequently verified documents presented to her by attorneys under similar circumstances. Before Mrs. Stanley testified, the city attempted to show through plaintiff that he had not signed the claim in the presence of the notary. After some questions of plaintiff, the court refused to permit the city to examine him any further on the subject. Thereupon the city made an offer to prove through plaintiff that the claim was brought to plaintiff at the hospital by his then attorney, signed by plaintiff, and that plaintiff at no time appeared before the notary to verify it. The court refused to permit the city to make such proof. Thereafter the court refused to give the jury an instruction offered by the city to the effect that if plaintiff did not appear before the notary and personally verify the claim, it would not be a verified claim as required by the charter, and its verdict must be in favor of the city.

[10-12] Was the claim a verified one? For the purposes of this discussion we will assume, as contended by the city, that plaintiff did not personally verify it, but that he signed it, and the notary verified it on the

assurance of plaintiff's attorney that the signature was that of plaintiff. We will also disregard the fact that the city made no objection to its introduction in evidence. "The chief purpose of the claim requirement is to enable the city to make an investigation of the claim and give it an opportunity to settle without litigation." Holm v. City of San Diego, 35 Cal.2d 399, 400, 217 P.2d 972, 973. Undoubtedly the requirement that the claim be verified is to hold the claimant responsible for false statements made in the claim. Section 121 of the Penal Code provides: "It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner, or that the person accused of perjury did not go before, or was not in the presence of, the officer purporting to administer the oath, if such accused caused or procured such officer to certify that the oath had been taken or administered." See People v. Darcy, 59 Cal.App.2d 342, 139 P.2d 118. "In determining whether or not there has been substantial compliance the purpose of the claim statute is important." Knight v. City of Los Angeles, 26 Cal.2d 764, 767, 160 P.2d 779, 780. The claim here satisfied both purposes of the claim statute, namely, the city was enabled to make a full investigation of the claim and had an opportunity to settle had it been so advised, and secondly, the verification was sufficient to support a perjury charge were any false matters stated therein. While it is true, as stated in 1 California Jurisprudence, p. 667, and in In re Johnston, D.C., 220 F. 218 (cited by the city), that the notary's jurat is not conclusive, nevertheless the use by the subscriber of the document as a verified one constitutes a substantial compliance with the requirement that the document be verified. In Le Mesnager v. Hamilton, 101 Cal. 532, 35 P. 1054, 40 Am.St.Rep. 81, it was held that a married woman could not be bound by an acknowledgment of a mortgage when she never in fact appeared before the notary making the acknowledgment, and that it was error to refuse evidence to prove the true facts. However, at that time there was a specific requirement that a married woman must appear personally before the notary, so that there could be no question that she was acting voluntarily. Moreover, at that time the courts were extremely technical in all matters respecting conveyances of property. In Fairbanks, Morse & Co. v. Getchell, 13 Cal.App. 458, 110 P. 331, it was held that an oath given over the telephone to a notary was invalid, but mainly on the ground that the person at the other end of the telephone was in a county other than that of the notary, and hence was out of the notary's jurisdiction. The courts in late years have liberalized their attitude towards claims required to be filed with municipalities. Thus, in Kelso v. Board of Education, 42 Cal.App.2d 415, 109 P.2d 29, the court held that a claim for injury to the son substantially complied with the statute although verified by the father. In Holm v. City of San Diego, supra, 35 Cal.2d 400, 217 P.2d 972, it was held that a claim which did not state the address of the claimant, a factor previously considered essential, Holm v. City of San Diego, Cal.App., 208 P.2d 777, substantially complied with the statute.

While there are circumstances under which, to constitute a verification to an instrument, the subscriber must personally appear before the notary, it would be the height of technicality, serving no good purpose, to hold that the claim here did not constitute a substantial compliance with the requirement that it be verified. Therefore there was no error in the court's refusing to permit the city to produce evidence on the subject.

4. Alleged Misconduct of Judge.

[13-16] The city has made nine assignments of alleged misconduct by the trial judge. We have examined all of these incidents. Some of them were comments on the evidence by the court; others were in connection with rulings on the admission or exclusion of evidence. We do not deem it necessary to detail the incidents here. As to the comments on the evidence, they were either legitimate comments by the court, or, where erroneous, such as the intimation that a certain witness' testimony was not impeached by his deposition, were fully cured by the court's repeated statements that the jury was the sole judge of the evidence

and the credibility of the witnesses. In some of these instances the judge made erroneous statements of the law, but in every instance the error was cured by permitting the city to proceed as the judge had previously stated it could not proceed. For example, the judge stated that a certain witness could not be cross-examined from his unsigned deposition, and then permitted the city to so examine him. In some of the instances the judge spoke heatedly, was discourteous, intemperate, and failed to exhibit that judicial demeanor expected of judges. As said in the Canons of Judicial Ethics of the Conference of California Judges, "A judge should be temperate * * * courteous * * * a judge's attitude should not reflect undue impatience or severity toward either counsel * * *" (Canons 5, 6 and 13.)

Taking these actions of the judge as a whole, it must be said that he should have displayed a more judicial temperament, but we cannot say that his outbursts prejudicially affected the case, particularly as the judge was somewhat impartial in the distribution between counsel of like, testy remarks. On occasions he was equally harsh and intemperate with the other counsel in the case, in one instance, resulting in an assignment by the cab company's counsel of misconduct by the judge. It must be pointed out that in no instance did the city's counsel make an assignment of misconduct at the trial. It frequently has been held that this failure prevents consideration of the matter on appeal. Jones v. Bridges, 38 Cal.App.2d 341, 101 P.2d 91; Jones v. Bayley, 49 Cal.App.2d 647, 122 P.2d 293; People v. MacDonald, 167 Cal. 545, 140 P. 256. It is the city's contention that the conduct of the judge as a whole and in part bring the case within the rule that where the misconduct is such that admonitions by the judge to the jury to disregard it could not repair the damage, no such assignment need be made. People v. Walker, 93 Cal. App.2d 818, 209 P.2d 834. For that reason we have examined the incidents in detail. In number, the city's counsel bore the brunt of this petulance more often than other counsel. However, counsel's conduct in extending the trial by unduly lengthy and repetitious cross-examination of the witnesses contributed somewhat to the situation. The city's tendency to emphasize quantity rather than quality has extended itself even to its briefs on this appeal. They total 385 pages in length. Its reply brief of 127 pages is primarily a repetition of the matters set out extensively in its opening brief. The statement in People v. Murphy, 53 Cal.App. 474, 487, 200 P. 484, 490, is appropriate here: "Much of the trouble during the trial between the court and counsel for the defendant was occasioned by the manifest desire of the court on the one hand to expedite the trial of the defendant as much as possible, and by counsel on the other hand to gain delay". We are not condoning the petulance and actions of the judge, but an examination of the entire record convinces us that it did not deprive the city of a fair trial, particularly in view of the fact that lightning did not strike the city alone, and that time after time the court admonished the jury that regardless of what it said the jury should disregard its statements and was the sole judge of the facts and the veracity of the witnesses.

5. Exclusion and Admission of Testimony.

[17] Counsel for the city was examining police officer Peyre on direct examination concerning a conversation at the scene of the accident with defendant Brodose. "Q. And did Mr. Brodose tell you where the plaintiff was with respect to his taxicab when he, Brodose, first saw him?" The court sustained an objection to this question as leading and suggestive, and in doing so remarked that a member of the police department of San Francisco is presumed to have passed a civil service examination that required some intelligence and therefore he did not need assistance by leading questions. Any error in the ruling and in the court's improper statement was cured by the fact that counsel was thereafter permitted to go thoroughly into the conversation and to use the same form of question.

[18] Later, on direct examination, counsel for the city asked Peyre this question: "Did this man [a witness to the accident]

tell you that he saw the injured man standing there and the cab was standing there, then the streetcar hit the cab and pushed it into the man?" An objection that the question was leading and suggestive was sustained, as was an objection to the following question, on the same ground: "Did he tell you the accident happened in this fashion: That the man, the injured man that was standing there and the cab was standing there, and then the streetcar came up ten seconds later and pushed the cab—yes, pushed the cab into the man?" Both questions were based almost verbatim on what Williams, the witness, had testified he told the police officer. While these were proper questions, no harm was caused by the ruling, for the subject was completely covered in subsequent questions.

[19] The city called Nils Wiseth in rebuttal to testify what plaintiff told him about the accident. After asking the witness what was said in the conversation referred to, and receiving an answer, counsel asked if plaintiff told the witness he was standing in a safety zone and the taxi came up to within five feet of him and he stood there 15 or 20 seconds. The court sustained an objection to this as leading and suggestive, which it unquestionably was. The witness was the city's witness on direct examination. Moreover, at the end of the discussion between court and counsel for plaintiff and counsel for the city, the latter withdrew the question.

Refusal to permit Kennedy to testify.

[20] Kennedy, the investigator for the cab company, arrived at the scene of the accident shortly after it occurred. Brodose testified he told Kennedy what had happened. Kennedy shortly after the accident interviewed Mrs. Murphy, taking a statement from her, which she signed. She testified that Kennedy suggested to her the number of feet that the car stopped south of 15th Street, as she was not a good judge of distance. Kennedy was in court during the trial. The usual order excluding all witnesses was made at the beginning of the trial at the request of the city. A little more than half way in the trial of the case, the city called Kennedy to the stand. Thereupon counsel for the cab company objected to his being sworn as a witness on the ground that he had sat in court during the trial up to that point, to the city counsel's knowledge, and that his presence in court in violation of the rule of exclusion made him incompetent as a witness. The court sustained the objection and refused to allow Kennedy to be sworn, solely on that ground. This undoubtedly was error. People v. Russell, 34 Cal.App.2d 665, 94 P.2d 400; People v. Talkington, 8 Cal.App.2d 75, 47 P.2d 368; People v. Mack, 115 Cal.App. 588, 2 P.2d 209; People v. Boscovitch, 20 Cal. 436; Mintzer v. Wilson, 21 Cal.App.2d 85, 68 P.2d 370. But was it prejudicial under the circumstances of this case? The city made no offer of proof, but "Where the trial court erroneously refuses to permit a witness to take the stand or be sworn to testify under any circumstances or upon any subject without regard to the question of the admissibility or relevancy of the evidence the witness might give, basing its refusal on the ground that the witness is wholly incompetent to testify, *and it can be ascertained from the record that the witnesses' testimony would be vital,* no offer of proof is necessary to establish that such error was prejudicial." People v. Duane, 21 Cal.2d 71, 81–82, 130 P.2d 123, 129; emphasis added. Thus, to be prejudicial, it must appear to this court that the testimony which the witness would have given was vital. Obviously, if it was not or would not have been admissible, then the city has not been damaged by its exclusion.

[21] The city at no place in its briefs, in spite of their great length, has set forth what it expected to *prove* by Kennedy. It does set forth what it would have *examined* him about, but in no wise intimates what it expected he would testify. It seems to assume that because Kennedy might have been an unfriendly witness, it could have cross-examined him as if he were one of the persons mentioned in section 2055 of the Code of Civil Procedure. In fact, it attempted to call him as such. The court properly sustained the objection that he was not one of those covered by the section. The city states that it "did not know exactly what it could prove by the witness" and

then refers to Lawless v. Calaway, 24 Cal. 2d 81, 147 P.2d 604, which holds that no offer of proof is required where the witness can be examined under section 2055 as such an examination "is often exploratory." 24 Cal.2d at page 91, 147 P.2d at page 609. But, as pointed out above, Kennedy could not have been examined under section 2055, and if called as a witness by the city, it would have been bound by his testimony. That the proposed examination of Kennedy was merely exploratory is shown by the city's statement of not what it expected him to testify, but what it wanted to examine him about. It is obvious from the statements in the brief that most of what the city intended to ask Kennedy was inadmissible; for example, Mrs. Murphy testified that Kennedy had suggested the 90 feet in her statement. The city says it wanted to ask him what his reasons for doing that were. His reasons would be immaterial. None of the matters proposed to be asked Kennedy would have been contradictory to the evidence adverse to the city nor in support of the city's contentions. Boiled down, the city's complaint is that it was not permitted to go on a fishing expedition with Kennedy. It has failed to show in any way that it was damaged by the court's refusal to let Kennedy testify, nor that his testimony would be vital.

Admission of testimony.

[22-24] Brodose was asked by his own counsel on direct examination if after the accident he looked to see if there were any marks made on the street by his cab while it was being pushed by the car and while he was holding on to the brakes. The city's objection that this called for the witness' opinion and conclusion was overruled. Again, he was asked if he could identify on a photograph in evidence, the marks he saw on the street made by his cab after it was hit by the car. A similar objection was overruled. While the objections were good and should have been sustained, no prejudice resulted from their being overruled. A reading of the transcript shows that it must have been clear to the jury that the witness was giving merely his opinion and that it was for the jury to determine when the skid marks were made.

[25] Counsel for the city cross-examined Brodose at great length concerning how he knew that the marks were made after his cab was struck. He stated that from his experience driving cars for quite a few years he knew that going at the speed he was going when he slowed down because plaintiff was in front of him, his tires would not skid. The city's counsel then moved to strike out the witness' testimony as to when the skid marks were made, on the ground that it was based merely on his opinion and conclusion. While the motion should have been granted, no prejudice resulted. His explanation of how he knew the origin of the marks was such that if the jury did not believe his testimony as to how fast he was going (and there was evidence by the city's witnesses to refute it) his whole conclusion would fall. His statement that the marks were made after his cab was struck was based upon and was no stronger than his testimony as to his actions after he saw plaintiff.

6. Alleged Misconduct of Juror.

[26] This complaint is not serious, although it did involve a comedy of errors in that the wrong juror got accused. During the trial of the case juror Brix was seen conversing with Brodose outside the courtroom. The city, in chambers, called the court's attention to this fact, and moved for a mistrial. Brodose was examined by the court in the absence of the jury. He stated that the juror said "Hello" to him and stated that his face seemed familiar. Brodose said he thought he recognized him too. The juror then asked if Brodose ever worked at Hunters Point, to which Brodose replied that when he was going to sea he did. Brodose testified that no mention of the case was made. Subsequently juror Bront was brought into the judge's chambers. Before any questions were asked of him, other than was he Mr. Brix, counsel called the court's attention to the fact that he was the wrong juror and he was excused. Later Brix was examined. The court asked him if he had spoken to Brodose. He admitted he had, but stated that the case was not

mentioned by either; that he was satisfied he had never seen Brodose before the case started; that he asked Brodose if he knew that Brix worked at Hunters Point and Brodose had replied that he used to be there too, during the war. During the interview counsel for the cab company asked the city's counsel, "Are you satisfied now * * * ?" The court denied the mistrial motion. The city contends that the incident was irregular and prejudicial. It undoubtedly was irregular, but there is no showing that it was prejudicial.

7. Alleged Misconduct of Counsel.

[27] In his argument to the jury, counsel for defendants Brodose and the cab company said: "Number one, there is the question of the swaying of the streetcar. Now, we all know it is a matter of common knowledge, his Honor knows it, I know it, you know it. When the city took over the Market Street Railway, with its tracks and equipment, the equipment was not in the best condition, and the tracks were in deplorable condition." The city immediately cited this as misconduct. The following then occurred:

"The Court: There is no misconduct. It is true there was no evidence or testimony offered as to the condition of the street or tracks, rather, directly, or of the streetcar.

"Mr. Baglin: And no evidence of any swaying either, your Honor.

"Mr. Miller: If the jurors don't have personal knowledge of that they can forget about it." Counsel then referred to the photograph of the roadbed in evidence and stated that the jury could see how it was "all chewed up." He then called attention to a bend in the track and argued that where there is such a bend, the car is inclined to sway. The court should have instructed the jury to disregard counsel's remark. It did point out that there was no evidence of the condition of the tracks. However, with the photograph of the track in evidence, we cannot say that the remark was prejudicial.

8. Damages.

[28] The jury awarded plaintiff $63,044.20, which the city contends is excessive. The rules applicable to the review of damages by appellate courts have been so frequently passed upon and are so well established that they do not require citation of authorities. Before this court can upset the award it must appear to us that it is so excessive as to indicate that the jury was motivated by prejudice or passion. Particularly is this so, where, as here, the trial judge on motion for new trial has passed upon the award. Nor is it a question of what damages this court would award in the first instance. Nor are awards in other cases necessarily a criterion of the proper award in the instant case. The types of injury, the age, physical condition, financial status of the various plaintiffs, and the value of the dollar at the time of injury, vary so greatly that it is almost impossible to find a case where the situation is on all fours with a case at bar.

The city concedes that plaintiff suffered a comminuted fracture of the right humerus, which makes him unable to bring his arm up to a right angle with the level of the shoulder joint; also that he suffered a dislocation of the right hip joint, as to which he now has a very good movable joint; also that he had a compound, comminuted fracture of both bones of the left leg in about the middle third; a comminuted fracture of the right ankle—three prominences of the ankle joint were broken. The left leg has healed but with one and a half inches of shortening. The bony prominences of the right ankle are enlarged and not freely movable. His inability to abduct his right arm more than 45 degrees from his body constitutes more than a 50% disability. By reason of the shortening of the left leg he has to wear a raised shoe and limps badly. He cannot dorsiflex the right ankle, that is, raise the foot toward the leg and force it down towards the leg normally, and has a marked decrease in motion of the ankle. He has large varicose veins and thickening of the vessels, and inflammation of the lymphatics of the leg, which came as a result of the fractures. The swelling and inflammation comes on intermittently but will be recurrent. His left knee was stiff because of the immobilization of the leg. Plaintiff's doctor and the doc-

tor whom the city had examine plaintiff were in substantial agreement as to the nature of plaintiff's injuries and disability. The city's doctor stated in his report that plaintiff "is suffering from a very marked disability, and he will never be able to return to hard or arduous work. The condition is now permanent. * * * The patient must seek employment of a sedentary nature and certainly one not requiring standing for any length of time or walking for any distance." Plaintiff at the time of injury was 56 years of age, with a life expectancy of 23.24 years. He was confined to the hospital for a period of approximately four months. Plaintiff's hospital bill was $1,044.20. He claimed $12,000 loss of wages, or chance to work during the time he was completely incapacitated. Originally the complaint asked for $25,000 general damages. It was amended at the trial, over the city's objection, to ask for $50,000 general and loss of earnings of $12,000, which with the hospital bill totaled $63,044.20, the exact amount the jury gave. (In fact, during their deliberations, they came back to court and asked the exact amount asked for by plaintiff.)

[29-31] The city attacks the $12,000 loss of earnings which the jury impliedly awarded and also the total amount of the damages on the ground that, in effect, plaintiff was an inebriate incapable of finding or holding employment, and also on the ground that the court erred in permitting plaintiff to estimate his earnings over the previous eight years, which estimate plaintiff gave as $18,000, or an annual average of $2,250. The earnings prior to the injury are admissible as evidence of the extent to which the earning capacity of the plaintiff has been impaired by the injury. Tornell v. Munson, 80 Cal.App.2d 123, 181 P.2d 112; Armstrong v. Ford, 30 Cal.App.2d 347, 86 P.2d 385; Treadwell v. Whittier, 80 Cal. 574, 22 P. 266, 5 L.R.A. 498, 13 Am.St. Rep. 175. As said in Wilcox v. Sway, 69 Cal.App.2d 560, 160 P.2d 154, the best method of proof of pecuniary loss is testimony of the plaintiff as to his earnings for a number of years immediately prior to the accident. Bonneau v. North Shore R. Co., 152 Cal. 406, 93 P. 106, 125 Am.St. Rep. 68. The city has cited no case holding that the testimony of the plaintiff as to his prior earnings is not admissible. There is no express limitation upon the time which this testimony may cover. The remoteness of the time affects the weight of the testimony and not its admissibility. The fact that the injured person was not employed at the time of the accident does not necessarily deprive him of the right to compensation for the loss of his earning capacity. Wilcox v. Sway, supra, 69 Cal.App.2d 560, 160 P.2d 154. Actually, the city's main attack on this evidence, as well as on the award itself, is its claim that the evidence shows that plaintiff neither earned what he claimed he had earned nor had the earning capacity that the jury found. Plaintiff testified that he came to California in 1942. Prior to that time he worked in underground mining in Minnesota, and as a laborer in the car repair department of a railroad, but not steady employment, that is, only nine or ten months a year for three or four years. His work record in California was spotty. From December 17, 1942, to July, 1943, his shipyard earnings were $472.95. From July, 1943, to July, 1944, he was intermittently unemployed because of rheumatism. From February to June of 1944 he earned $100 per month as a farm laborer. At the time of the accident, April 15, 1945, plaintiff was unemployed and living at the St. Vincent de Paul Shelter, apparently on its charity. He had been on its rolls in November, 1943. From time to time he had been admitted to the San Francisco Hospital for "alcoholism" or "alcoholic addiction." The records of the hospital indicate that the day after the accident he might have suffered from delerium tremens. A couple of months after his discharge from the hospital after the accident he was again hospitalized due to a fall and the breaking of his hip, probably while intoxicated.

While the evidence would have justified the jury in finding, as contended by the city, that plaintiff was a ne'er do well who over the preceding eight years had earned very little money, and whose earning power at the time of the accident was practically nil, on the other hand, there was evidence

which supported the jury's finding that he had the earning capacity found by the jury. Unquestionably the man was badly disabled and incapacitated from future hard work, the only type of work for which he was fitted. In view of the seriousness of his injuries we cannot say that the verdict is excessive.

Other Matters.

[32, 33] It is not clear from the city's briefs whether it claims the court erred in refusing to allow it to call the witness Klein as its witness, when on cross-examination the court sustained an objection to a question put to the witness as not being proper cross-examination, or whether the incident is pointed out solely for the purpose of contrasting it with the situation when, over the city's objection, the court permitted plaintiff to make Blake his witness during plaintiff's cross-examination (one of the nine incidents of alleged misconduct heretofore mentioned). Whether during cross-examination a party will be permitted to make the witness his own, is a matter entirely in the discretion of the trial court. While, in view of the court's action as to the witness Blake, it probably would have been better for plaintiff to accede to the city's request, we cannot say that the court abused its discretion to the point of being prejudicial.

[34] In its reply brief the city raises for the first time thirteen other claims of misconduct by the judge. It would appear that in the voluminous opening brief and the fine-tooth-combing with which the city went over the record, raising every possible contention, serious and not serious, nothing would have been overlooked. We have endeavored to cover every point raised by the city, and in spite of the rule that we have the right to disregard issues raised for the first time in the reply brief, have considered them. They relate to the court's limiting the city's cross-examination of certain witnesses, and the comments of both the court and opposing counsel concerning the length of the trial. In practically every instance the matter sought to be gone into on cross-examination had been covered more than once before. Both the limitations and the comments were because of the city's delaying tactics and the court's effort to speed up the trial. The court had the right where the trial dragged almost interminably, as did this, to try to speed it up. The city's actions were responsible for the comments.

[35] There was no misconduct in the action of the plaintiff in asking certain questions of the city's investigator Worcester. The city did not object to them. On one occasion the cab company counsel accused the city's counsel of trying to keep the truth out of the case, when the city interposed an objection. The court promptly and at some length admonished the jury to disregard the remarks. This fully met the situation.

The judgment is affirmed.

PETERS, P.J., and FRED B. WOOD, J., concur.

Hearing denied; SHENK and EDMONDS, JJ., dissenting.



99 Cal.App.2d 534

CENTERS et al. v. DOLLAR MARKETS et al.

Civ. 17492.

District Court of Appeal, Second District, Division 3, California.

Sept. 21, 1950.

Martin Centers and Virginia Centers brought an action against Dollar Markets, a corporation, and others, to recover damages for malicious prosecution. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgment on a directed verdict for defendants, and plaintiffs appealed. The District Court of Appeal, Vallee, J., held that the conflicting evidence as to want of probable cause on the part of the named defendant's cashier in accusing Virginia Centers of obtaining money by false pretenses should have been submitted to the jury.

Affirmed in part and reversed in part.

1. Malicious prosecution ⇐56

In order to recover damages for malicious prosecution, plaintiff must prove termination of the criminal proceedings in his favor, want of probable cause, and malice on part of defendants.

2. Appeal and error ⇐927(7), 989

Where trial court entered judgment on directed verdict for defendant in action for malicious prosecution, and it was conceded that evidence established that criminal proceeding was terminated in favor of plaintiff, reviewing court would consider only evidence most favorable to plaintiff, together with every inference which reasonably could be drawn and every presumption which fairly could be deemed to arise therefrom in plaintiff's favor, to determine whether there was any evidence of malice and want of probable cause.

3. Malicious prosecution ⇐20

"Probable cause", as it relates to malicious prosecution, is suspicion founded upon circumstances sufficiently strong to warrant reasonable man in belief that charge is true.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Probable Cause".

4. Malicious prosecution ⇐56

In order to recover compensatory damages for malicious prosecution, plaintiff must prove that defendant did not have reasonable grounds for believing that facts alleged in complaint were true.

5. Malicious prosecution ⇐20

"Probable cause", as it relates to malicious prosecution, does not depend upon possession of facts which satisfactorily prove guilt of accused person but has reference to common standard of human judgment and conduct, and exists where accuser was possessed of information or facts which were sufficient to have caused reasonable person to honestly believe that charges made were true.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Probable Cause".

6. Malicious prosecution ⇐64(2)

In malicious prosecution actions, proof of favorable termination of criminal proceedings does not create conflict on issue of "probable cause", since proof that no crime was committed or that accused is innocent does not negative existence of probable cause.

7. Malicious prosecution ⇐71(2)

In malicious prosecution actions, when evidence bearing on question of probable cause is in conflict, it is province of jury to determine whether facts exist which will warrant inference of probable cause.

8. Malicious prosecution ⇐71(2)

In malicious prosecution actions, if there is no dispute concerning existence of facts relied upon to show want of probable cause, trial judge must determine, as matter of law, whether such undisputed facts do, or do not, warrant inference of want of probable cause.

9. Malicious prosecution ⇐71(2)

In malicious prosecution actions, if there is no evidence whatever from which jury might infer that defendants did not in fact believe that crime has been committed and that plaintiff had committed it, question of defendant's belief is to be determined by court on basis of what, under circumstances, was sufficient to cause reasonable man to entertain suspicion that crime had been committed and that plaintiff had committed it.

10. Malicious prosecution ⇐27, 30

"Malice", as it relates to malicious prosecution, means actuated by wrongful motive, that is, party must have had in mind some evil or sinister purpose, but malice does not necessarily infer presence of anger or vindictiveness and it is sufficient if it appears that former suit was commenced in bad faith to vex, annoy, or wrong adverse party.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Malice".

11. Malicious prosecution ⇐56

In malicious prosecution action, plaintiff is not required to prove that prosecutor

was inspired by personal hostility, a grudge, or ill will.

12. Malicious prosecution ⇐56

In malicious prosecution action, malice must be proven against particular defendant in order to justify award of compensatory damages against that defendant.

13. Malicious prosecution ⇐64(2)

In malicious prosecution action, malice, like any other fact in issue, may be proved by direct evidence or may be inferred from all the circumstances in case.

14. Malicious prosecution ⇐23, 32

In malicious prosecution action, malice may, but need not necessarily, be inferred from want of probable cause, but want of probable cause may not be inferred from the most express malice.

15. Malicious prosecution ⇐18(7)

Party is not required to exhaust all sources of information bearing on facts which come to his knowledge in order to have "probable cause", as it relates to malicious prosecution.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Probable Cause".

16. Malicious prosecution ⇐18(6)

Knowledge of facts which may justify alleged malicious prosecution is that which is possessed at time of its occurrence, not that which is subsequently acquired.

17. Malicious prosecution ⇐64(2)

In action to recover damages for malicious prosecution brought by customer against corporate owner of supermarket and several of its employees as result of complaint filed against customer for obtaining money by false pretenses, evidence did not establish want of probable cause on part of secretary of corporation and manager of store, where there was no evidence that either of them had not acted in good faith and under honest belief that crime had been committed and that it had been committed by plaintiff, and there were circumstances made known to them sufficiently strong to warrant reasonable men in believing that charges were true.

18. Malicious prosecution ⇐71(2)

In action for malicious prosecution brought by customer against corporate owner of supermarket and several of its employees as result of complaint filed against customer for having obtained money by false pretenses, whether store's cashier had probable cause in accusing customer of the offense, was for jury.

19. Malicious prosecution ⇐27, 32

In malicious prosecution actions, malice may be inferred from want of probable cause, or it may be shown by proving lack of good faith on part of accuser.

20. Malicious prosecution ⇐20

If defendant in malicious prosecution action did not himself believe in guilt of accused, then circumstances relied upon by him in making accusation would not shield him.

21. Malicious prosecution ⇐64(2)

In action to recover damages for malicious prosecution brought by customer against corporate owner of supermarket and several of its employees as result of complaint filed against customer for obtaining money by false pretenses, evidence was sufficient to warrant inference that supermarket's cashier did not in fact suspect plaintiff of guilt and that he was actuated by malice and sinister motives in making accusations against plaintiff.

22. Corporations ⇐399(1)

Corporate defendant is liable for acts of its agents, acting within scope of their authority.

23. Malicious prosecution ⇐3

One may be civilly liable for malicious prosecution without personally signing complaint initiating criminal proceedings, if such person, without probable cause and with malice, instigates or procures prosecution.

24. Malicious prosecution ⇐3

Test of liability in action for malicious prosecution is whether defendant was actively instrumental or was proximate and efficient cause of maliciously putting law in motion.

25. Malicious prosecution ⇐71(4)

In action for malicious prosecution brought by customer against corporate owner of supermarket and several of its employees as result of complaint filed against customer for obtaining money by false pretenses, jury questions were presented as to whether defendants had made full and fair disclosure of all facts to deputy city prosecutor and as to whether such prosecutor had given any advice.

26. Malicious prosecution ⇐21(1)

Advice of counsel is not defense to action for malicious prosecution if it appears that defendant did not believe that accused was guilty.

27. Malicious prosecution ⇐42

In action for malicious prosecution brought by customer against corporate owner of supermarket, where it was conceded that cashier in supermarket who had accused customer of obtaining money by false pretenses was acting within scope of his authority, if jury concluded that such cashier did not believe customer was guilty, corporate owner of supermarket would be liable for acts of cashier unless it could establish that it acted on advice of counsel.

Russell H. Pray, Eric A. Rose, Long Beach, for appellants.

Clock, Waestman & Clock and E. W. Sheridan, all of Long Beach, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from a judgment for defendants entered on a directed verdict in an action for damages for malicious prosecution. The claim is that the evidence was such as to require the submission of the cause to the jury.

For a number of years prior to February 21, 1948, Dollar Markets, a corporation, had operated a supermarket in Long Beach. The market was of the self-service type, with two cash registers near the entrance. Plaintiff, a housewife, with her husband and three children, had lived adjacent to the market for three and a half years. She had done substantially all of her shopping for groceries and related items at the market. During that time she had visited the market nearly every day and had known its employees, Mr. Mead, the manager, and Mr. Main, the cashier. Mr. Mead had given her credit when a check from her husband, who was overseas, was delayed. She had frequently cashed checks for $55.20 which came to her husband for disability received in World War II. In each instance the check was O.K'd by the manager and then presented to the cashier for payment.

On February 21, 1948, plaintiff went to the market to buy two cans of milk. She entered the rear of the store, could not find the brand of milk she was seeking, asked the manager, defendant Mead, when he expected a shipment of a particular brand, and ordered a carton. She took two cans of milk, went to the cashier, defendant Main, waited in line and paid for the milk. Main and a young boy, a stacker, were at the register. She then returned home.

About 10 or 15 minutes later Mead called on her at her home and asked her if she had told Main "that Mr. Mead held a check of mine and Mr. Main was supposed to have paid me $66.40. Q. And what did you tell him? A. I told him no, I had not." Mead left. About 15 minutes later Mead and Main called on plaintiff. Mead asked Main if plaintiff "was the one he had given the money to and he said yes.

"Q. Did he say how much? A. $66.00.

"Q. $66.00 or $66.40? A. $66.40.

"Q. What else was said during the conversation? A. I told him he hadn't given it to me. Mr. Main said he had; He said he would be short $66.40 when he checked the cash register that night. * * *

"Q. Did he then say anything about any other monies? A. Oh, yes, I was twenty-five short last Saturday and I think you got that too. * * *

"Q. What was said after that? A. I denied I had gotten it, and they claimed

I had, so then Mr. Mead stated there wouldn't be anything more said about it, they would check further."

Plaintiff did not talk to either of them again.

Main testified he was the cashier on February 21, 1948; he had known plaintiff as a regular customer for some time; she was in the store on the average of once a day; he accepted about 20 checks on the morning of February 21. In cashing a check he looked at it "for the O.K., placed it on the cash register where the currency is placed, handed the money, turned the check over, stamped with the bank stamp, put it underneath the register." On February 14, plaintiff "came through the check line I am sure and whether she bought anything or not I am not sure, and she asked Dow [Mead] to O.K. a check on the bank for $25.00—she asked me for the $25.00 and Dow had the check in the back, O.K., and would bring it up in a few minutes and I handed her the money and she said 'Thank you', and left and I went on checking. * * * and I never thought another word about it. I forgot it." Plaintiff had not asked him for money like that before. He told Mead about it on the 21st. On the 21st "I asked her [plaintiff] if there was anything that I could do for her and she said, 'I'd like to get these two cans of milk and $66.40.' I says, 'For what?' She says, 'Dow has my check in the back room, and has okayed it and will bring it up in a few minutes.' * * * I says, 'All right,' so I hands her $66.40 and she thanks me"; he asked Mead for the check in a minute or two; he told the details of these occurrences to Mead, Dyer, general manager of Dollar Markets, and Inspector Carroll of the Long Beach Police Department.

James Lynch testified that on February 21st he was employed by Dollar Markets as "sack boy," working alongside Main. Plaintiff came up on the wrong side of the cash register, talked to Main, and he (Main) gave her some money in large bills—fives and tens. He told Mead, Dyer and Inspector Carroll about the incident.

On February 23, 1948, defendant Dyer advised defendant Gillingham, secretary and treasurer of Dollar Markets, of the alleged incident of February 21. Gillingham then checked the manager's report of the store for February 21 to verify the shortage that Dyer had reported to him. The report showed a shortage in both cash registers of $66.61. He then examined the manager's report of February 14. It showed a shortage of about $24.32 in both cash registers. He then questioned Dyer regarding the facts. On February 21 either Mead or Dyer called the Long Beach Police Department, and Inspector Carroll was sent to the market to make an investigation. Gillingham did not do anything further about the matter until he was asked by Inspector Carroll on February 24 to come to his office. Gillingham, accompanied by Dyer, went to the inspector's office. On the way Gillingham and Dyer discussed the matter. At the inspector's office they met Mead. Gillingham, Dyer and Mead presented the facts to the inspector. In their presence the inspector dictated a report of the transaction from notes he had in his possession and the statements of Dyer and Mead. Main, the cashier, was not present. They then went to the office of Milton Emlein, Deputy City Prosecutor of the City of Long Beach. The inspector first talked to the prosecutor alone. The others were then called in and with the inspector talked to the prosecutor from 15 minutes to half an hour. The prosecutor questioned the inspector regarding facts other than those contained in his report, and questioned Dyer about the facts. Dyer told him he had conducted a thorough investigation and what it had revealed. The prosecutor questioned Mead about the facts. Gillingham then signed the complaint. He did not talk to the prosecutor at all. He testified that at that time he believed plaintiff was guilty.

Mr. Emlein testified that at the conclusion of the questioning he asked the group if they desired a complaint; if so, he would issue it. Someone indicated that they did. Gillingham was selected because of his position with the company. When asked if he advised the issuance of

a complaint, Mr. Emlein stated that he approved its issuance. When asked if he told those present there was probable cause, he said he could not recall. He testified that at the time he issued the complaint he was convinced there was probable cause.

Gillingham signed and swore to a complaint that day, charging plaintiff in two counts with theft of $25 from Dollar Markets on February 14, 1948, and $66.40 on February 21, 1948. Plaintiff was arrested the same day, taken to the Long Beach jail, booked, photographed, fingerprinted, and placed in a tank with other prisoners. About half an hour later she was arraigned, pleaded not guilty; the trial was set for March 2, and she was released on her own recognizance. The trial was continued to March 16.

On March 16, 1948, on motion of Mr. Emlein, the complaint was dismissed on the following signed request of Gillingham: "Gerald Gillingham being the complaining witness therein, states that further investigation of the facts upon which the complaint was issued shows that there was an insufficient basis upon which to press the charges contained in said complaint."

Gillingham testified that Main gave the information he had about the alleged thefts to Mead. Mead gave it to Dyer and Dyer gave it to him (Gillingham). He had no personal knowledge of the case. He made no investigation other than talking to Dyer and sitting in at the meetings with Inspector Carroll and the deputy city prosecutor. He had no actual belief in the matter; it was Dyer's judgment. He did not talk to Main before signing the complaint.

Dyer, Main and Mead each testified that on February 24, 1948, he believed plaintiff was guilty.

[1] In order that plaintiff recover, it was essential she prove three facts: 1) termination of the criminal proceedings in her favor, 2) want of probable cause, and 3) malice on the part of defendants. Jaffe v. Stone, 18 Cal.2d 146, 149, 114 P.2d 335, 135 A.L.R. 775; Brock v. Southern Pacific Co., 86 Cal.App.2d 182, 194, 195 P.2d 66; Jensen v. Leonard, 82 Cal.App.2d 340, 351, 186 P.2d 206.

[2] Respondents concede that the evidence establishes that the criminal proceeding was terminated in favor of plaintiff. They also concede that the individual defendants were acting within the scope of their authority as employees of Dollar Markets. The question is whether, considering only the evidence most favorable to plaintiff together with every inference which reasonably can be drawn and every presumption which fairly can be deemed to arise therefrom in her favor, there is any evidence of want of probable cause and of malice.

[3-6] Probable cause is "a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." Lee v. Levison, 173 Cal. 166, 169, 159 P. 438; Hudson v. Zumwalt, 64 Cal.App.2d 866, 872, 149 P.2d 457; Sebastian v. Crowley, 38 Cal.App.2d 194, 202, 101 P.2d 120. The burden was on plaintiff to prove that a defendant did not have reasonable grounds for believing that the facts alleged in the complaint were true in order to recover compensatory damages against that defendant. Brock v. Southern Pacific Co., 86 Cal.App.2d 182, 194, 195 P.2d 66; Sebastian v. Crowley, 38 Cal.App.2d 194, 203, 101 P.2d 120. Probable cause does not depend upon the possession of facts which satisfactorily prove the guilt of an accused person. It has reference to the common standard of human judgment and conduct. It exists if one is possessed of information or facts which are sufficient to cause a reasonable person to honestly believe the charge is true. Jensen v. Leonard, 82 Cal.App.2d 340, 351, 186 P.2d 206; Moore v. Durrer, 127 Cal. App. 759, 765, 16 P.2d 676. Proof of the favorable termination of the criminal proceeding does not create a conflict on the issue of probable cause. Moore v. Durrer, 127 Cal.App. 759, 765, 16 P.2d 676. Proof that no crime was committed or that the accused is innocent does not negative the existence of probable cause.

Haydel v. Morton, 8 Cal.App.2d 730, 733, 48 P.2d 709.

[7-9] When the evidence bearing on the question of probable cause is in conflict, it is the province of the jury to determine whether facts exist which will warrant or reject an inference of probable cause. However, if there is no dispute concerning the existence of the facts relied on to show want of probable cause, the trial judge must then determine, as a matter of law, whether such undisputed facts do, or do not, warrant an inference of want of probable cause. If there is no evidence whatever from which the jury might have inferred that the defendants did not in fact believe that a crime had been committed and that plaintiff had committed it, the question of defendants' belief is to be determined by the court on the basis of what, under the circumstances, was sufficient to cause a reasonable man to entertain a suspicion that the crime had been committed and that plaintiff had committed it. Franzen v. Shenk, 192 Cal. 572, 578, 581, 582, 221 P. 932; Haydel v. Morton, 8 Cal.App.2d 730, 733, 48 P.2d 709.

[10-14] In an action for malicious prosecution, malice means actuated by a wrongful motive, i. e., the party must have had in mind some evil or sinister purpose. Pickering v. Havens, 70 Cal.App. 381, 388, 233 P. 346. Appellant says that malice is "an absence of an honest and sincere belief by the defendants that the criminal prosecution of plaintiff, Virginia Centers, was justified." It does not necessarily infer the presence of anger or vindictiveness. It is sufficient if it appear that the former suit was commenced in bad faith to vex, annoy or wrong the adverse party. Hudson v. Zumwalt, 64 Cal.App.2d 866, 872, 149 P.2d 457. The plaintiff is not required to prove that the prosecutor was inspired by personal hostility, a grudge, or ill will. Singleton v. Singleton, 68 Cal.App.2d 681, 696, 157 P.2d 886. Malice must be proven against a particular defendant in order to justify an award of compensatory damages against that defendant. Thomson v. Catalina, 205 Cal. 402, 405, 271 P. 198, 62 A.L.R. 235. Like any other fact in issue, malice may be proved by direct evidence or may be inferred from all the circumstances in the case. It may, but need not necessarily, be inferred from want of probable cause; but want of probable cause may not be inferred from the most express malice. Burke v. Watts, 188 Cal. 118, 126, 204 P. 578; Singleton v. Singleton, 68 Cal.App.2d 681, 690, 696, 157 P.2d 886; Davidson v. De Sousa, 20 Cal.App.2d 311, 314, 66 P.2d 740.

There is no conflict in the evidence relating to the facts from which the existence or want of probable cause for the prosecution of the criminal charge must be determined as to the defendants Gillingham and Mead. There was no evidence that either of them did not act in good faith and under an honest belief that the crime had been committed and that it had been committed by plaintiff. There were circumstances made known to them sufficiently strong to warrant a reasonable man to believe the charge was true.

[15] Appellants argue that because Gillingham testified that when he went to the city prosecutor's office he had formed no actual belief in the matter, and because he did not exhaust all sources of information, he did not in fact believe the truth of the charge. The record is not clear as to just what time counsel was referring when he asked the witness "You had formed no actual belief in the matter at all, had you?" and the witness answered, "No"; but it would appear that it was before the meeting in the city prosecutor's office. The witness testified that he relied on Dyer's judgment; he had complete confidence that Dyer and Mead would tell him all the facts, he believed they told him everything they knew, and at the time he signed the complaint he believed plaintiff was guilty; he based his belief on all the facts that had been gathered and presented from the time Dyer first informed him of the case on February 23, the conversation and reports read in the inspector's office, and the review of the facts presented in the inspector's report to the prosecutor and his (the prosecutor's) recommendation that a complaint be issued. A party is not required to exhaust all sources

of information bearing on the facts which have come to his knowledge in order to have probable cause. Brock v. Southern Pacific Co., 86 Cal.App.2d 182, 199, 195 P. 2d 66.

[16, 17] Appellants also argue that want of probable cause appears because Gillingham did not, between the time the complaint was signed and the date the proceeding was dismissed, make any further investigation of the case. The knowledge of facts which may justify the alleged malicious prosecution is that which is possessed at the time of its occurrence; not that which is subsequently acquired. Hudson v. Zumwalt, 64 Cal.App.2d 866, 872, 149 P.2d 457; Perry v. Washington National Ins. Co., 14 Cal. App.2d 609, 618, 58 P.2d 701, 59 P.2d 158. The court properly determined, as a matter of law, that the evidence did not establish want of probable cause on the part of the defendants Gillingham and Mead. This conclusion relieves us of the necessity of discussing the question of malice attributed to these defendants.

[18] Defendant Main, the cashier, told Mead, and testified, that on February 14 plaintiff obtained $25 and on February 21, $66.40, by false pretenses. Plaintiff, at all times, and in her testimony, denied the statements of Main *in toto* and denied that she received the money. She related the incidents which occurred on her visits to the market in detail. If plaintiff's testimony was true, the jury would have been justified in inferring that Main's statements to Mead were necessarily and knowingly false. Robinson v. McKnight, 103 Cal.App. 718, 729, 284 P. 1056. If Main's statements to Mead were false, there was no theft and hence no probable cause on the part of Main for plaintiff's arrest. The evidence was thus in conflict as to whether there was want of probable cause on the part of Main. If there is evidence with respect to the actual belief of the defendant sufficient to warrant a conclusion that he did not in fact believe the truth of the charge, the question of probable cause to that extent involves a question of fact to be submitted to the jury. Sutherland v. Palme, 93 Cal.App.2d 307, 314, 208 P.2d 1035; Gooding v. McAlister, 114 Cal. App. 284, 292, 299 P. 774. There was evidence sufficient to support the conclusion that Main did not in fact suspect plaintiff of guilt and that he was actuated by sinister motives.

[19-21] Malice on the part of Main may be inferred from want of probable cause. It may be shown by proof of lack of good faith on the part of an accuser. Baker v. Gawthorne, 82 Cal.App.2d 496, 500, 186 P.2d 981. If a defendant did not himself believe in the guilt of the accused, then the circumstances relied on will not shield him. Franzen v. Shenk, 192 Cal. 572, 579, 221 P. 932. He must have believed that his charge was true. There was other evidence of malice on the part of Main. On several occasions after the arrest of plantiff, Main asked her twelve year old boy why his mother did not come and do some more shoplifting. Gillingham testified that at the times involved Dollar Markets had a rule prohibiting the cashier from cashing checks unless O.K'd by someone in authority; that the transactions of February 14 and 21, as told to him, were highly irregular and in violation of the rules; and that Main had no authority to give money from the cash register without depositing a check or other evidence of payment in the register. The evidence was sufficient to warrant the inference that Main was actuated by malice.

[22, 23] As we have said, respondents concede that Main was the agent of the corporate defendant and that his activities were within the scope of his authority in acting for and on behalf of the corporation. The corporate defendant is liable for the acts of its agents acting within the scope of their authority. Pierre v. Great Atlantic, etc., Tea Co., 4 Cal.App.2d 468, 471, 40 P.2d 909; Diggs v. Arnold Bros., Inc., 132 Cal.App. 518, 524, 23 P.2d 71. Main did not sign the complaint. However, he put in motion the forces which resulted in the charge. He related his story to Mead and to the inspector. He assisted, participated in, and cooperated in causing the prosecution. One may be civilly liable for malicious prosecution without personally sign-

ing the complaint initiating the criminal proceeding. If a person, without probable cause and with malice, instigates or procures the prosecution, he is liable. The rule is stated in Blancett v. Burr, 100 Cal.App. 61, 62, 279 P. 668: "The general rule appears to be that 'one who procures a third person to institute a malicious prosecution is liable in damages to the party injured to the same extent as if he had instituted the proceeding himself * * *' and 'that it is not necessary that the complaint or information on which the prosecution is based should have been signed by the person sought to be held liable in order to establish his liability in an action for malicious prosecution. It is enough if he was instrumental in setting the law in motion and caused the prosecution to proceed.' Ann.Cas. 1918A, pages 485, 486, where authorities, including Kinsey v. Wallace, 36 Cal. 462, 480, are cited. To practically the same effect is the declaration of the law in 38 Corpus Juris, 395, where reference is also had to many authorities, and wherein it is stated that the test of liability in an action for malicious prosecution is whether the defendant was actively instrumental or was the proximate and efficient cause of maliciously putting the law in motion. A case which is nearly parallel in its facts with the instant case is that of Holden v. Merritt, 92 Iowa 707, 61 N.W. 390. Therein it appears that the defendant furnished an inspector of the United States government with facts on which the inspector filed an information on which the plaintiff was arrested. The defendant insisted that there was no evidence that he had instigated or procured the prosecution. With reference thereto, in part, the court said: '* * * It need not be shown that the defendant ordered or directed the warrant or process to issue, or that he participated in its execution. If he, on his own motion, gave information or made complaint to the officers of the law in such a manner as that, in the regular and ordinary course of events, an arrest must be made, or will probably follow, this is sufficient to warrant the jury in finding him the real prosecutor. (Citing authorities.)'"

[24-27] Defendants assert that the defense of advice of counsel was established by uncontroverted evidence. There is no evidence that Main was advised by counsel. The evidence did not establish that Dollar Markets acted, through its officer Gillingham, on the advice of counsel. Advice of counsel can only be established by proving the facts that were stated by a defendant to counsel. Singleton v. Singleton, 68 Cal. App.2d 681, 695, 157 P.2d 886. Dollar Markets did not prove the facts that were stated to the prosecutor. The evidence was that the report of Inspector Carroll and other facts—the nature of which was not disclosed—were presented to the prosecutor. One cannot say from the record what facts were stated to him. Whether a full and fair disclosure of all the facts was made to Mr. Emlein was a question of fact to be determined by the jury. Miller v. Lee, 66 Cal.App.2d 778, 784, 153 P.2d 190. And whether Mr. Emlein gave any advice was a question of fact for the jury. Further, advice of counsel is not a defense to an action for malicious prosecution if it appears that the defendant did not believe the accused was guilty. Franzen v. Shenk, 192 Cal. 572, 580, 221 P. 932. As we have said, the jury could have concluded that Main did not believe plaintiff was guilty; and Dollar Markets is liable for the acts of Main, unless it can establish that it acted on the advice of counsel.

One of the defendants named in the complaint was Thomas I. Lingo. Appellant does not point to any evidence connecting this defendant with the prosecution of plaintiff, and we have found none.

The judgment in favor of defendants Gillingham, Mead and Lingo is affirmed. The judgment in favor of defendants Main and Dollar Markets, a corporation, is reversed.

SHINN, P. J., and WOOD, J., concur.

MEADOWS v. EMETT & CHANDLER et al.

Civ. 14501.

District Court of Appeal, First District. Division 2, California.

Sept. 19, 1950.

Rehearing Denied Oct. 19, 1950.

Hearing Denied Nov. 16, 1950.

George Donald Meadows brought an action against E. L. Emett and Norman Chandler, individually and as a copartnership doing business under the firm name and style of Emett & Chandler, to recover damages for breach of a contract to pay money. The defendants, who were residents of Los Angeles County, moved to change the place of trial to Los Angeles. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., denied the motion to change venue, and the defendants appealed. The District Court of Appeal, Nourse, P. J., held that the complaint was not sufficient to create a prima facie case entitling plaintiff to maintain an action in a county other than that of the residence of the defendants.

Reversed with directions.

1. Pleading ⇐34(4)
Venue ⇐72

Where motion for change of venue is made, it must clearly appear from complaint alone that plaintiff is entitled to have cause tried in county other than that in which defendant resides, and in determining whether plaintiff is so entitled all uncertainties will be resolved against complaint and all allegations will be strictly construed against pleader.

2. Pleading ⇐45

Mere conclusions or indefinite statements of pleader will not suffice to create prima facie case entitling pleader to maintain action in county other than that of residence of defendant.

3. Pleading ⇐45

In action to recover for breach of contract by corporation, brought in county where contract was made by corporation against individual defendants transacting business as copartners, on alter ego theory, complaint alleging that defendants were owners of all capital stock of corporation at time contract was made and that corporation was merely medium through which defendants transacted business as copartners fell short of creating prima facie case entitling plaintiff to maintain action at county other than that of residence of defendants.

4. Corporations ⇐1

Courts will not disregard corporate entity unless it is necessary in order to prevent fraud or injustice, and allegation that corporation is alter ego of individual stockholders is insufficient to justify court in disregarding corporate entity in absence of allegations of facts from which it appears that justice cannot otherwise be accomplished.

5. Corporations ⇐1

In order to rely on alter ego theory, it must be alleged and proved that stockholders and corporate entity are business conduits and alter ego of one another, and that to recognize their separate entities would aid consummation of wrong, and mere ownership of all stock and control and management of corporation by one or two individuals is not of itself sufficient to cause courts to disregard corporate entity.

6. Venue ⇐22(1)

Where contract was made in San Francisco between corporation and plaintiff, and, subsequent to dissolution of corporation, agent brought action in San Francisco, on alter ego theory, against individuals who formerly owned corporation, in absence of allegation that recognition of corporate entity would sanction fraud or promote injustice, individual defendants could not be deprived of their statutory right to be tried in Los Angeles where they resided. Code Civ. Proc. §§ 396b, 397, subd. 1.

Cosgrove, Cramer, Diether & Rindge, Los Angeles, Brobeck, Phleger & Harrison, San Francisco, for appellants.

William E. Ferriter, James C. Purcell, San Francisco, for respondents.

NOURSE, Presiding Justice.

The appeal involves the question of venue. Plaintiff sued in the City and

County of San Francisco for an alleged breach of contract to pay money. Defendants are all residents of the county of Los Angeles. They moved to change the place of trial to Los Angeles under sections 396b and 397, subd. 1 of the Code of Civil Procedure. The defendants filed affidavits and amended affidavits in support of their motion. No counter affidavits were filed. The appeal is taken from the order denying the motion to change the venue.

The complaint alleges that in 1939 plaintiff entered into a contract in San Francisco with a corporation located in Los Angeles for the payment of commissions on insurance procured by plaintiff for the corporation; that in 1943 the corporation dissolved and assigned all its assets to the defendant partnership; that on that date said "co-partnership assumed all of the debts of the said corporation."

On this appeal plaintiff argues that the affidavits of defendants were insufficient to support the motion. They show that in 1946 plaintiff commenced a similar suit on the contract of 1939 against the partnership, and later a similar action against the corporation and against the present defendants individually. The two actions were tried together and defendants had judgment of non-suit. On appeal the judgment was affirmed, 86 Cal.App.2d 1, 193 P.2d 785, the appellate court holding that plaintiff's proof failed to show any right of recovery and that the alleged contract was not shown to have existed as a matter of fact. The defendants contend that their liability under the alleged contract of 1939 was finally determined in the prior judgment and that the present proceedings must be, and can only be, one on the contract of 1943 whereby they assumed all the obligations of the dissolved corporation. The respondent contends that he is suing solely on the alleged contract of 1939 and argues that he may be deemed to rely on the alter ego theory to hold the individual defendants liable for the corporation's contract.

The appellants rely on the allegations of the complaint setting forth a new contract of assumption of the corporate debts which was made in Los Angeles County when the corporation was dissolved. They point out that the motion must be heard and decided on the plaintiff's complaint without amendment. They point out that the complaint alleges that the contract sued on was made with the corporation which is not a party defendant. If respondent may contend that he is now suing on the alter ego theory the essential facts supporting that theory must be pleaded and it is of no avail to respondent on this appeal that the complaint might be amended to plead a good cause of action.

[1, 2] Assuming that the action on the corporate debt was commenced against the individual defendants in good faith the trial court was limited, on the motion for change of venue, to the cause pleaded in the complaint and it must appear clearly from the complaint alone that plaintiff is entitled to have the cause tried in a county other than that in which the defendant resides. In determining this question all uncertainties will be resolved against the complaint and the allegations will be strictly construed against the pleader. Neet v. Holmes, 19 Cal.2d 605, 613, 122 P.2d 557; Sheeley v. Jones, 192 Cal. 256, 219 P. 744; Rench v. Harris, 76 Cal.App.2d 113, 117, 172 P.2d 576. "[M]ere conclusions or indefinite statements of a pleader will not suffice to create a prima facie case entitling one to maintain an action at a county other than that of the residence of the defendant." Gas Appliance Sales Co. v. W. B. Bastian Mfg. Co., 87 Cal.App. 301, 309, 262 P. 452, 456; 25 Cal.Jur. p. 910.

There are just two theories on which plaintiff may maintain the action—first, that when the corporation was dissolved and the defendants assumed all its obligations a new contract of assumption arose binding the individual defendants to pay plaintiff's claim against the corporation; second, that at the time of the alleged contract of 1939 with the corporation the two defendants were acting as the alter ego of the corporation as that term has been defined in the authorities herein cited.

Respondent vigorously denies that he is suing on the first theory and this is under-

standable since to admit it would compel a change of the place of trial to Los Angeles where both defendants reside and where the contract of assumption was made.

[3-5] He insists that he is suing on the second theory alone and we will examine the complaint for the purpose of determining whether that theory can be maintained. The only allegations which might form the basis of the alter ego theory are: "That the defendants, E. L. Emett and Norman Chandler, were on the said 9th day of February, 1939, and at all times thereafter until the dissolution of said corporation as aforesaid, the owners of all capital stock of said corporation, and that the said corporation was merely a medium through which said defendants, E. L. Emett and Norman Chandler, transacted business as copartners."

These allegations fall far short of what is required before a defendant can be denied his statutory rights as to the place of trial. The rule is stated in Norins Realty Co. v. Consol. A. & T. G. Co., 80 Cal.App.2d 879, 883, 182 P.2d 593, 596, where the court said: "The allegation that a corporation is the alter ego of the individual stockholders is insufficient to justify the court in disregarding the corporate entity in the absence of allegations of facts from which it appears that justice cannot otherwise be accomplished. California L. & S. Supplies v. Schultz, 105 Cal.App. 471, 287 P. 980. The court will not disregard the corporate entity unless it is necessary in order to prevent fraud or injustice. 6A Cal.Jur. p. 76. Mere ownership of all the stock and control and management of a corporation by one or two individuals is not of itself sufficient to cause the courts to disregard the corporate entity. Hollywood Cleaning & P. Co. v. Hollywood L. Service, 217 Cal. 124, 129, 17 P.2d 709; Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641."

The same rule is followed in Dos Pueblos Ranch and Imp. Co. v. Ellis, 8 Cal.2d 617, 621, 67 P.2d 340, 342, citing with approval Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641, where the further observation was made that in order to rely on this theory it must be alleged and proved that the stockholders and the corporate entity "'are the "business conduits and alter ego of one another," and that to recognize their separate entities would aid the consummation of a wrong.'"

[6] The rule is firmly settled that no reliance can be had on this theory in the absence of *pleading* that recognition of the corporate entity would sanction a fraud or promote injustice. Hollywood Cleaning & P. Co. v. Hollywood L. Service, 217 Cal. 124, 129, 17 P.2d 709; Erkenbrecher v. Grant, supra, 187 Cal. page 11, 200 P. 641; Continental Securities, etc., Co. v. Rawson, 208 Cal. 228, 238, 280 P. 954; Wiseman v. Sierra Highland Min. Co., 17 Cal.2d 690, 697, 111 P.2d 646. If a plaintiff must plead those factors in order to state a cause of action against individual defendants it is obvious that he must plead them in order to take from such defendants their statutory right of trial in the county of their residence.

The judgment is reversed with directions to grant the motion.

GOODELL, J., concurs.

DOOLING, Justice.

I concur. The main opinion does not in express terms meet the respondent's argument that there was no sufficient affidavit of merits. An affidavit of merits was originally filed which omitted the classic phrase "that he has stated all of the facts of the case" to his counsel (25 Cal.Jur. 901–902) and substituted therefor the statement: "Said counsel is more familiar with the facts of this case than is affiant." An amendment to this affidavit was filed in which it is expressly stated "(t)hat prior to the execution of said affidavit (the original affidavit of merits) * * * I had fully and fairly stated the case and all the facts thereof of the above entitled action" to counsel. Taking the affidavit as amended it is certainly sufficient. Counsel for respondent argues "It is clear * * * that if counsel is more familiar with the facts than the client, the latter does not know all of the facts and could not pos-

sibly state all of the facts to counsel." The argument is hypertechnical. No litigant can state more than he knows and the classic recital of the statement of "all of the facts of the case" to counsel is necessarily subject to that implied qualification. Here we have also the additional fact recited that on the former appeal in an action grounded on the same basic claim a judgment of non-suit was affirmed, "(a)nd when the facts of the case are averred, the question of whether or not the defendant has a meritorious defense may be left for the consideration of the court." 25 Cal. Jur. 901; Westover v. Bridgford, 25 Cal. App. 548, 144 P. 313; Carter v. Broder, 50 Cal.App. 63, 194 P. 527.

Hearing denied; CARTER, J., dissenting.



99 Cal.App.2d 546

IMPERIAL-YUMA PRODUCTION CREDIT ASS'N v. SHIELDS et ux.

Civ. 3995.

District Court of Appeal, Fourth District, California.

Sept. 21, 1950.

Rehearing Denied Oct. 9, 1950.

Hearing Denied Nov. 20, 1950.

Action by Imperial-Yuma Production Credit Association, a corporation, against E. S. Shields and Mary Shields, on a note, wherein defendants filed a counterclaim against the balance due. The Superior Court, Imperial County, L. J. Mouser, J., entered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Griffin, Acting P. J., held that the evidence failed to establish that the agent of cattle company was the agent of the association or that the association had ever authorized the cattle company agent to pasture cattle on the defendants' land.

Judgment affirmed.

1. Associations ⇐20(5)

In association's action on note, where defendants filed counterclaim for damages caused by livestock pastured on their land by alleged agent of association, evidence supported ruling of trial court that defendants had failed to show liability on part of association for acts of agent of cattle company that had leased property for pasturage purposes. Civ. Code, §§ 1589, 2310.

2. Appeal and error ⇐205

Where defendant made no offer of proof or disclosure as to nature of evidence excluded, appellate court could not determine whether exclusion was error.

3. Associations ⇐18

Declaration, if any, by agent of cattle company that he might be an agent for, or director of, association, made out of presence of association and without its knowledge, would not establish fact that agent of cattle company was agent of association. Civ. Code, §§ 1589, 2310.

4. Appeal and error ⇐1056(1)

In association's action on note, where defendants filed counterclaim for damage caused by livestock pastured on their land by alleged agent of association, and defendants had leased crop to a cattle company for pasturage purposes, exclusion from evidence of alleged conversation between a defendant and association employee after damage was discovered, wherein defendant had accused association of permitting agent of cattle company to pasture off defendants' crop, and employee had in effect denied such accusation, was not prejudicial error.

5. Associations ⇐19

Where assignment of crop proceeds executed by defendants provided that payments under pasturing agreement could be made by cattle company to association, receipt by association of $298.86 from livestock owner and their crediting of such amount to defendants, did not constitute a ratification or confirmation of cattle company agent's act, as regards liability for damage to crops by livestock. Civ. Code, §§ 1589, 2310.

Leslie L. Burr and A. C. Finney, El Centro, for appellants.

George R. Kirk, El Centro, for respondent.

GRIFFIN, Acting Presiding Justice.

This is the third appeal in the instant action. For a more complete statement of the facts see Imperial-Yuma Production Credit Association, a corporation, v. Shields, 88 Cal.App.2d 328, 198 P.2d 951; and Id., 74 Cal.App.2d 932, 169 P.2d 671. On the third trial, settlement was made by a stipulation that defendants were entitled to a credit of $1,685.97 by reason of wheat delivered by defendants but for which they were not credited on the note. The issues were then narrowed down to the question of whether defendants were entitled to an offset or counterclaim against the balance of $1,508.93 due on the note set forth in plaintiff's cause of action. The claim was for damages alleged to have been suffered by defendants as a result of the destruction of a 120-acre grain crop. The cross-complaint alleges, in this respect, that at plaintiff's request, defendants planted a crop of barley, with the understanding that at the proper stage of growth it was to be pastured; that at that stage defendants informed plaintiff and that plaintiff failed to so pasture the crop and that thereafter, when it became too late to so pasture it, defendants informed plaintiff that they did not desire to pasture it at all; that nevertheless, during defendants' absence, plaintiff pastured the 120 acres and the crop was consumed by plaintiff's livestock; that for such pasturing plaintiff credited defendants with $298.86 and no more; that had the barley crop not been pastured at that time and allowed to produce a crop of grain, the reasonable net value would have been $3,500; and that by reason thereof defendants were injured in the sum of $3,201.14, after allowing credit for $298.86 already paid. Plaintiff denied that it instigated or requested the planting of the crop or that plaintiff had anything to do with the planting or pasturing of it, and denied that defendants were entitled to any credit under the alleged claim.

The issues are presented on an agreed statement of facts and the testimony of defendant E. S. Shields. In the agreed statement of facts it is stated that under the pleadings and evidence there remained but one item before the court, i. e., that of the alleged destruction of the crop and the liability of plaintiff to defendants for the damages suffered, if any. The renewal note, the loan acceptance, the crop mortgage, and the statement of account showing payments credited, were received in evidence without objection. The court sustained objections to certain questions propounded to the witness Shields which are the subject of contention on this appeal.

Shields testified that he owned 120 acres of land and on February 26, 1940, he and his wife signed a crop and chattel mortgage covering crops on this and other acreage for the years 1940, 1941 and 1942, in addition to considerable farm machinery, tools, etc. as security for the payment of the renewal note sued upon. This mortgage was received in evidence.

Apparently defendant Shields planted the acreage to grain and subsequently leased it for pasturage purposes to the San Pasqual Land & Cattle Company, which operated through one A. Kalin. According to the assignment in evidence plaintiff association, on October 3, 1940, secured from Shields an assignment of all proceeds from the rental of pasturage and sale of crops grown on the acreage for the calendar year 1940-1941. This agreement was subsequently accepted by San Pasqual Land & Cattle Company. According to a receipt in evidence, on March 14, 1941, plaintiff gave defendant credit for $298.86 received from the cattle company for pasturage on 80 acres of land for the month of January. From the exhibits in evidence it does not appear that plaintiff association had any part in the transaction between defendants and the cattle company or had any control over the time or manner in which the acreage was to be pastured. According to a letter accompanying the assignment sent to defendants for signature, plaintiff asked that defendant sign and return it and asked that defendants inform plaintiff "the name of the purchaser of your pasture. We understand it is Mr. Al Kalin." The only evidence offered by

defendants on that subject was the testimony of Mr. Shields. He stated that he was farming about 600 acres of land in 1940; that he executed the note and assignment in evidence; that he had some conversation with plaintiff relative to the crops that were to be planted and that it was to receive the returns from them during the year 1940. He then testified that in September, 1940, a field worker for plaintiff came to his ranch and made a list of all equipment available, and told defendants that unless the note was paid by them the company was going to sell all the equipment; that the field worker suggested defendants see Mr. Kalin, who was one of the board of directors of the Production Credit Association, and that he might do something for them; that he went to see Mr. Kalin, who was a regional director in the Westmorland district of the Production Credit Association. As to what was said at that time, the court sustained an objection on the ground of hearsay. The witness then testified that about December 1, 1940, he called the "Production Credit" and informed Mr. Hixon that the grain field was ready for pasture and should be pastured right away; that he did not recall what the reply was; that about January 1, 1941, he called again and told him that the barley had gone too far now to be pastured; that while this defendant was out of the city he discovered the crop had been pastured around February 1, 1941; that he went to plaintiff's office and had a conversation with Mr. Hixon. The court then sustained an objection to a relation of that conversation and defendant Shields made an offer of proof which recites that Shields said to Hixon: "I see you have permitted Mr. Kalin to pasture off my barley crop"; that Mr. Hixon replied: "We turned that whole matter over to Mr. Kalin and you will have to see him. I have nothing further to say to you." The court then refused to hear evidence as to any claimed damage because of the defendants' failure to establish any basis for plaintiff's liability for such claimed damage, whereupon defendants rested. The court directed a verdict in favor of plaintiff for $1,508.93, being the balance due on the note and directed that it find against defendants on their cross-complaint. Such a verdict resulted. Judgment was entered accordingly. Defendants appealed and claim that the court erred in its ruling and in granting plaintiff's motion for a directed verdict.

It is argued by defendants that the evidence establishes that Kalin was at all times herein mentioned, in fact, the agent of plaintiff and that when it accepted the benefits, namely, $298.86 from the pasturage, there was a confirmation of the act of Kalin under secs. 1589 and 2310 of the Civil Code and the holding in Phillips v. Sanger Lumber Co., 130 Cal. 431, 434, 62 P. 749.

Plaintiff's contention is that there was no evidence that Kalin was agent for plaintiff in making the agreement with defendants for pasturing the acreage or in accepting or making payments to it, or that plaintiff ever directed Kalin to perform the obligation at all or in any particular manner; that accordingly, defendants showed no liability on the part of plaintiff for the alleged loss of the barley crop.

[1-3] The instruments in evidence, on their face, clearly support the trial court's ruling that there was a failure of proof on the part of defendants to show liability on the part of plaintiff association. There is nothing contained therein indicating that Kalin was plaintiff's agent in any of the transactions or was ever authorized by the corporation to pasture cattle on defendants' land in its behalf or that plaintiff ever directed Kalin to pasture it at the time indicated. The only possible evidence, which bears on this subject, is the testimony of defendant Mr. Shields. He stated that a field worker *suggested* to him that he see Mr. Kalin, who undeniably was the authorized agent of the San Pasqual Land & Cattle Company and who, as he stated, was also one of the board of directors of plaintiff association; that he told him "he might do something for him". This statement, if so made, did not prove that Kalin was plaintiff's agent or that Kalin was authorized to act for the association in any manner. Shields, subsequently, contacted Kalin, apparently at

some other place than plaintiff's place of business, and made some arrangements with him about pasturing the cattle on defendants' premises. We are unable to determine whether the sustaining of the objection to the relation of that conversation was proper or improper, because there was no offer of proof or disclosure as to the nature of the conversation. If Kalin stated that he was dealing on behalf of the San Pasqual Land & Cattle Company in entering into the agreement for leasing the property for grazing purposes no agency in relation to plaintiff association could be established by such conversation. On the other hand, if Kalin made some declaration indicating that he might be an agent for or a director of plaintiff association, such declaration of the agent would not create ostensible authority and such declaration, made out of the presence and without the knowledge of the principal, was incompetent to establish either the fact of agency or the extent of the agent's authority. Union Construction Co. v. Western Union Telegraph Co., 163 Cal. 298, 125 P. 242; Curtin v. Ingle, 137 Cal. 95, 69 P. 836, 1013; Lambert v. Gerner, 142 Cal. 399, 76 P. 53; 1 Cal.Jur. p. 698, sec. 8; 1 Cal.Jur. p. 741, sec. 41. In the absence of an offer of proof it cannot be said that the trial court erred in its ruling in this respect.

[4] The only other conversation which defendants rely upon to prove such agency and authority is the purported conversation with Mr. Hixon, after the discovery of the claimed damage. Even if the evidence had been admitted under the offer of proof, the evidence of agency and authority of Kalin to act for the association in pasturing the cattle at the time indicated falls far short of establishing that fact. In effect it was but an accusation that plaintiff association did "permit" Kalin to pasture off defendants' barley crop. If Kalin was dealing through the San Pasqual Land & Cattle Company, as indicated, he would need no permission of plaintiff to the pasturing of the acreage and plaintiff would have no authority to tell him when he could or should pasture it. In effect, the reply of Mr. Hixon tends to negative the accusation and clearly indicates that Kalin was not acting for the plaintiff association. We see no prejudicial error in sustaining the objection. Defendants failed to, and declined to produce other proof on this subject.

[5] The remaining argument that the receipt of $298.86 from the San Pasqual Land & Cattle Company constituted a ratification or confirmation of the act of Kalin, under the law of agency, is without merit. The assignment of crop proceeds, duly executed by defendants, provides for such payments to be made to plaintiff association. In the absence of a contrary showing, the receipt of such funds by it could not be construed as a ratification of Kalin's act as agent.

Under the evidence produced or proffered, the ruling of the trial court in sustaining objections to the questions propounded and the granting of the motion for a directed verdict must be sustained.

Judgment affirmed.

MUSSELL, J., concurs.



99 Cal.App.2d 506

PEOPLE v. PORTER.

Cr. 2657.

District Court of Appeal, First District, Division 1, California.

Sept. 20, 1950.

Lloyd Porter was convicted in the Superior Court in and for the County of Monterey, H. G. Jorgenson, J., for issuing a check without sufficient funds with intent to defraud and defendant appealed. The District Court of Appeal, Bray, J., held that evidence sustained conviction.

Affirmed.

1. False pretenses ⇐49(1)

Evidence sustained conviction for issuing a check without sufficient funds with intent to defraud. Pen.Code § 476a.

2. False pretenses ⇐14, 22

Offer of restitution or restitution itself is no defense to a prosecution for issuing a check without sufficient funds with intent to defraud nor is it necessary for prosecution to show that victim was actually defrauded. Pen.Code, § 476a.

3. Criminal law ⇐736(2)

In prosecution for issuing a check without sufficient funds with intent to defraud, where there was a conflict in testimony regarding whether defendant's statements on arrest were given freely and voluntarily, it was for jury to resolve conflict. Pen.Code, § 476a.

4. Criminal law ⇐491(1)

In prosecution for issuing a check without sufficient funds with intent to defraud, where police officer testified that he knew defendant's handwriting, action of trial court in asking witness whether handwriting on check was defendant's, was proper. Code Civ.Proc. § 1870, subd. 9.

5. Criminal law ⇐491(1)

In prosecution for issuing a check without sufficient funds with intent to defraud, refusal of trial court to appoint a handwriting expert to have check in question analyzed was not error.

6. Criminal law ⇐650

In prosecution for issuing a check without sufficient funds with intent to defraud, refusal of trial court to submit defendant to a lie detector test as requested was not error, since result of such a test would not have been admissible in evidence.

7. False pretenses ⇐52

In prosecution for issuing a check without sufficient funds with intent to defraud, an instruction charging that it was no defense to prosecution for making and uttering a fictitious check that after check was passed the defendant attempted to make restitution, was not error. Pen.Code, § 476a.

8. Criminal law ⇐656(3)

In prosecution for issuing a check without sufficient funds with intent to defraud, action of trial court cutting off defendant's answer to a question concerning a conversation defendant had with prosecuting attorney, regarding lowering of charge to misdemeanor, and telling defendant that he could further argue question to jury, showed no prejudice. Pen.Code, § 476a.

Lloyd Porter, in pro per.

Fred N. Howser, Atty. Gen. and C. A. Linn and William M. Bennett, Deputy Attys. Gen., for respondent.

BRAY, Justice.

Defendant, appearing in propria persona as he did in the trial court, appeals from a judgment, after jury verdict, convicting him of the crime of violating section 476a of the Penal Code (issuing check without sufficient funds, with intent to defraud), and from the order denying his motion for a new trial.

Contentions.

1. Insufficiency of the evidence. 2. Error in admission of defendant's statements. 3. Court mislead the jury concerning handwriting testimony. 4. Court refused to appoint a handwriting expert for defendant. 5. Court refused to permit defendant to take a lie detector test. 6. Error in instructions. 7. Prejudice of the court.

1. Evidence Sufficient.

[1] The chief basis of the contention that the evidence is insufficient to justify the verdict, is that the defendant's story, if believed, showed that he had no intent to defraud. However, the jury obviously did not believe his testimony, and did believe that of the prosecution. There was ample evidence to prove all the necessary elements of the crime, including intent to defraud. On Sunday afternoon, October 16, 1949, defendant Lloyd Porter entered the Rodeo Drug Store in Salinas and made a small purchase from the proprietor, John Fratini. Defendant offered in payment a check for $21. This check was dated the same day, drawn on the Salinas branch of the Bank of America, with Lloyd Porter as payee and with Archibald Porter as maker. It was endorsed by Lloyd

Porter. Defendant showed Fratini his driver's license and stated that Archibald Porter was his brother, and that the latter owed him the amount of the check for work defendant had performed for him. Thereupon Fratini cashed the check. Fratini took the check to the Salinas branch and found there was no account of the maker there. Thereupon he deposited it in the Monterey County Bank. Four days later the check came back endorsed "Unable to locate." About a half an hour before defendant presented the check to Fratini a girl employee of the drug store gave defendant, at his request, two blank checks on the Bank of America. About two days later defendant cashed with the Valley Distributing Company in Salinas a check for $8 drawn on the same bank, in which Lloyd Porter was the payee and endorser and Archibald Porter was the maker. When he cashed this check defendant said that Archibald Porter was his uncle. This check came back "Refer to maker." An official of the Salinas branch of the Bank of America testified that an examination of the Bank's records for approximately ten years past revealed no account in either the name of Lloyd or Archibald Porter. On October 21, defendant was taken into custody and after questioning and unsuccessful attempts by the police to locate the brother, defendant admitted that he wrote the check and signed a written statement to that effect. Lieutenant of Police Roberts, who testified he knew defendant's handwriting, stated that the signature "Archibald Porter" was in defendant's handwriting. At the trial, defendant admitted cashing the check, but claimed that it was given him by his brother, and that in cashing it he had no intention of defrauding anyone, pointing out that he had given Fratini his true address, shown him his operator's license, and that, as he was on parole for a prior crime, he would not have taken the chance of committing a crime. He stated that he was unable to locate his brother. He also claimed that the oral and written statements made by him to the police were not freely or voluntarily given but given "under duress more or less." Several years back on a prior arrest he had received "some pretty rough treatment down there at the City Jail." This time the lieutenant of police shoved him on to a stool and told him when he signed the statement he could get up, and rather than take a beating defendant signed the statement. All of this was denied by the lieutenant and the other officers present. It is obvious that, again, the jury did not believe the defendant.

[2] At the time of his arrest, defendant offered to pay the check. The arresting officer did not communicate this fact to the complaining witness. Defendant contends that this is positive proof of his lack of intent. Of course, offer of restitution or restitution itself is no defense to a prosecution under section 476a of the Penal Code (People v. Weaver, 96 Cal.App. 1, 274 P. 361), nor for that matter is it necessary to show that the victim actually was defrauded. People v. Sherman, 100 Cal.App. 587, 280 P. 708. The effect of this offer to repay, as well as the other testimony of defendant on the question of intent, was a matter for jury determination. "In the case of People v. Walker, 15 Cal.App. 400, 114 P. 1009, the court said that the intent with which a check is 'deposited' was a question exclusively for the jury; and the intent with which a person does an act may be inferred from all the surrounding circumstances." Ex parte Shackleford, 64 Cal.App. 78, 81, 220 P. 430, 431.

2. Admission of Defendant's Statements.

[3] Defendant contends that they were not admissible because not freely and voluntarily made. As pointed out above, there was a conflict in the testimony and it was for the jury to resolve this conflict, which they did. The court fully instructed the jury on what constituted "free and voluntary" and even on the difference between admissions and confessions.

3. Testimony on Handwriting.

[4] On cross-examination of Lieutenant Roberts, defendant asked Roberts if he was

a handwriting expert. Roberts replied, "I wouldn't say a handwriting expert, no." Then the following occurred:

"By Mr. Porter: Q. You wouldn't be qualified then to pass on that that was definitely the defendant's handwriting? A. I don't believe I was ever asked to do that.

By the Court: Q. But you saw his handwriting a great many times, is that right? A. Right.

Q. And in your opinion, it is his handwriting? A. Yes.

Q. And you told him so at the time? A. Right.

Q. Have you changed your mind about it at all? A. No."

Defendant contends that by this action the court told the jury that Roberts was a handwriting expert. The action of the court is not subject to such construction. The court was merely asking, as it had a right to do, for the opinion of one who had seen the handwriting many times. Section 1870, subdivision 9, of the Code of Civil Procedure provides: "The opinion of a witness respecting the * * * handwriting of a person, when he has knowledge of the * * * handwriting" may be given. See People v. Bidleman, 104 Cal. 608, 38 P. 502.

Defendant now contends that Roberts' testimony as to his familiarity with defendant's handwriting was false. However, he did not question Roberts' statement at the trial and there is no evidence in the record upon which such claim of falsity can be based.

4. Refusal to Appoint Expert.

[5] Defendant, testifying in his own behalf, after stating that he had never denied cashing the check but had denied cashing it with intent to defraud, stated: "And what I would like more that anything else is to have the handwriting expert to examine that check and that hasn't been done by the prosecution." He then continued his testimony without pause. This is the only intimation at the trial that he desired a handwriting expert appointed. He now contends that this constituted a demand that the court have the check analyzed by a handwriting expert. It is plain that it did not constitute such a demand. Moreover, assuming it to be a demand, the language of the court in People v. Conte, 17 Cal.App. 771, 122 P. 450, 457, concerning a demand by defendant that a doctor who testified as to a rock used as a murder weapon but which no longer had visible blood stains on it, be required to analyze the rock for blood, is applicable here, 17 Cal.App. page 784, 122 P. page 455: "* * * we are familiar with no law requiring the court under such circumstances to order the services of an expert witness in behalf of a defendant to be compensated for out of the public funds."

5. Lie Detector.

[6] The same thing is true concerning a request made by defendant in chambers at the conclusion of the testimony that the court submit him to a lie detector test. In People v. Wochnick, 98 Cal.App.2d 124, 219 P.2d 70, after an exhaustive review of the cases on the subject of lie detector tests as evidence, the court said, 98 Cal. App.2d page 128, 219 P.2d page 72: "We are in accord with the views expressed in the foregoing cases that 'the systolic blood pressure deception test for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory.'" As the result of such a test would not have been admissible in evidence, the defendant could not have been benefitted by such a test, even if the court had the power to order it.

6. Instructions.

[7] Defendant states that the court "did unlawfully misinstruct the jury." The only specification of error is defendant's claim that the court instructed the jury on section 476 as well as 476a of the Penal Code. The court at no time instructed concerning the elements of the offense set forth in section 476 (uttering a fictitious check). It fully and fairly instructed on the elements of the offense set forth in section 476a, emphasizing the fact that for a conviction it was necessary

that the intent to defraud be proved. The court did say, "It is no defense to the prosecution for making and uttering a *fictitious* check that after the check was passed, the defendant attempted to make restitution." (Emphasis added.) This sole reference to "fictitious check" did not constitute a charge under section 476, and if error, it was harmless, as it is obvious that the court was referring to the matter of restitution rather than to the type of crime. Defendant could be convicted of violating section 476a if the jury found the intent to defraud, whether it found that he actually wrote the maker's signature on the check, or passed it knowing that the maker (his brother) had no funds in or credit with the bank. We can find no error in the instructions.

Recent Developments.

Since defendant's conviction and this appeal was perfected, defendant has attempted to file with this court a letter which would indicate that the bank official was in error in testifying that defendant at no time had an account with the bank. This letter, of course, has no place in the record. Moreover, it is immaterial. It showed that defendant closed out his bank account on January 1, 1945. At the trial, defendant did not contend that he still had a bank account at the time he cashed the check. Moreover, he contended that the check was drawn by his brother on his brother's bank account. There was no such account.

7. Prejudice of the Court.

[8] Defendant contends that he was tried by a prejudiced court. The only specification concerns the following incident: Defendant, while testifying, stated to the prosecuting attorney, Mr. Barron, that the latter had offered to "drop this charge to a misdemeanor for a County Jail sentence. Was that true?" Barron replied, "That was on His Honor's suggestion I went over to see him." Then the following occurred:

"The Witness: Do you think for one minute that if I had of given that check there I would jeopardize myself to face 28 years which I could have got out for three or four months here maybe, or a year! Is that—does that sound reasonable?

"Mr. Barron: Your Honor—

"The Court: Well this is kind of a difficult situation.

"Mr. Barron: It is Your Honor.

"By the Court: Q. Of course, you knew, as a matter of fact, if you were convicted of a misdemeanor that your parole would be revoked and you would have to go back to prison, didn't you, when you made that statement that you wouldn't plead guilty? A. Yes, Your Honor, you want to remember that I could have plead guilty for that and when back on a minor violation, why, or just—

"The Court: Well, you have answered the question.

"The Witness: That—I have answered the question partly.

"The Court: You can argue that question to the jury. * * *"

Then Mr. Barron wanted to testify to the conversation he had with defendant. The court refused to permit him to do so. The action of the court shows no prejudice.

The judgment and order appealed from are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

36 Cal.2d 125

SIMPSON v. HITE.

L. A. 21678.

Supreme Court of California, in Bank.

Sept. 29, 1950.

Rehearing Denied Oct. 26, 1950.

Original proceeding by J. E. Simpson against Benjamin S. Hite, Registrar of Voters of the County of Los Angeles, for a peremptory writ of mandate directing respondent to omit from the ballot a proposed initiative ordinance providing for repeal of resolutions of Los Angeles County Board of Supervisors which designated, and pursuant to which the county had acquired, a site for municipal and superior courts buildings and for designation of a different site. The Supreme Court, Schauer, J., held that proposed initiative ordinance dealt with administrative matters which under state law were committed solely to the Board of Supervisors and that therefore ordinance was not within the initiative function.

Peremptory writ of mandate awarded.

1. Counties ⇐55, 105(2)
Mandamus ⇐74(1)

Proposed initiative ordinance providing for repeal of resolutions of Los Angeles County Board of Supervisors which designated, and pursuant to which county had acquired, site for municipal and superior courts buildings and entered into architectural and construction contracts and for designation of a different site dealt with administrative matters which under state law were committed solely to the board and therefore ordinance was not within the initiative function and its omission from ballot should be directed by peremptory writ of mandate. Gen.Laws, Acts 5211c, 5238, § 22; Government Code, § 25351; Code Civ. Proc. § 144.

2. Courts ⇐72

County boards of supervisors are required by state law to provide suitable quarters for superior and municipal courts, and what is required to constitute suitable quarters is a matter for the board to determine. Gen.Laws, Act 5238, § 22; Code Civ.Proc. § 144; Government Code, § 25351.

3. Counties ⇐55

The powers of initiative and referendum in Los Angeles County apply only to acts which are legislative in character and not to executive or administrative acts.

4. Courts ⇐72

Determining what is suitable as quarters for municipal and superior courts pursuant to duty imposed by state law upon county board of supervisors to provide suitable quarters for such courts necessarily includes the selection of a site for buildings to house such courts, and ascertainment of the extent and character of accommodations which such buildings must contain. Gen. Laws Act, 5238, § 22; Code Civ.Proc. § 144; Government Code, § 25351.

5. Courts ⇐72

Prescribing the policy that county board of supervisors shall provide suitable quarters for municipal and superior courts was the "legislative act" of the state, while carrying out such policy by performing the duty of providing such quarters is an "administrative function" delegated by state to county board. Gen.Laws, Act 5238, § 22; Code Civ.Proc. § 144; Government Code, § 25351.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Administrative Function" and "Legislative Act".

6. Counties ⇐55

Where a series of acts by county board of supervisors are all directed to the end of carrying out a duty imposed on board by state law and repeal of one or more of the steps theretofore taken by the board is sought by means of an initiative ordinance, the acts sought to be repealed are to be judged as legislative or administrative, and therefore within the initiative function, in their true relationship as a part of the entire process, and not as isolated acts.

7. Counties ⇐55

The initiative or referendum is not applicable where the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power the practical application of which is essential.

8. Counties ⇐37

The procedure prescribed by state Conservation and Planning Act must be followed by county board of supervisors when it is proposed to change the site of a public building. Gen.Laws, Act 5211c, §§ 10, 35, 44, 61, 70–74.

Loeb & Loeb, Herman F. Selvin and Dana Latham, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, A. Curtis Smith, Assistant County Counsel, Los Angeles, and Clarence H. Langstaff, Deputy County Counsel, Sacramento, for respondent.

Morrow & Trippet, Fred M. Cross, Oscar A. Trippet, F. B. Yoakum, Jr., Bailie, Turner & Lake, Robert Baker, Bodkin, Breslin & Luddy and Henry I. Dockweiler, Los Angeles, Louis T. Fletcher, So. Pasadena, Freston & Files, Haas & Home, Elmer H. Howlett and Clifford E. Hughes, Los Angeles, F. A. Knight, Long Beach, Kenyon F. Lee, L. H. Phillips, John W. Preston, Stanton, Stanton & Wellborne, Irving Walker, Westover & Smith, Mabel Walker Willebrandt, Emmet H. Wilson, Jr., J. Marion Wright and E. R. Young, Los Angeles, for real parties in interest.

SCHAUER, Justice.

Petitioner asks that this court by mandate direct respondent, registrar of voters of Los Angeles County, to omit a proposed initiative ordinance from the ballot to be used at the general election to be held November 7, 1950. The principal provisions of the proposed ordinance, in substance and effect, are (1) the repeal of resolutions of the Los Angeles County Board of Supervisors which designate, and pursuant to which the county has acquired, a site for municipal and superior courts buildings; (2) a declaration of the will of the people that such site be used for parking or some other useful purpose; and (3) a designation of another site for a building or buildings to house the courts. It appears also that as a necessary incident of the foregoing provisions, the ordinance would require the withdrawal by the county from, or abandonment of, contracts heretofore made for, or as preliminary to, the construction of the courts buildings on the already acquired site.

[1] Respondent has joined issue by demurrer to the petition, and the proponents[1] of the proposed initiative ordinance have filed a demurrer and answer. Upon the facts pleaded, as admitted by the demurrers and by the answer, we have concluded that the proposed ordinance deals with administrative matters which, under state law, are committed solely to the board of supervisors; therefore, the ordinance is not within the initiative function and the peremptory writ should issue.

[2] By state law[2] boards of supervisors are required to provide "suitable quar-

1. The proponents of the initiative ordinance allege that they constitute the "Los Angeles County Courthouse Committee [and that it] is an unincorporated association of twenty-three civic leaders, business men and lawyers of the County of Los Angeles, * * * the majority of whom are citizens * * * and registered voters of said county; said Committee was organized in 1949 for the purpose of obtaining for the County of Los Angeles a single courthouse site * * * for the future construction thereon of a single building or adjacent and connecting buildings, to house the Superior and Municipal Courts and the County Law Library, in lieu of three separate, scattered sites theretofore selected by the Board of Supervisors, for the construction thereon of three separate buildings for said functions." The committee admits the prior acquisition by the county of the site selected by the board of supervisors and "admits that all of the site selected by the proposed Ordinance is privately owned except for a strip from Broadway to Hill Street with a frontage of about fifty six (56) feet immediately north of the law library property," which "law library property," it is also admitted, "the Board of Law Library Trustees of the County of Los Angeles has held title to" since July 20, 1950, and which was acquired "for the purpose of constructing thereon a separate building for * * * [a] County law library" at a cost (for the land) of "about $580,333."

2. See post, 222 P.2d 228.

ters" for superior and municipal courts. Such state law leaves to the boards of supervisors to determine, in each case, what is required to constitute "suitable quarters." It is undisputed that suitable quarters for such courts are wanting and are needed in Los Angeles County, and that the board of supervisors has so determined. Some three years prior to the filing of the proposed initiative ordinance, the board of supervisors decided upon an area north of Temple Street, bounded on the east by North Broadway, as a site for a municipal courts building and a superior courts building. On June 26, 1947, the Los Angeles city planning commission duly approved the site proposed by the supervisors for the municipal courts building and on August 26, 1948, the commission duly approved the site for the superior courts building.[3] Between October 14, 1947, and July 6, 1948, the board of supervisors adopted a series of resolutions designating and directing acquisition of the area north of Temple Street as a site for the courts buildings. Pursuant to these resolutions, and in performance of the duty enjoined by the state law, the property was acquired at a cost of $1,550,085.61. The board appropriated and allocated funds aggregating $10,699,700 for construction of the buildings on the acquired site; of such funds it has spent $54,517.62 budgeted under the Accumulative Capital Outlay Act (Stats.1937, ch. 717; Stats.1949, ch. 14, Gen.Laws, Act 8496a) "for the purpose of constructing" the superior courts building, and $484,883.98 appropriated from general funds "for purposes directly connected with the construction of said courts building." It employed architects who prepared plans for the buildings; it has paid the architects $170,654.40 for their services in respect to the municipal courts building and $507,305.34 for their services in respect to the superior courts building; further fees which it has agreed to pay the architects are payable as construction of the buildings progresses. (The possible liability of the county for further fees or damages in the event that the partially completed project is abandoned is as yet undetermined.) After public hearing the city planning commission duly approved the extent of such buildings and their situation on the area selected as a site. The board of supervisors called for bids for construction of the superior courts building and entered into a contract with the board of the Retirement Association[4] of the County of Los Angeles whereby the latter agreed to erect the municipal courts building and to lease it to the county. (The amount of liability, if any, on this contract in the event of withdrawal or abandonment by the county is another undetermined matter.)

At this stage in the carrying out of the project, on August 25, 1950, the initiative petition now in question was filed with the respondent. The area designated by the proposed initiative ordinance as a substitute site for the location of any new courthouse or courts building is south of Temple Street, bounded on the east by North Broadway, immediately across Temple Street from a portion of the site designated and acquired by the board of supervisors.

3. See discussion of the California Conservation and Planning Act (Deering's Gen.Laws, Act 5211c), post, 222 P.2d 230. The City of Los Angeles has a comprehensive zoning plan (Ordinance 90500) and the County of Los Angeles has a master plan (Ordinance 1494).

4. The county retirement association, which consists of all county employes (Gov.Code, § 31552), is managed by a retirement board of five members (Gov. Code, & 31520). The lease agreement between the Los Angeles retirement board and the county of Los Angeles was entered into under a state law which permits investment of funds of a retirement association in "[r]eal property or improvements * * * acquired for sale or lease to the county in which the retirement system is established" (Gov. Code, § 31595, par. (e)). Such an investment requires unanimous approval by the retirement board and approval of four-fifths of the board of supervisors. (Gov.Code § 31601). It also requires that the property and the plans of the proposed building be examined by an appraiser appointed by the retirement board and board of supervisors; the appraiser must determine whether the investment will return the statutorily permitted rate of interest. (Gov.Code, § 31603).

It is observed that the act of the board of supervisors in determining that "suitable quarters" for the superior and municipal courts were wanting and were needed, and that the provision of such quarters entailed the procurement of a suitable site and the construction of adequate buildings, does not appear to have been challenged by referendum or otherwise, and is not attacked by the proposed initiative ordinance. It is only the designation of the site which has already been acquired, and, perforce incidentally, the making of the architectural and construction contracts which are extant, that are attacked. Under the circumstances of this case, are these matters within the reach of the initiative?

[3] The powers of initiative and referendum in Los Angeles County apply only to acts which are legislative in character, and not to executive or administrative acts. (See Housing Authority v. Superior Court (1950), 35 Cal.2d 550, 219 P.2d 457; Essick v. City of Los Angeles (1950), 34 Cal.2d 614, 624, 625, 213 P.2d 492; note, 122 A.L.R. 769.) The state legislature has declared the legislative policy applicable here: that the board of supervisors shall provide suitable quarters for the municipal and superior courts. (Deering's Gen.Laws, Act 5238, § 22, Stats.1947, ch. 1101 § 1 ["The board of supervisors shall provide suitable quarters for the municipal courts"]; Code Civ. Proc., § 144 ["If suitable rooms for holding the superior courts * * * are not provided in any county by the supervisors thereof, * * * the courts * * * may direct the sheriff of the county to provide such rooms"]; Ex parte Widber (1891), 91 Cal. 367, 369, 27 P. 733 ["It will be conceded upon all sides that it is the duty of the board of supervisors to prepare suitable rooms * * * for the use of the judges of the superior courts"]; Gov. Code, § 25351, Stats.1947, ch. 424, § 1 ["The board may construct, lease, build * * * or repair buildings for a * * * courthouse * * * and such other public buildings as are necessary to carry out the work of the county government"].)

[4, 5] It seems obvious beyond the reach of serious argument that the board of supervisors cannot perform the duty of providing "suitable quarters" for the courts without selecting and designating the sites of the buildings to house the courts, as well as the character and size of the buildings. The determination of what is "suitable" as quarters for the courts necessarily includes the selection of a site as well as ascertainment of the extent and character of accommodations which a building or buildings must contain. Prescribing the policy and duty was the legislative act of the state; carrying out the policy by performing the duty is an administrative function delegated by the state to the local governing body, the board of supervisors. "The governing body of the [local political subdivision] * * * by its resolution did not make a law but thereby acted in an executive or administrative capacity as an instrumentality of the state to make operative the provisions of a state law already existing." (State v. Butler (1945), 145 Neb. 638, 17 N.W.2d 683, 690; see also Kleiber v. City and County of San Francisco (1941), 18 Cal.2d 718, 725, 117 P.2d 657; Housing Authority v. Superior Court (1950), supra, 35 Cal.2d 550, 219 P.2d 457; State v. Salome (1949), 167 Kan. 766, 208 P.2d 198, 208; Seaton v. Lackey (1944), 298 Ky. 188, 182 S.W.2d 336, 339; Dickson v. Hardy (1932), La.App., 144 So. 519, 526.)

Here the state has acted to establish the basic policy and has vested the responsibility for carrying out that policy in a board of supervisors. The steps which the board has taken to carry out the state policy—the determination that for "suitable quarters" it was necessary or expedient to erect new buildings rather than to continue to use existing buildings, the fixing of sites for the buildings to make them convenient for the purpose to be served, the determination of the size of the buildings, the arrangement of space therein to provide court rooms, jury rooms, judges' chambers and all the other details which enter into implementing the legislative act of the state—viewed as parts of the entire project, are all inextricably interwoven and related. We are satisfied that, regardless of what might be the character of a particular step in another context, such steps appear here, in the respects in which they are sought to be interrupted and repealed or controlled

by the initiative ordinance, to be predominantly and controllingly administrative in character.

The proponents of the initiative measure rely upon the following cases as establishing that the selection of the sites of the courts buildings is a legislative matter: Hopping v. Council of City of Richmond (1915), 170 Cal. 605, 150 P. 977; Hopping v. Council of City of Richmond (1915), 170 Cal. 618, 150 P. 982; Hill v. Board of Supervisors (1917), 176 Cal. 84, 167 P. 514; Burdick v. City of San Diego (1938), 29 Cal.App.2d 565, 84 P.2d 1064; Knowlton v. Hezmalhalch (1939), 32 Cal.App.2d 419, 89 P.2d 1109. However, in none of those cases was the court purporting to deal with a situation such as the one at bar, where the legislative policy has been expressly fixed by the state itself, and the execution of that policy has been specifically imposed by the state law on the board of supervisors as an administrative function. It would be beyond the powers of a board of supervisors to repeal or amend the state-declared policy; likewise, it is beyond the powers of the electorate of Los Angeles County by initiative procedure to repeal or amend such state policy. The board cannot escape the duty imposed upon it by the state through the medium of declining to act; neither can the electorate of the county take from the board the administrative functions delegated to it by the state. The situation is similar to that in Riedman v. Brison (1933), 217 Cal. 383, 387, 18 P.2d 947. There the state legislature, by general act, provided that the governing body of a city might submit to the electors of the city the proposition of withdrawing from a water district. This court denied a petition for mandate to compel the city clerk to place on the ballot an initiative proposal directing the council to submit such question to the electors, for "the legislature, in its general act, * * * designated the city council * * * as the state agency which may initiate proceedings for the withdrawal of the municipality from the Metropolitan Water District. * * * The provisions of the charter of the city relating to the initiative apply only to its legislative acts which, unless otherwise authorized, can relate only to municipal affairs, of which this is not one. (Hopping v. Council of City of Richmond, 170 Cal. 605, 611, 150 P. 977.)"

The Hopping (supra, 170 Cal. 605, 150 P. 977; 170 Cal. 618, 150 P. 982), Burdick (supra, 29 Cal.App.2d 565, 84 P.2d 1064) and Knowlton (supra, 32 Cal.App.2d 419, 89 P.2d 1109) cases concerned the use of initiative or referendum to control the essentially municipal affairs of erection of municipal buildings by cities. In the Hill case (supra, 176 Cal. 84, 167 P. 514), the act of the board of supervisors which was involved was a "resolution declaring the necessity for the construction of a new hall of records." The decision of the court that such resolution was subject to referendum was based on its view that: "That a resolution such as is here under consideration is legislative in character is conclusively established by the decision in the Hopping case." But, as pointed out in the Hopping case (p. 611 of 170 Cal., 150 P. 977), "To allow it [the referendum] to be invoked to annul or delay executive conduct would destroy the efficiency necessary to the successful administration of the business affairs of a city. In many cases it would entirely prevent the exercise of the executive power necessary to carry out the acts determined upon by the legislative department." It is manifest from reading the Hopping decision that the basic elements of the acts of the city council which were held to be most material as fixing the character of its acts as legislative are not here involved in the acts of the supervisors; on the contrary those elements here were in large part resolved by the state legislature when it determined the public purpose and policy of requiring the board of supervisors to furnish "suitable quarters" for the courts. Certainly the court in the Hopping case did not consider the question here involved, i.e., whether the electorate of a county, in a case such as this, may by the initiative interrupt and interfere with the performance by the supervisors of their state-imposed administrative duty to furnish suitable quarters for state courts. Insofar as any language used in the Hill case may imply that the acts of the board of supervisors with which we are here concerned are

legislative and subject to the initiative, it is clearly contrary to the practical and efficient operation of the state-imposed plan of government, tends to defeat the state policy, and should be, and is, overruled. Nickerson v. San Bernardino (1918), 179 Cal. 518, 522, 177 P. 465, and Jardine v. City of Pasadena (1926), 199 Cal. 64, 71, 248 P. 225, 48 A.L.R. 509, are not in point. In those cases this court refused injunction to control the local governing body's power in connection with providing a site for a public hospital. The cases refer to that power as "legislative and discretionary," but they are not concerned with, and make no attempt to draw, a distinction between legislative and administrative action.

[6] As pointed out in Newsom v. Board of Supervisors (1928), 205 Cal. 262, 269, 270 P. 676, "It has been recognized from an early date in the history of the state that in the exercise of their functions under particular statutes 'the board of supervisors is a special tribunal, with mixed powers—administrative, legislative and judicial' * * *." Where a series of acts by a board are all directed to the end of carrying out a duty imposed on the board by the law of the state, and where it is sought by a citizens' committee of the county to interrupt the process through repeal by the initiative of one or more of the steps theretofore taken by the board, the acts sought to be repealed are to be judged, as legislative or administrative, not as isolated acts but in their true relationship as a part of the entire project.

[7] If the selection of sites of courts buildings were subject to referendum, the electors could nullify every determination of the board of supervisors to erect buildings for the courts and thereby nullify the legislative policy and prevent execution of the duty imposed upon the board of supervisors. Furthermore, a small group, or various small groups, of electors, by repeated initiative proposals for a change of site, could interfere with the supervisors' attempts to furnish quarters for the courts at any time, even when the period for referendum had passed. Thus, such small group or groups of electors could not merely place the board of supervisors in a strait jacket (see Housing Authority v. Superior Court (1950), supra, 35 Cal.2d 550, 219 P.2d 457) but could interfere with the functioning of the courts by depriving them of the quarters which the supervisors were bound to, and in good faith sought to, furnish. This application of the initiative would be "inappropriate and impossible of operation" and would repeal "provisions of * * * state law vesting administrative and discretionary powers in the Board of Supervisors" (Newsom v. Board of Supervisors (1928), supra, 205 Cal. 262, 269, 272, 270 P. 676, which held that the initiative method cannot be employed where compliance with the requirements of the general law calls for the exercise of the mixed administrative, legislative and judicial powers of the local legislative body and its various functions are so intermingled as to render the initiative entirely inconsistent and unworkable). The initiative or referendum is not applicable where "the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential * * *." (Chase v. Kalber (1915), 28 Cal.App. 561, 569-570, 153 P. 397 [improvement of city streets]; see Hunt v. Mayor & Council of Riverside (1948), 31 Cal.2d 619, 628–630, 191 P.2d 426.) Similarly, where a state act specifies the steps to be taken by a local body in enacting legislation, an initiative measure cannot be validly adopted unless such steps are taken. (Hurst v. City of Burlingame (1929), 207 Cal. 134, 140, 277 P. 308 [zoning, lack of notice and hearing]; Galvin v. Board of Supervisors (1925), 195 Cal. 686, 696-698, 235 P. 450 [toll bridge franchise, lack of hearing, notice to state engineer, etc.].)

It is to be observed also that difficulties resulting from the use of the initiative here proposed are apparent from a consideration of the requirements of the state Conservation and Planning Act (Deering's Gen.Laws, Act 5211c). That act requires that every city and every county adopt a master plan for the development of the area. (§ 10.) The plan may include,

among other things, the locations and arrangement of public buildings. (§ 44.) The master plan is to be prepared and adopted by the planning commission of the political subdivision. (§ 35.) Before adopting or substantially amending the plan, the commission must hold a public hearing thereon. (§ 61.) The legislative body of the city or county shall adopt such parts of the master plan "as may practicably be applied to the development of the city or county for a reasonable period of time next ensuing" (§ 70) and shall "upon recommendation of the planning commission" determine reasonable means for putting it into effect (§ 71). Before recommending the plan or any amendment to the legislative body, the planning commission shall hold at least two public hearings, and before adopting the plan the legislative body shall hold at least one public hearing. (§ 72.) The legislative body shall not change the plan without referring the proposed change to the planning commission for a report (§ 72) and the planning commission must hold public hearings on such proposed changes (§ 74). The legislative body shall not construct or authorize a public building in an area for which the plan has been adopted without submitting the location and character of such building to the planning commission for a report, and the legislative body can overrule the commission's disapproval of a proposed public building only by a two-thirds vote. (§ 73.)

[8] The above prescribed procedure must be followed by the board of supervisors when it is proposed to change the site of a public building. (See Newsom v. Board of Supervisors (1928), supra, 205 Cal. 262, 270, 270 P. 676; see also Johnston v. Board of Supervisors (1947), 31 Cal.2d 66, 74, 187 P.2d 686.) There is no machinery provided for the electors as a whole to comply with the planning commission procedure, yet the law requiring the master plan, and compliance with it, makes no exception in favor of initiative-fixed sites. Thus the board would encounter further difficulty and delay if it were required to accept, and seek to fit into the master plan, as presumptively would be necessary in order to secure planning commission approval of, changes proposed from time to time by the electors in the site of courts buildings. And this difficulty and delay would constitute not merely an inconvenience to the supervisors, and a continuing check on their efforts to house the courts in accordance with the legislative direction of the state, but also, since the need for "suitable" court quarters is determined and unchallenged, it could result in continuing hindrance of the more efficient functioning of the courts.

All material contentions advanced by the proponents of the initiative ordinance are necessarily disposed of by our holding that such ordinance deals with matters which are not within the initiative function.

For the reasons above stated, it is ordered that the peremptory writ of mandate issue forthwith directing the respondent to omit the proposed initiative ordinance from the ballot.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

Rehearing denied; CARTER, J., dissenting.



36 Cal.2d 78

PETROVICH v. CITY OF ARCADIA et al.

L. A. 20761.

Supreme Court of California, in Bank.

Sept. 21, 1950.

Rehearing Denied Oct. 19, 1950.

Action by Martin Petrovich, etc., against the City of Arcadia and others for rescission and cancellation of a bid to construct a sewer system for defendant city and for exoneration of surety on bid bond, wherein the City of Arcadia filed a cross-complaint against plaintiff and the Great American Indemnity Company, as surety, seeking to recover full amount of bid bond. The Superior Court, Los Angeles County, Frederick F. Houser, J., entered judgment against each of the parties on their respective pleadings and defendants appealed from the judgment adverse to them.

The Supreme Court, Shenk, J., held that bid bond only provided security for actual damage to city resulting from successful bidder's refusal to enter into contract and not for forfeiture of bond as a penalty or as liquidated damages and that recovery was properly denied in absence of showing of actual damage.

Judgment affirmed.

Carter and Spence, JJ., dissented.

Prior opinion, 205 P.2d 41.

1. Municipal corporations ⇐327

Recognition by subsequent legislation of the power of cities of the sixth class theretofore to provide for bid security and forfeiture thereof as a penalty or liquidated damages upon failure of successful bidder to enter into contract could not be deemed an exercise of such power for a sixth class city which had theretofore invited bids for construction of sewer system without providing for forfeiture of bid bond. Government Code, §§ 37900–37907, 37930–37935, St.1949; p. 1187, § 4.

2. Municipal corporations ⇐333

Where invitation by sixth class city for bids for construction of sewer system and bid form furnished by city required cashier's check or bond as a guarantee of entry into contract and provided that in case of failure to do so surety's liability to city would be established and deposit of bid, security and forfeiture thereof were not required by any statute applicable to sixth class cities, bid bond merely provided security to the extent of sum stated in bond for actual loss or damage to city resulting from bidder's refusal to enter into contract and did not provide for forfeiture of full sum of bond to city as a penalty or liquidated damages. Civ.Code, §§ 1442, 1670, 1671.

3. Contracts ⇐318

Forfeitures in the nature of a penalty are not favored and language must be so construed as to avoid a forfeiture, if that is possible.

4. Municipal corporations ⇐333

Bid invitation and executed bid for construction of city sewer system should not be held to extend the hazards of bidder and surety on his bid bond beyond the fair meaning of the language used, where such language was of the city's own choosing.

5. Municipal corporations ⇐250, 253

Municipalities in dealings with private persons are not exempt from the rules requiring construction of language so as to avoid a forfeiture if possible and so as not to extend the liability of other party to contract beyond the fair meaning of language used in contract where such language was of the municipality's own choosing.

6. Damages ⇐79(1)

To enforce a contract for liquidated damages, even in favor of a municipal corporation, under statutory exception to general rule as to invalidity of such contracts, it must appear from the nature of the case that it would be impracticable or extremely difficult to fix the actual damages. Civ. Code, §§ 1670, 1671.

7. Damages ⇐157(3)

Whether a case comes within statutory exception to general rule as to invalidity of contracts for liquidated damages presents a question of fact which must be alleged and proved. Civ.Code, §§ 1670, 1671.

8. Municipal corporations ⇐333

Where city sought to recover full amount of bid bond as liquidated damages for successful bidder's refusal to enter into contract, finding that it was not impracticable or extremely difficult to fix amount of damage or loss to city by reason of such refusal was supported by absence of specific evidence that nature of case made it difficult to ascertain such loss or damage and by reasonable inference from the facts that such difficulty did not exist. Civ.Code, §§ 1670, 1671.

9. Municipal corporations ⇐333

Recovery on bid bond given as a guarantee that bidder upon acceptance of bid would enter into contract and furnish performance bond was properly denied in absence of showing of actual damage to city resulting from successful bidder's refusal to enter into contract. Civ.Code, §§ 1442, 1670, 1671.

10. Appeal and error ⊂=843(2)

Where agreement in connection with bids for construction of city sewer system merely required bidder to furnish security for actual damage to city resulting from failure to enter into contract upon acceptance of bid, whether city in absence of statute had power to provide by contract for a forfeiture or liquidated damages for failure to enter into contract became an academic matter which need not be determined, particularly where existence of such power had subsequently been recognized by statute. Government Code, § 37935.

T. Guy Cornyn, Arcadia, Burke, Marshall & Burke and Daniel G. Marshall, all of Los Angeles, for appellant.

Stephen Monteleone, Los Angeles, for respondents.

SHENK, Justice.

The plaintiff brought this action against the city of Arcadia for the rescission and cancellation of his bid to construct sanitary improvements in that city, and for the exoneration of the surety on the bid bond. The city cross-complained joining the surety as a defendant, and prayed for a forfeiture of the bond and for judgment in the full amount thereof. Judgment went against each of the parties on their respective pleadings. The city has appealed from the judgment adverse to it.

In the early part of 1946 the city was duly authorized by popular vote to incur a bonded indebtedness of $350,000 to construct sanitary improvements. The bonds were sold and the proceeds provided a fund in the stated amount for the purpose intended.

On August 6, 1946, the city invited bids for the construction of sewer lines and works in accordance with specifications on file, each bid to be accompanied by a cashier's check or a bond in at least ten per cent of the amount of the bid. On August 20th, 1946, the plaintiff filed a bid of $347,129.40 and a surety bond in the sum of $37,500. On that date the bids were opened, and the plaintiff's bid was found to be the lowest. Five other bids ranged in amounts from $416,188.75 to $556,480.80. On August 22, and before acceptance, the plaintiff delivered to the city council a written request for permission to withdraw his bid because the cost of certain "wyes" in the pipe lines amounting to $55,448.06 had been inadvertently omitted, and the inclusion of that item would have brought the amount of the bid to $402,577.46. Permission to withdraw or amend the bid was refused. The plaintiff's bid was accepted and he was requested to sign a contract to perform the work. This he failed to do and commenced the action for the cancellation of the bid and the bid bond. The judgment on the issues thus raised was based on the trial court's finding that there was no inadvertent error in the computation of the plaintiff's bid. Since the plaintiff has not appealed, any question as to the correctness of that finding is now foreclosed.

The only questions for determination concern the correctness of the court's findings on the issues tendered by the cross-complaint.

The invitation for bids required that each bid must be accompanied by either a cashier's check or a bond in at least ten per cent of the total amount of the bid as a guarantee that on acceptance the bidder would enter into the contract and furnish a faithful performance bond.

The plaintiff's bid was on a form furnished by the city and contained the following language with ink lines drawn through the portions indicated: "A* ~~cashiers check properly made payable to the City of Arcadia~~* a Bid Bond in favor of the City of Arcadia for Thirty Seven Thousand Five Hundred dollars ($37,500.00), which amount is not less than ten percent (10%) of the total amount of this proposal, is attached hereto and is given as a guarantee that the undersigned will execute the Agreement and furnish the required bonds if awarded the contract and in case of failure to do so within the time provided *~~said check shall be forfeited to the City~~* Surety's liability to the City will be established * * *.* (Strike out inapplicable phrase.)"

The bid bond in the sum of $37,500 was in the usual form with the condition stated that upon the acceptance of an award made to the plaintiff and his entering into a contract and giving the required performance bonds, the bid bond obligation should be null and void, otherwise to remain in full force and effect.

After the plaintiff refused to sign the contract, the city adopted a resolution to the effect that the plaintiff's bid bond was forfeited. The cross-complaint was based on the assumption that the language of the invitation for bids and of the bid provided for forfeiture of the bid bond in the event the plaintiff refused to execute the contract upon the acceptance of his bid. At the close of the trial the city asked and was granted leave to amend the cross-complaint by adding an allegation that from the nature of the case it was impracticable and extremely difficult to fix the amount of damage or loss to the city by reason of the plaintiff's failure to perform. No further evidence was introduced. There was no testimony offered indicating that the nature of the case made it difficult to fix the amount of damage; nor was there any evidence of actual damage to the city. The city did not readvertise for bids and the advertised project was abandoned. Subsequently under other plans and specifications another contract was let.

The city relied on the language of the instruments in evidence and the plaintiff's noncompliance to establish a case either of forfeiture of the bond, or for liquidated damages under the exception to the general invalidity of agreements therefor. Sections 1670, 1671, Civil Code. The trial court determined that the instruments relied upon did not provide for a forfeiture of the bond; that the language applicable to a bid bond was that of guarantee only; and that there was no intention or agreement that the penal sum should be treated as liquidated damages. The court found that it was not impracticable or extremely difficult to fix the amount of damage or loss to the city by the plaintiff's failure to enter into the contract, and that the city suffered no actual damage. The city questions the foregoing determination and findings, and the judgment based thereon.

At the time here involved there was no statute applicable to cities of the sixth class, of which the City of Arcadia is one, requiring the deposit of bid security and forfeiture thereof under such a contract. The legislature enacted the requirement in 1949. Prior to that year provisions relating to public work contracts in fifth and sixth class cities were included in sections 777 and 874 of the Municipal Corporation Bill of 1883. Stats.1883, p. 93 as amended, Deering's Gen.Laws, Act 5233. In 1949 these provisions became sections 37900 to 37907, inclusive, of the Government Code. Stats. 1949, pp. 100, 165. At no time did they contain specific provision for bid security deposit and forfeiture. At the same session of the legislature sections 37930 to 37935, inclusive, applicable to cities of the sixth class only, were added to the Government Code. Stats.1949, p. 1186, sec. 3 of Act. It was there provided that security, in the form of cash, cashier's check, certified check, or surety bond, in at least ten per cent of the amount should accompany the bid, and that if the successful bidder should fail to execute the contract the amount of the bidder's security should be forfeited to the city (with an exception not necessary to be noticed). Thus in cases such as this the legislature has now made mandatory a deposit of security and forfeiture when the successful bidder has inexcusably refused to execute the contract. In adopting those provisions it was declared in section 4 that the legislative intention was not to change the existing law, but rather by such adoption to declare that under prior section 874 "cities of the sixth class always have had power * * * to require a bid bond, cashier's check or other security, and the power thereunder to declare the forfeiture thereof upon failure, neglect or refusal to enter into a contract awarded thereunder."

[1] The foregoing may be said to be a legislative recognition in 1949 of the power of cities of the sixth class theretofore to provide by other means what the legislature has now enacted, namely to make adequate provision for the forfeiture of required bid

security as a penalty or liquidated damages. But that recognition cannot also be deemed an exercise of the power for the city. In exercising the power the greater penalty must be declared in conjunction with the requirement for bid security deposit. Therefore assuming that the city might make the proper provision by the instruments involved, the question is whether it has done so. Where similar provisions, statutory or otherwise, have been brought into question the result has turned on whether the language declared the full sum forfeited either as a penalty or as liquidated damages. Here language to that effect in relation to the bond security is lacking.

Palo and Dodini v. City of Oakland, 79 Cal.App.2d 739, 180 P.2d 764, involved a provision of the Oakland City Charter requiring the deposit of a certified check with a bid and the forfeiture of the check in the event the successful bidder failed to execute the contract. It was held that, restricting the charter language to its most technical limits, as required by the established rule, the explicit and mandatory terms called for a forfeiture and prohibited any relief therefrom.

In Town of Mill Valley v. Massachusetts Bonding and Insurance Company, 68 Cal. App. 372, 229 P. 891, the bond forfeiture declaration of section 10 of the Improvement Act of 1911, Stats.1911, p. 730, was brought into question. That section required the deposit of either a certified check or a bond with the bid. The language of forfeiture read: "But if said bidder fails, neglects or refuses to enter into the contract to perform" the work, "then the certified check accompanying his bid and the amount therein mentioned, shall be declared to be forfeited to said city and shall be collected by it and paid into the general fund, and any bond forfeited may be prosecuted, and the amount due thereon collected and paid into said fund." It was held that the language did not fall short of prescribing a forfeiture in the case of a bond, but that the terms of the statute created the forfeiture. The court noted the omission of the express declaration as to the bond, but concluded that the result was the same because of the use of the word "forfeited" in direct connection with the word "bond." No similar language in connection with the bond requirement appears in the present case.

City of Los Angeles v. Shafer, 53 Cal. App. 458, 200 P. 384, 386, involved a faithful performance bond under section 9 of the Street Improvement Act of 1913, Stats. 1913, p. 954. In the event of the abandonment of the work, that section authorized the city to relet the contract and hold the contractor and his sureties responsible on his bond for the costs and expenses of reletting, and any damage resulting from the abandonment. Cf. sec. 37935, Govt. Code, Stats.1949, p. 1186. There was no express alternative declaration of forfeiture. The court contrasted the provision applicable to the bond liability with language in the same section requiring certified check security with the bid and forfeiture of the whole sum if the bidder failed to enter into the contract. As to the bond it was said: "If the Legislature intended that the obligation be one for liquidated damages or for a penalty or a forfeiture, it could have so provided."

Numerous other cases have been cited in support of the propriety of the city's resolution that there was a forfeiture in the present case. Those cases supported the power of the city to enforce full recovery where the statute or contract declared a forfeiture, usually as liquidated damages. Turner v. City of Fremont, 8 Cir., 170 F. 259—contract, liquidated damages; Davin v. City of Syracuse, 69 Misc. 285, 126 N.Y. S. 1002—contract, liquidated damages; Village of Morgan Park v. Gahan, 136 Ill. 515, 26 N.E. 1085—contract, forfeiture, legality assumed; Wheaton Building & Lumber Co. v. City of Boston, 204 Mass. 218, 90 N.E. 598—statute, liquidated damages; Daddario v. Town of Milford, 296 Mass. 92, 5 N.E.2d 23, 107 A.L.R. 1447—PWA rules and contract, liquidated damages; Mayor etc., of Baltimore v. J. L. Robinson Const. Co., 123 Md. 660, 91 A. 682, L.R.A.1915A, 225, Ann.Cas.1916C, 425—charter, liquidated damages; Elliott Bldg. Co. v. City of Greensboro, 190 N.C. 501, 130

S.E. 200—contract, liquidated damages. City of Weston v. Bank of Greene County, Mo.App., 192 S.W. 126, involved a suit by the city on a deposit check payment of which had been refused. The terms and source of the provisions, whether statutory or contractual, under which the check was deposited were not disclosed in the opinion, but the action was upheld under the assumed power of the city "to require a deposit with bids, to be forfeited on the conditions stated in the said published offer", as indicated in Village of Morgan Park v. Gahan, supra.

The foregoing cases disclose that forfeiture to the full amount of the deposit as a penalty or as liquidated damages was accomplished by express language. Thus there was notification by the terms of the statute or the contract of the extent of the contractor's and surety's liability where liability in excess of actual loss and damage was intended.

[2] In the present case the plaintiff's bid on the form furnished by the city, with the inapplicable phrases stricken as instructed therein, reads: "A bid bond * * * is attached hereto and is given as a guarantee that the undersigned will execute the agreement and furnish the required bonds if awarded the contract and in case of failure to do so within the time provided * * * surety's liability to the City will be established." This language contains no words of forfeiture or of an agreement that the full sum of the bond will be considered as liquidated damages in the event the contract is not entered into. Nor does the city's invitation for bids contain such language. The declaration is that of guarantee.

[3, 4] Forfeitures in the nature of a penalty are not favored; and language must be so construed as to avoid a forfeiture if that is possible. O'Morrow v. Borad, 27 Cal.2d 794, 800, 167 P.2d 483, 163 A.L.R. 894 and cases cited; Booth v. Los Angeles County, 124 Cal.App. 259, 261, 12 P.2d 72; sec. 1442, Civ.Code. In the case of agreements for liquidated damages sections 1670–1671 serve to prevent any penalizing effect, and therefore there may be no need for such a rule of construction. In the present case we are of the opinion that the agreement does not provide for either a penalty or liquidated damages since the language in relation to the bid bond contained in the executed bid form adopts no more than the words of guarantee in the bid invitation. Words indicating that the full sum of the bond would be forfeited or treated as liquidated damages could readily have been used. To construe words actually used otherwise than in accordance with their plain meaning would result in unauthorized changes in or additions to the language of the instruments and would base the conclusion upon uncertain or doubtful inferences contrary to the language expressly employed. The wording of the bid invitation and the executed bid was of the city's own choosing and should not be held to extend the bidder's and the surety's hazards beyond its fair meaning. Barber Asphalt Paving Co. v. City of St. Paul, 136 Minn. 396, 162 N.W. 470, L.R.A.1917E, 370.

[5] Municipalities are not exempt from the foregoing rules in dealings with private persons. Sacramento County v. Southern Pacific Co., 127 Cal. 217, 59 P. 568, 825; Hoyt v. Board of Civil Service Commissioners, 21 Cal.2d 399, 402, 132 P.2d 804; Corporation of America v. Durham, etc., Co., 50 Cal.App.2d 337, 340, 123 P.2d 81 and cases cited. There is here no justification for applying a different rule because a municipality is involved. In Groves v. John Wunder Co., 205 Minn. 163, 286 N.W. 235, 123 A.L.R. 502, 506, it was pointed out that if so-called public contracts were in the suggested special category for measuring damages, a municipal corporation would be dealt with more favorably than the ordinary litigant. In the absence of statutory or contract language otherwise providing, the guarantee measured the city's compensatory right to the extent of the actual damage only and the liability of the surety on the bid bond would thereby be deemed to be "established" for the actual damage resulting from the plaintiff's breach, but limited by the sum stated in the bond. 11 C.J.S., Bonds, § 130, p. 508; United States v. Alcorn, C.C., 145 F. 995, 998;

Weinreich Estate Co. v. A. J. Johnston Co., 28 Cal.App. 144, 148, 151 P. 667 and authorities cited.

[6-10] If it be assumed by any process of reasoning that the language of the instruments might be construed as an agreement to treat the total sum of the bond as liquidated damages, such a construction would bring into operation sections 1670 and 1671 of the Civil Code. Under those sections it must appear from the nature of the case that it would be impracticable or extremely difficult to fix the actual damages. These provisions apply to the city as well as to any other contracting party. City of Los Angeles v. Shafer, supra, 53 Cal.App. at page 466, 200 P. 384. Whether the case comes within their terms presents a question of fact which must be alleged and proved. Dyer Bros. Golden West Iron Works v. Central Iron Works, 182 Cal. 588, 593, 189 P. 445; Rice v. Schmid, 18 Cal.2d 382, 385, 115 P.2d 498, 138 A.L.R. 589. No specific showing on that issue was attempted by the city and the findings were based on inferences contrary to its position. Different inferences may not here be indulged. It is not indicated that loss or damage was suffered by the city in any proceeding to re-let the contract. In fact, no steps to that end were taken, and there was no showing that any special loss to the city resulted in abandoning the project. The absence of specific evidence that the nature of the case made it difficult to ascertain loss or damage, and the reasonable inferences from the facts that such difficulty did not exist, support the finding of the failure of any showing on that issue. Also as no actual damage was shown the trial court was justified in concluding that there was no basis upon which recovery could be awarded on the city's cross-complaint. The question of the general power of the city in the absence of statute to provide by contract for forfeiture or liquidated damages becomes a matter of academic interest only and unnecessary to be decided in this case. This is especially true as the legislature has now spoken on the subject.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, and SCHAUER, JJ., concur.

CARTER, Justice.

I dissent.

The interpretation placed upon the transaction by the majority opinion is unsupportable. It is conceded that the city could lawfully have provided for a forfeiture or liability of the full amount of the bid bond, and there is no doubt about it. Palo and Dodini v. City of Oakland, 79 Cal.App.2d 739, 180 P.2d 764. The issue is wholly one of interpretation. Desiring to have constructed a sewer system, the city called for bids. In its invitation for bids it was stated that each bid must be accompanied by "*either* a cashier's check or bid bond" for 10% of the bid "made payable" to the city "as guarantee" that the bidder "will enter into a contract if his bid is accepted." In addition, a form of bid was furnished and used by the bidder wherein it was stated: "A * cashiers check properly made payable to the City of Arcadia* a Bid Bond in favor of the City of Arcadia for Thirty-seven Thousand Five Hundred Dollars ($37,500.00), which amount is not less than * * * 10% of the * * * amount of this proposal, is attached hereto and given as a guarantee that the undersigned will execute the Agreement * * * if awarded the contract and in case of failure to do so within the time provided* said check shall be forfeited to the City.* Surety's liability to the City will be established." A footnote in explanation of the asterisk stated "Strike out inapplicable phrase." Plaintiff drew a line through the phrases between the first two asterisks and those between the last two. It is also recited therein that defendant-city "will in no way be responsible for any errors or omissions made in the preparation of this bid." The court found and it is not questioned that plaintiff-bidder committed a "wilful breach of duty in refusing to enter into" the construction contract.

The only reasonable interpretation of the invitation for bids and bid form is that the liability under the bond would be for the

full amount. The words used cannot be differently construed. It is provided that if the bidder fails to execute the contract, his *liability* to the city will be *established*. "Established" means: "Made stable or firm; fixed or secured in some way." Webster's New Int. Dict., 2d Ed., p. 874. "Establish" means: "To fix immovably or firmly." Id. p. 874. "To establish is to make stable or firm; to fix in permanence and regularity, to settle or secure on a firm basis, to settle firmly or to fix unalterably." Wells Lamont Corporation v. Bowles, Em.App., 149 F.2d 364, 366. The "liability" would not be settled beyond dispute if there still remained to determine the amount of the liability, as is held by the majority. The liability was for the amount of the bid bond, otherwise the complete or exact liability would not be fixed. "The process of fixing implies, primarily a stabilization or definite determination". Pulcifer v. County of Alameda, 29 Cal.2d 258, 263, 175 P.2d 1, 4. See also, San Francisco Pioneer Woolen Factory v. Brickwedel, 60 Cal. 166, 177. The term "to establish" is the same as the phrase "to fix". "To fix" is "to make firm, stable, or fast; to fasten; to set or place definitely; to establish; station; settle; to assign precisely, to give a permanent form to; to make definite and settled". Webster's Int. Dict., 2d Ed., p. 958. " 'Fixed' [liability], means certain and definite as to *both obligation and amount* * * *." [Emphasis added.] National Commercial Title & Mortgage Guaranty Co. v. City of Newark, 11 A.2d 759, 763, 18 N.J.Misc. 186. See also, First Savings Bank & Trust Co. of Albuquerque, N. M., v. Stuppi, 10 Cir., 2 F.2d 822, 825; Oklahoma Cotton Growers' Ass'n v. Groff, 135 Okl. 285, 275 P. 1032, 1036; Commercial Casualty Ins. Co. v. State Board, 119 N.J. 94, 194 A. 390; San Francisco Pioneer Woolen Factory v. Brickwedel, 60 Cal. 166. The majority opinion completely ignores the plain meaning of the words used in the documents forming the basis of this transaction.

There is, however, another completely compelling factor. It is conceded that if a cashier's check had been furnished, it would have been forfeited. There is utterly no basis for assuming that the parties intended a different result to flow if a bond instead of a check was given. The invitation for bids said that *either* a check or bond must accompany the bid, indicating that one was considered exactly equivalent to the other. True, the word "forfeiture" was not used in connection with the bond, but equally forceful and more appropriate words were used. More appropriate, for it would not be technically accurate to use the word "forfeiture" in referring to the bid bond, as distinguished from a cashier's check, for a forfeiture usually refers to the loss of a fixed tangible asset or property right such as a cashier's check would be, rather than a mere promise which is the basis of the liability created by a bid bond. It would be odd to refer to the forfeiture of the promise or the bond, inasmuch as, on the contrary, liability is to be based thereon. Thus the more appropriate words, that liability should be "established", were used. But certainly they have the same meaning and effect as words providing for a forfeiture of a cashier's check would have. That the cashier's check or bid bond were to stand for the same nature and measure of liability is further evidenced by the invitation for bids which stated that such a *check or bond* must accompany the bid as a guarantee that the contract would be executed, the *same* "guarantee" for either kind of security. It is fallacious to speak of the bidder choosing the bid bond over the cashier's check to escape a "forfeiture" or that kind of liability. Plainly the bid bond is used because it requires much less liquid capital to obtain it. It is not reasonable to suppose a different rule of liability would be imposed depending upon the security supplied. Common sense would seem to dictate that the city did not intend to give to the bidder the alternative to determine for himself whether he would suffer a forfeiture or not merely by choosing the form of security —check or bond. The rule of construction against forfeiture does not require a court to blind itself to all reason and common sense. The requirement of security for the execution of a contract by a bidder on government contracts is common, and it is

generally held that the security is forfeited on failure to execute the contract. See, Palo and Dodini v. City of Oakland, 79 Cal. App.2d 739, 180 P.2d 764; McQuillan Mun. Corps., 2d Ed., sec. 1323. To say that a different result would follow as to liability when a cashier's check or money is deposited, rather than a bond, is wholly artificial. Such a construction will thwart the manifest purpose of the security requirement contained in the bid. It is obvious that the construction placed upon the documents here involved will not only give the bidder the right of choice of security (cashier's check or bid bond), but will also permit him to determine in advance whether he may run the risk of having his security forfeited, or merely subject the surety on his bid bond to an action for the actual damages suffered by the public corporation for his failure to execute the contract in case his bid is accepted. Of persuasive importance in construing the instruments is the public policy underlying the requirement that security be furnished by bidders.

There is a clear analogy between this case and Town of Mill Valley v. Massachusetts Bonding, etc., Co., 68 Cal.App. 372, 229 P. 891. There the proceeding was conducted pursuant to the Improvement Act of 1911, Stats.1911, p. 730. That act provides: "All proposals or bids offered shall be accompanied by a check payable to the city certified by a responsible bank, for an amount which shall not be less than ten per cent of the aggregate of the proposal, or by a bond for the said amount and so payable". The language relating to the forfeiture is as follows: "But if said bidder fails, neglects or refuses to enter into the contract to perform said work or improvement, as hereinafter provided, then the certified check accompanying his bid and the amount therein mentioned shall be declared to be forfeited to said city and shall be collected by it and paid into the general fund, and any bond forfeited may be prosecuted, and the amount due thereon collected and paid into said fund."

It will be noted that the last quoted provision does not specifically provide that in the event a bid bond is given in lieu of a certified check, the bond may be forfeited if the bidder fails or refuses to enter into the contract to perform the work, while it does expressly provide that if the bidder furnishes a certified check and refuses to enter into the contract, the certified check accompanying the bid shall be declared forfeited to the city. With reference to the forfeiture of the bond, all that is said is: "[A]ny bond forfeited may be prosecuted, and the amount due thereon collected and paid into said fund." This is far from a declaration that if the bidder furnishes a bid bond instead of a certified check, and refuses to enter into the contract, *the bond shall be forfeited.* Nevertheless, the District Court of Appeal, in construing this provision in Town of Mill Valley v. Massachusetts Bonding, etc., Co., supra, squarely held that the last quoted language was susceptible of no other construction than that the bond should be forfeited in like manner as the certified check. In this connection, the court states, 68 Cal.App. at page 377, 229 P. at page 893: "This language does not, as contended, fall short of prescribing a forfeiture; nor does it, as claimed, amount to a mere declaration of duty authorizing the trustees to declare a forfeiture, in which event the city might be limited to a recovery of actual loss sustained. The statute itself creates the forfeiture, if language means anything, for the terms employed are plain and unambiguous. When the bid is accompanied by a check, the provision recites that it shall be 'declared to be forfeited,' and immediately following in referring to a bond it recites that 'any bond forfeited may be prosecuted and the *amount due thereon collected.*' [Emphasis that of the author.] While the act does not provide an express declaration in the case of a bond as it does in referring to the check, the language of the section clearly contemplates that a statutory forfeiture occurs upon failure to enter into the contract in either event. When a bond is declared forfeited and payment of the amount is refused, of necessity a suit must follow to enable the trustees to avail themselves of the benefits of the forfeiture, namely, the amount due thereon. But that a forfeiture is prescribed

and imposed expressly under the act itself, upon failure to enter into the contract, there can be no question. The same reason and intent apply in both cases."

As I read the last quoted excerpt, it unequivocally declares that the same rule must be applied to a bid bond as to a certified check and that the only difference between the two is that "When a bond is declared forfeited and payment of the amount is refused, *of necessity a suit must follow* to enable the trustees to avail themselves of the benefits of the forfeiture, namely, the amount due thereon." [Emphasis added.] The court then declares, with respect to whether the same rule should apply to a bid bond as to a certified check, that *"The same reason and intent apply in both cases."*

Applying the reasoning in the Mill Valley case to the case at bar, no other conclusion can be reached than that if the certified check may be forfeited for failure to enter into the contract, the bid bond may likewise be forfeited and the city entitled to recover the full amount of the bond without proving that it has suffered any amount of damages whatsoever by the failure of the bidder to enter into the contract.

In addition to the foregoing, however, the statutes now require that the bond as well as the check shall be forfeited. The Act under which the bonds were voted to construct the sewer here involved provides that the contract for the work shall be let "as other contracts are let" by the city. Stats. 1901, p. 27, sec. 9, Deering Gen. Laws 1943, Act 5178. In 1949, provisions were added to the Government Code dealing with municipal corporations. Said code now provides that contracts of a city of the sixth class shall be let to the lowest bidder and that: "All bids shall be presented under sealed cover and accompanied by one of the following forms of bidder's security. (a) Cash. (b) Cashier's check made payable to the city. (c) A certified check made payable to the city. (d) A bidder's bond executed by an admitted surety insurer, made payable to the city." Gov. Code, sec. 37931. Then it is provided: "The security shall be in an amount equal to at least 10 per cent of the amount bid. A bid shall not be considered unless one of the forms of bidder's security is enclosed with it." Gov. Code, sec. 37932. "If the successful bidder fails to execute the contract, the amount of his *bidder's security shall be forfeited to the city* except as hereinafter provided." Gov. Code, sec. 37933. [Emphasis added.] When these sections were added to the code, the Legislature stated in the same Act that: "It is not the intention of the Legislature in adopting this act *to change the existing law, but rather it is the intention of the Legislature to declare by such adoption that under Chapter 6, Part 2, Division 3, Title 4 of the Government Code cities of the sixth class always have had power under said chapter to require a bid bond,* cashier's check or other security, *and the power thereunder to declare the forfeiture thereof upon failure, neglect or refusal to enter into a contract awarded thereunder."* [Emphasis added.] Stats.1949, Ch. 690, sec. 4. While the specific provision for forfeiture above quoted was not made before 1949, yet the Legislature assumed provision therefor could be made by a city as was done here. Manifestly, in restating the law, it clearly calls for forfeiture whether check or bond is used. For this Court to arrive at a different conclusion is to fly in the face of the legislative declaration and the plain common sense construction of the language here used.

Furthermore, it has been held consistently that a forfeiture occurs when security is given with a bid. In Turner v. City of Fremont, 8 Cir., 170 F. 259, it was held valid as liquidated damages. To the same effect are Davin v. City of Syracuse, 69 Misc. 285, 126 N.Y.S. 1002; Wheaton Building & Lumber Co. v. City of Boston, 204 Mass. 218, 90 N.E. 598; and Daddario v. Town of Milford, 296 Mass. 92, 5 N.E. 2d 23, 107 A.L.R. 1447; Village of Morgan Park v. Gahan, 136 Ill. 515, 26 N.E. 1085, holds there is a forfeiture. To the same effect are Elliott Bldg. Co. v. City of Greensboro, 190 N.C. 501, 130 S.E. 200; Mayor, etc., of Baltimore v. J. L. Robinson Const. Co., 123 Md. 660, 91 A. 682, L.R.A. 1915A, 225, Ann.Cas.1916C, 425; City of

Weston v. Bank of Greene County (Mo.) 192 S.W. 126, and there is a strong policy favoring that result, as stated in Palo and Dodini v. City of Oakland, 79 Cal.App.2d 739, 750, 180 P.2d 764, 771: "Provisions requiring a deposit accompanying a bid for city contracts, or for forfeiture thereof, *are necessary as a matter of public policy to protect the public interests.* If, as here, a bidder were allowed without loss to himself to withdraw his bid after the bids have been publicly opened, fraudulent practices would develop. The body awarding contracts could agree to release a favored contractor if it turned out that his proposal was low as compared to other bids. Moreover, any bidder who found that in comparison with the other bidders, his bid was quite low, could withdraw his bid, and the city would thereby lose the value of competitive bidding and be forced to pay the prices of higher bidders with no compensation to itself for the loss sustained." To further that policy requires at least a reasonable construction of the instruments and forbids the unnatural and strained interpretation given by the majority. The majority holding will make it possible for the *well financed contractor to monopolize the field* and eliminate the small contractor. Naturally cities will, after this opinion becomes the law, *always require a cashier's* check for it can be forfeited. As a result, unless a contractor has the *actual cash* on hand, he cannot put up the check. In large contracts that is a very important factor.

Furthermore, it is obvious that the inevitable result of the rule announced by the majority will be that the city will have to bring suit on every bid bond in order to recover any damage suffered by it as the result of the failure of the bidder to execute a contract awarded to him. While it is impossible to visualize all of the difficulty a city might have to prove the amount of damages suffered, it is obvious that it will place an undue burden upon the city to protect its interests in such a case. Of course, the careful city attorney, after reading an opinion of the Supreme Court holding that no forfeiture may be required in such a case, will advise the city council to require a cashier's check with every bid, and, as stated above, this will mean that the contractor without a large cash reserve will not be able to bid on large jobs because he will be unable to deposit a cashier's check with his bid.

It seems to me that if the majority is right in holding that a forfeiture cannot be had in this case, it should go the whole way and hold that the same rule would apply to a certified check because of the provisions of sections 1670 and 1671 of the Civil Code, on which the majority also relies as a basis for its decision. In this connection, it should be noted that the case of Town of Mill Valley v. Massachusetts Bonding, etc., Co., supra, holds squarely that sections 1670 and 1671 of the Civil Code have no application to a case of this character. At page 376 of 68 Cal.App., at page 893 of 229 P. the court said: "The still further claim is made that a statutory forfeiture is inapplicable to the case, for the reason that appellant surety company, by the express terms of its bond, excluded any liability for a statutory forfeiture or penalty. It is accordingly claimed that sections 1670 and 1671 of the Civil Code and the equity rules against forfeitures control the case, and that therefore plaintiff should have pleaded and proved its damage." And again on page 378 of 68 Cal.App., on page 894 of 229 P.: "A court of equity has no power to disregard or set aside the express terms of statutory legislation, however much it may interfere with the operation of common-law rules. Hence any pleading or proof of actual damage has no place in a case where equity does not apply. This being so, the sections invoked by appellant can avail it nothing. This brings us to the final contention of appellant upon the subject, namely, that a statutory forfeiture is inapplicable to the case, for the reason that appellant surety company by the express terms of its bond excluded any liability for such forfeiture or penalty." Further, on page 379 of 68 Cal.App., on page 894 of 229 P.: "The insertion in the bonds of the phrase 'liquidated damages' does not in anywise change their character or limit the liability thereon,

so as to require pleading and proof incident to such damages. The amount thereof was the same as required by the statute. There was therefore no attempt by the parties to limit liability under the bonds in this particular. Under these circumstances, whether the amount be considered as a penalty or as liquidated damages is of no moment, for in either event the instruments are absolute undertakings to pay the amount named therein, and are not conditioned against loss or damage requiring pleading and proof." While it is true, as heretofore stated, the proceedings involved in the Mill Valley case were pursuant to the provisions of the "Improvement Act of 1911", Stats. 1911, p. 730, and "Improvement Bond Act of 1915", Stats. 1915, p. 1441, the court there pointed out that the same reasoning applied whether the security declared to be forfeited was a certified check or a bid bond, and, as heretofore further pointed out, the 1949 session of the Legislature declared that "cities of the sixth class always have had power" under the statutes of this state "to require a bid bond, cashier's check or other security, and the power thereunder to declare the forfeiture thereof upon failure, neglect or refusal to enter into a contract awarded thereunder." Stats. 1949, Ch. 690, sec. 4.

To my mind this is a case in which this Court should do a clean cut job of simplifying the law so that both public corporations and contractors will know just what their respective rights are, and not try to arrive at a result in this case which will relieve a contractor and a bonding company of liability by making bad law which not only reflects unfavorably upon this court, but will continue to plague those who may be subjected to it as long as the majority of this Court will permit it to stand.

I would, therefore, reverse the judgment.

SPENCE, Justice.

I dissent.

In my opinion the judgment should be reversed and I am in accord in the main with the reasoning found in the dissenting opinion of Mr. Justice CARTER.

Rehearing denied; CARTER and SPENCE, JJ., dissenting.

BECK v. UNRUH et al.
Civ. 17523.

District Court of Appeal, Second District, Division 3, California.

Sept. 27, 1950.

Rehearing Denied Oct. 26, 1950.

Hearing Granted Nov. 20, 1950.*

Action by Max Beck, against Ida W. Unruh and others, to quiet title to property in Los Angeles County. The Superior Court of Los Angeles County, Walter R. Evans, Judge assigned, entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Wood, J., held that where, at time bankrupt's property was sold to state for delinquent taxes, no consent had been obtained of the bankruptcy court to make such sale, tax collector was without power to convey property, and the state had no title to convey to a purchaser at a tax sale.

Affirmed.

1. Bankruptcy ⇐11

Upon adjudication of bankruptcy, United States District Court acquires exclusive authority and control over all property of bankrupt, and jurisdiction of bankruptcy court extends to adjudication of questions respecting title of property which is vested in trustee, who has actual or constructive possession of all of bankrupt's property.

2. Bankruptcy ⇐188(1), 214

A trustee in bankruptcy takes property of bankrupt subject to all such liens as would have been enforceable against it in hands of bankrupt himself, but owner of lien may not institute proceedings in a state court to enforce it without permission of bankruptcy court.

3. Bankruptcy ⇐215
Taxation ⇐618, 679(5)

Where corporation was adjudged a bankrupt in 1927, and property, which was under exclusive jurisdiction of bankruptcy court, was sold to state for delinquent taxes in 1932, but no consent of bankruptcy court to sell was obtained, tax collector was without power to convey property and therefore state had no title to convey to a purchaser at a tax sale. Revenue and Taxation Code, §§ 3521, 3725.

* Subsequent opinion 231 P.2d 13.

Alfred L. Armstrong, Hollywood, for appellants.

Charles I. Rosin, Los Angeles, for respondent.

WOOD, Justice.

Action to quiet title to real property in Los Angeles County. Plaintiff's claim of title is based on a deed from a trustee in bankruptcy, and defendants' claim of title is based on tax deeds to and from the State of California.

On November 4, 1927, the United Finance Company, a corporation, was adjudged a bankrupt. The real property involved herein was owned by the bankrupt and was listed in the schedule of assets in bankruptcy. Taxes assessed against said property for the fiscal year 1926-1927 were not paid, and on December 1, 1932, the tax collector of Los Angeles County executed deeds which allegedly conveyed the property to the state for such delinquent taxes. The trustee in bankruptcy was discharged on December 11, 1936, and the bankruptcy proceedings were terminated. No disposition was made of the property herein in the bankruptcy proceedings. On May 19, 1944, said property was sold at public auction by the tax collector to Fred R. Salter, and the collector executed deeds which allegedly conveyed the property to him. On June 9, 1944, Salter conveyed his interest in the property to one Ewald who, on February 12, 1945, conveyed his interest to Ida W. Unruh, one of the defendants herein. The deeds to Salter, the deed to Ewald and the deed to Ida W. Unruh were all recorded on November 15, 1945. On May 2, 1947, the bankruptcy proceedings were reopened, and on June 9, 1947, another trustee in bankruptcy was appointed. On December 15, 1947, the trustee sold all the right, title and interest of the bankrupt corporation in said property to plaintiff and executed a deed therefor in favor of plaintiff.

On March 15, 1948, plaintiff commenced this action to quiet title to the property. In the complaint it is alleged that plaintiff is the owner of and in possession of said property; and that defendants claim some title or interest in the property but the defendants have no title or interest therein. Defendants in their answer deny those allegations, except that they admit that defendant Ida W. Unruh claims some title and interest in the property; they allege that Ida W. Unruh is the owner of and in possession of the property, and that plaintiff has no title or interest therein. As affirmative defenses, they allege that the cause of action is barred by sections 3521 and 3725 of the Revenue and Taxation Code.

The court found, among other things, that plaintiff is the owner, in possession and entitled to possession of the property; that "from Nov. 4, 1927 and until Dec. 15, 1947, when the said real property was sold to the plaintiff by the trustee in Bankruptcy * * *, the said real property was in the custody of the Court, and the said Fred R. Salter [purchaser at the tax sale] acquired no right, title or interest in or to the said real property, and the defendants acquired no right, title or interest" therein by reason of the conveyance by Fred R. Salter to Ida W. Unruh; and that the cause of action is not barred by either section 3521 or section 3725 of the Revenue and Taxation Code. Judgment was rendered quieting title in plaintiff on the condition that "plaintiff reimburse defendants, repaying to them the amount of taxes, penalties and costs expended by them, determined by the Court to be in the amount of $1728.51." Defendants appeal from the judgment.

Appellants contend that the cause of action is barred under the provisions of sections 3521 and 3725 of the Revenue and Taxation Code. Section 3521 provides that: "A proceeding based on an alleged invalidity or irregularity of any deed to the State for taxes or of any proceedings leading up to the deed can only be commenced within one year after the date of recording of the deed to the State in the county recorder's office * * *." Section 3725 provides that: "A proceeding based on alleged invalidity or irregularity of any proceedings instituted under this chapter

can only be commenced within one year after the date of execution of the tax collector's deed." Plaintiff (respondent) asserts, in substance, that those sections are not applicable to the present case. He argues that the tax sales were made while the property was in the custody of the federal court in bankruptcy proceedings, and that therefore such sales were void.

[1, 2] Upon an adjudication of bankruptcy the United States District Court acquires exclusive authority and control over all property of the bankrupt. Manter v. Howard, 94 Cal.App.2d 404, 408, 210 P.2d 880; Wells v. California Tomato Juice, Inc., 47 Cal.App.2d 634, 636, 118 P.2d 916; Loeffler v. Wright, 13 Cal.App. 224, 230, 109 P. 269. It was stated in the Manter case, supra, 94 Cal.App.2d at page 408, 210 P.2d at page 882, that: "'The filing of the petition [bankruptcy] *is an assertion of jurisdiction* with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. This jurisdiction is exclusive within the field defined by the law, *and is so far in rem that the estate is regarded as in custodia legis from the filing of the petition.*'" Such jurisdiction extends "to the adjudication of questions respecting the title" to the property, Ex Parte Baldwin, 291 U.S. 610, 616, 54 S.Ct. 551, 554, 78 L.Ed. 1020, which title is vested in the trustee in bankruptcy, Nuckolls v. Bank of California, 10 Cal.2d 266, 274, 74 P.2d 264, 114 A.L.R. 708, who has actual or constructive possession of said property. See In re Canyon Pipe Line Co., D.C., 39 F.Supp. 233, 235. The trustee in bankruptcy, however, takes the property of the bankrupt "subject to all such liens as would have been enforceable against it in the hands of the bankrupt himself", In re Knox-Powell-Stockton Co., 9 Cir., 100 F.2d 979, 982, but the owner of a lien may not institute proceedings in a state court to enforce it without permission of the bankruptcy court. Wells v. California Tomato Juice, Inc., 47 Cal.App. 2d 634, 636, 118 P.2d 916; Straton v. New, 283 U.S. 318, 51 S.Ct. 465, 75 L.Ed. 1060.

In Re Eppstein, 8 Cir., 156 F. 42, 17 L. R.A.,N.S., 465, certain real property belonging to a bankrupt corporation was sold for taxes prior to the filing of the petition in bankruptcy, but title and possession remained in the bankrupt, and these passed to the trustee upon his qualification. After the period of redemption had passed and while the property was in the custody and control of the court of bankruptcy, the holder of the tax sale certificate, without leave of that court, obtained a tax deed from the county treasurer. The court held therein that a court of bankruptcy may require those who assert title to property which had rightfully come into its possession and control as part of the bankrupt's estate, to present their claims to that court. It was stated therein, 156 F. at page 43: "We do not mean that property in the course of administration under the bankruptcy act is exempt from taxation, or freed from tax liens or claims theretofore fastened upon it * * * but that it is in custodia legis, and that any act interfering with the court's possession, or with its power of control and disposal, and done without its sanction, is void."

In the case of Dayton v. Stanard, 241 U.S. 588, 36 S.Ct. 695, 60 L.Ed. 1190, sales of land for taxes and special assessments, which land belonged to a bankrupt estate, were held to be invalid because the sales were made without permission of the federal court.

[3] As above shown, the corporation herein was adjudged a bankrupt in 1927 and the sale to the state for delinquent taxes was made in 1932—at which time the property was under the exclusive jurisdiction of the federal court. The consent of the court to make such sale was not obtained. The tax collector was without power to convey the property, and therefore he passed no title to the state. It was stated in Re Kirkpatrick, D.C.Cal., 17 F.Supp. 56, 57, wherein creditors attempted to foreclose a deed of trust without permission of the court in bankruptcy, that until the court *"abdicated its jurisdiction, no person and no other court could acquire power or jurisdiction to deal with it* [the property of the bankrupt estate], *or change its status and of course could pass no title to it to*

another by a purported sale or otherwise." Since the state had acquired no title to the property, it had no title to convey to the purchaser at the tax sale. As was stated in DeFlon v. Van Lue, 83 Cal.App.2d 288, 290, 188 P.2d 301, 302, "'The state cannot convey title that it does not possess.'" The trial court properly found that the defendants herein acquired no right, title or interest in the property by reason of the conveyance by the purchaser at the tax sale. Under such circumstances the cause of action was not barred by said sections of the Revenue and Taxation Code. See 3 A.L.R.2d pp. 893-908 for a discussion of the subject, "Necessity of consent of court to tax sale of property in custody of court * * * or trustee appointed by it."

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



99 Cal.App.2d 743

PEOPLE v. OLIVERIO.

Cr. 4472.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1950.

Joseph Oliverio was convicted in the Superior Court of Los Angeles County, William M. Byrne, J., of bookmaking, and he appealed from the judgment of conviction and from an order denying his motion for a new trial. The District Court of Appeal, Wilson, J., held that the evidence sustained the conviction.

Judgment and order affirmed.

1. Gaming ⇐98(3)

Evidence sustained conviction for bookmaking. Pen.Code, § 337a, subd. 3.

2. Gaming ⇐73

Racing paraphernalia need not be found in possession of person charged with bookmaking to justify conviction, and person charged with bookmaking need only receive money as a wager on a race or purported race. Pen.Code, § 337a, subd. 3.

3. Criminal law ⇐1159(2)

When circumstances shown by evidence reasonably justify conviction for bookmaking the conviction will not be disturbed by reviewing court. Pen.Code, § 337a, subd. 3.

Leland E. Zeman, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Norman H. Sokolow, Deputy Attorney General, for respondent.

WILSON, Justice.

The only point raised by appellant for a reversal of the judgment in this case is that the evidence is insufficient to sustain his conviction of bookmaking in violation of subdivision 3, section 337a [1] of the Penal Code.

Appellant presented a motion for a new trial which was denied, whereupon he was sentenced to imprisonment in the county jail. Execution of the sentence was suspended and he was placed on probation for a period of three years. He has appealed from the judgment of conviction and from the order denying his motion for a new trial.[2]

1. Sec. 337a: "Every person, * * *
"3. Who * * * receives, holds, * * * or purports or pretends to receive, hold * * * any money * * * bet or wagered, or to be * * * bet or wagered, or offered for the purpose of being * * * bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of * * * speed * * * between * * * beasts, * * *
"Is punishable by imprisonment * * *."

2. Appellant's brief does not conform with Rule 15(a) of the Rules on Appeal, 22 Cal.2d 12, in that it is not prefaced by a topical index of its contents or by a table of authorities.

A statement of the evidence will demonstrate its sufficiency. A police officer had had appellant under observation for about three and a half weeks in a pool hall. On the date of arrest the officer had observed appellant for approximately an hour. The latter was approached from time to time by various people each one of whom had a conversation with him. Each would hand him a sum of money which he placed in his pocket, and he would then go to the pay telephone at the front of the room, dial a number and hold a short conversation. Appellant was approached by a person who said, "Give me Lurline; give me Jimmie John, five, one to place." This person handed appellant a sum of money which he placed in his pocket and went to the telephone. The officer moved close to the telephone and heard appellant say, "Jimmie John, one to place; and also, Lurline B, one to place." About ten minutes later a person approached appellant and asked, "What did my bet pay?" to which he replied, "Ten, ten," took money from his pocket and handed it to the person. The officer left the pool hall and went across the street to confer with his fellow officer. When he returned to the pool hall appellant had left. The latter was arrested subsequently as he was returning home. The National Scratch Sheet, dated the day of the above mentioned occurrence, was fixed in a cardboard sign to the left of the pay telephone which appellant would consult while holding his telephone conversations.

Another officer entered the pool hall, heard the telephone bell ring "at least a dozen times." He answered it and the names of horses were given to him in the succeeding conversations.

When appellant was arrested he was carrying $200 on his person. An officer consulted the scratch sheet in question and found that two horses named Jimmie John and Lurline B were running in the fifth race at Del Mar on that date.

[1] The evidence is sufficient to sustain the conviction, to establish the *corpus delicti*, and to prove the charge against appellant beyond a reasonable doubt. People v. Hoffman, 94 Cal.App.2d 379, 382, 210 P.2d 885 and cases there cited; People v. Woods, 35 Cal.2d 504, 218 P.2d 981.

[2, 3] It is not necessary that racing paraphernalia be found in the possession of the person charged with the crime of bookmaking. The only requirement is that he receive money as a wager on a race or a purported race. People v. Hoffman, supra. The evidence shows that appellant received money from a person who named two horses listed in the scratch sheet as being in a race at the Del Mar race track on the day in question. When the circumstances shown by the evidence reasonably justify the finding of guilt such finding will not be disturbed by the reviewing court. People v. Warnick, 86 Cal.App.2d 900, 903, 195 P.2d 552.

Appellant's reliance upon People v. Banks, 39 Cal.App.2d 164, 102 P.2d 818, is in vain. We pointed out in People v. Hoffman, supra, 94 Cal.App.2d at page 382, 210 P.2d 885, the inapplicability of that decision in a case where the evidence is similar to that above outlined, and further that the appellate court assumed the prerogative of the jury, weighed the evidence and accorded belief to the testimony of witnesses that the trial court had disbelieved. In People v. Woods 35 Cal.2d 504, 218 P.2d 981, the Banks case was specifically disapproved insofar as it is in conflict with evidence of the character presented in the Woods case.

Judgment and order denying new trial affirmed.

MOORE, P. J., and McCOMB, J., concur.

BOWDEN et al. v. HEATON et al.

Civ. 7697.

District Court of Appeal, Third District, California.

Sept. 30, 1950.

Rehearing Denied Oct. 30, 1950.

Hearing Denied Nov. 27, 1950.

Action by Lottie Bowden and Clara Mitchell against Jennison Heaton and Beulah F. Heaton to quiet title to certain property, wherein defendants filed answer and cross-complaint to quiet title in themselves. The Superior Court, Humboldt County, Delos A. Mace, J., entered a decree quieting plaintiffs' title on ground of adverse possession and defendants appealed. The District Court of Appeal, Adams, P. J., held that the evidence adduced by plaintiffs had sufficiently satisfied all the necessary requirements to establish the title in plaintiffs by adverse possession.

Judgment affirmed.

1. Appeal and error ⇐930(1), 989

Presumptions favor judgment of trial court, and only province of appellate court is to determine whether in its most favorable aspect there is evidence to support decision of trial court.

2. Adverse possession ⇐13

Elements required to be established to constitute adverse possession are that the possession was by actual occupation, open and notorious, and not clandestine, that it was hostile to title of one claiming to be true owner, that it was held under claim of title, that it was continuous and uninterrupted five years prior to commencement of action, and that claimant paid all taxes levied or assessed against land.

3. Adverse possession ⇐114(1)

In action to quiet title brought in 1945, evidence that prior owners took possession of land in 1937 on issuance to them of commissioner's certificate, that deed was issued to them in 1938, that they had pastured 200 head of sheep on land and had occasionally lived on place, that place was posted with signs on all gates and locks were put on gates and no trespassing signs were posted on premises and that they had paid all taxes, was sufficient to establish title in prior owners by adverse possession.

Marcel E. Cerf, Robinson & Leland, San Francisco, for appellants.

E. S. Mitchell, Eureka, for respondents.

ADAMS, Presiding Justice.

Plaintiffs, Lottie Bowden and Clara Mitchell, about January 31, 1945, filed an action claiming to be owners of some 800 acres of land in Humboldt County, and seeking to quiet their title thereto. Numerous defendants were named, but as the only defendants concerned with this appeal are Jennison Heaton and his wife, Beulah F. Heaton, further reference to the others may be omitted.

The Heatons filed an answer and a cross-complaint setting up ownership of some 600 acres of the property in themselves, and seeking to quiet title as against plaintiffs. The latter replied to the cross-complaint, and the issues created were tried by the court, sitting without a jury, and resulted in a decree quieting plaintiffs' title on the ground that plaintiffs, under color of title, had taken possession of the property, and by adverse possession for more than the statutory period had acquired an unassailable title as against the Heatons.

The evidence in the case shows that plaintiffs were owners of the property in controversy prior to June 1, 1926, at which time they leased it, with an option to purchase. The lease interest eventually became vested in Benbow Company, a corporation, which company, about June 1, 1926, executed a trust deed to Mercantile Trust Company which did not include the property in controversy, but did include "all executed contracts for the sale and purchase of any other real property covered by this indenture, whether same be a part of the property herein specifically described or such real property as shall hereafter be acquired by the company." On April 16, 1928, plaintiffs, in execution of the option to sell, deeded the property to

Benbow Company, taking, in payment therefor, promissory notes to the amount of $16,375, secured by a mortgage on the property conveyed, said mortgage being recorded June 22, 1928. In June, 1933, one Wilson succeeded the original trustee under the trust deed. On September 5, 1933, Wilson executed a deed to F. H. Woll and F. K. Clelland, which included the 800 acres of the property conveyed by plaintiffs to Benbow Company. Woll and Clelland executed to Jennison Heaton, on September 24, 1934, a deed apparently for but 600 acres of the original 800 acres, upon which the Benbow Company had constructed an airport, which deed was recorded August 3, 1936.

On October 10, 1933, payment of the purchase notes executed by Benbow Company not having been made, plaintiffs instituted foreclosure proceedings, naming a large number of defendants. Jennison Heaton was included as "Jennison Heaton, a corporation," and, though Beulah Heaton was not at first named as a defendant, she was thereafter, by an amendment of the complaint allowed by the court, made a defendant, was served with summons September 11, 1936, and defaulted.

A decree of foreclosure of plaintiffs' mortgage was entered December 16, 1936, and the property was sold to plaintiffs on May 22, 1937, at which time a certificate was issued to them. The property was not redeemed, and on or about May 22, 1938, a deed was issued to plaintiffs. They took possession of the land when the certificate was issued, and, as found by the trial court, it was thereafter held by them in actual possession, openly and notoriously and under claim of right. They paid all taxes assessed against said property, beginning with back taxes from 1932 on.

It appears from the record that defendants sought in the lower court to have judgment entered on the pleadings because of what they claimed was an admission by plaintiffs that defendants were the owners of the property. This was denied by the court which pointed out that plaintiffs had elsewhere in their pleadings denied defendants' ownership. It was also contended in the lower court that defendants' chain of title was superior to that of plaintiffs because the trust deed carried title to after-acquired property, that plaintiffs' deed to Benbow Corporation brought the property into the trust, and that the purchase-money mortgage executed by the Benbow Company to plaintiffs was secondary and subordinate to the provisions of the trust deed. The trial court ruled to the contrary, citing Civil Code, sec. 2898; Hawkins v. Harlan, 68 Cal. 236, 9 P. 108; 25 A.L.R. 92; 36 Am.Jur. 810; but it also held that the argument was irrelevant since plaintiffs had established title by adverse possession. The same arguments are made on this appeal, but since the judgment of the court below is based upon adverse possession, only that phase of appellants' asserted ground for reversal need be considered here.

[1] Regarding the finding of the trial court that plaintiffs acquired title by adverse possession, appellants contend that there was a failure of proof on this behalf. However, on appeal the presumptions favor the judgment, and our only province is to determine whether, in its most favorable aspect, there is evidence to support the decision of the trial court.

[2] Elements required to be established to constitute adverse possession, as set forth in 1 Cal. Jur., sec. 22, p. 522, are that the possession was by actual occupation, open and notorious, and not clandestine; that it was hostile to the title of one claiming to be the true owner; that it was held under claim of title; that it was continuous and uninterrupted for five years prior to the commencement of the action; and that claimant paid all taxes levied or assessed against the land. Also see Meier v. Meier, 71 Cal.App.2d 502, 505–506, 162 P.2d 950; Posey v. Bay Point Realty Co., 214 Cal. 708, 711–712, 7 P.2d 1020; Lundy v. Lakin, 96 Cal.App.2d 221, 215 P.2d 61.

[3] Here the evidence, we think, brings plaintiffs within these conditions. Their title is based upon the certificate and deed issued in their foreclosure proceeding; they paid all taxes; their possession was continuous and uninterrupted for more than five years; it was by actual occupa-

tion, open and notorious, and was hostile to any claims of defendants. Testimony given by Mrs. Bowden was that plaintiffs went into possession on the issuance to her and her daughter of the commissioner's certificate on May 22, 1937, that they then hired a Mr. Metcalf and his wife, who lived on the place, to run the premises, and plaintiffs put some 200 head of sheep on the land to pasture; that from August, 1938, until July, 1942, a Mr. Marshall ran the place for them on a share basis; that they then leased the property to a Mr. James who later conveyed his lease to a Mr. Gamlon, who continued in possession under the lease; that plaintiffs occasionally lived on the place part of the time, as the house was furnished; that the place was posted with signs on all of the gates, including those into the airport; locks were put on gates entering the property, and metal "no trespassing" signs were posted on them; that a portion of the land was leased to and used by the Campfire Girls for five years, for camping purposes, from 1940 on; that their possession has never been questioned by any one; and that she wrote Heaton about the time of the foreclosure asking him if he would like to pay the balance due on the mortgage and take the property over, but he never replied.

Clara Mitchell corroborated her mother's testimony regarding signs, and locks and chains on the gates. She testified that she took wood from the property; that she never saw a plane on the airport; and that no one ever questioned their right of occupancy of or title to the property.

Defendants did not appear at the trial, but rested their case upon the record title. Their only witness was their attorney who testified that he landed his plane on the airfield in 1941, and that in 1942 he took down a sign near the airport; that in 1939 he posted one reading "Keep out, J. Heaton, owner"; but he gave no testimony of doing so under directions from or by authority of the Heatons, or that in taking the sign from a gate he so acted.

We are satisfied that the evidence adduced by plaintiffs justifies the conclusion of the trial court, and sufficiently satisfies all necessary requirements to establish title in plaintiffs by adverse possession, even though defendants' contention that their chain of title established title in themselves were conceded—which we hold need not be determined in this action.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.



99 Cal.App.2d 650

ROSENKRANZ et ux. v. PELLIN et al.

Civ. 17516.

District Court of Appeal, Second District, Division 3, California.

Sept. 26, 1950.

Rehearing Denied Oct. 11, 1950.

Hearing Denied Nov. 20, 1950.

Action by Aaron Rosenkranz and Selda Rosenkranz, husband and wife, against O. H. Pellin and others for unlawful detainer. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., entered judgment for plaintiffs for possession of the property, $500 damages and $150 attorney's fees and the named defendant appealed. The District Court of Appeal, Vallée, J., held that evidence sustained finding that defendant Pellin was in possession of the premises during month of April, 1949, although lease was cancelled by plaintiffs as of March 31, 1949.

Judgment affirmed.

1. Landlord and tenant ⇐80(3)

The possession of the subtenant, in so far as landlord is concerned, is that of tenant.

2. Landlord and tenant ⇐291(13)

In action for unlawful detainer, where lease was terminated by landlord as of March 31, 1949, and subtenant of defendant assignee of lease testified he was in possession of premises to day of trial April 29, 1949, evidence was sufficient to sustain finding that defendant was in possession during month of April, 1949.

3. Landlord and tenant ⇐291(13)

In action for unlawful detainer, where plaintiff owner of property testified that

its reasonable rental value was $500 a month, such evidence was sufficient to sustain finding of $500 as reasonable rental value of property.

4. Landlord and tenant ⇐95

Generally a sale by a lessor of realty during an unexpired term does not of itself abrogate lease and its effect is to grant all right of original lessor to grantee of reversion and grantee then becomes landlord by operation of law and tenant becomes a tenant of grantee of reversion. Civ. Code, § 821.

5. Landlord and tenant ⇐79(2)

A lessee is under duty to his lessor to perform, covenants of lease and assignee who assumes a lease binds himself on those covenants.

6. Landlord and tenant ⇐79(2)

Where lease provided that lessee would vacate premises within 60 days from date of notice in event lessors exercised their option to cancel lease and provided that lessee agreed to pay lessors a reasonable attorney's fee in event an action was filed to compel performance of terms and conditions of lease or to terminate it, and thereafter plaintiffs purchased premises from lessors and lessee assigned his interest in lease to defendant who assumed lease and agreed to be bound by its terms, defendant was bound by covenants of lease.

7. Courts ⇐169(1)

Under statute providing that municipal court shall have original jurisdiction in all proceedings in unlawful detainer where rental value is three hundred dollars or less per month, and where whole amount of damages claimed is three thousand dollars or less, amount sued for is test of jurisdiction. Code Civ. Proc. § 89(d).

8. Courts ⇐122

Where complaint in unlawful detainer action alleged reasonable rental value of property to be $500 a month, and prayed damages for rent and that damages be trebled, action was within jurisdiction of Superior Court. Code Civ. Proc. § 89(d).

David A. Matlin, Los Angeles, for appellant.

Kenneth C. Beatson, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendant O. H. Pellin from a judgment for plaintiffs in an action of unlawful detainer.

On February 28, 1947, the Bicks and Lassars were the owners of three parcels of real property in Los Angeles. The property was unimproved except for a two-story house on one of the lots. On that date they executed a written lease of the property to Rosner for three years. The lease contained a provision by which the lessors reserved the right to cancel the lease at any time during its term, "If all or any portion of this property is sold or if a major building is to be erected on any portion of said property, the Lessors may, on giving the Lessee sixty (60) days notice in writing cancel this lease, and the Lessee will vacate said premises within sixty (60) ———from date of such notice and release the Lessors from all obligation under the terms of this lease." Rosner took possession.

On September 17, 1947, the lessee, with the approval of the lessors, assigned his interest in the lease to appellant Pellin, who, in writing, assumed the lease and agreed to be bound by its terms.

On October 21, 1948, Pellin sublet the property to Von Benzonheim. Prior to subletting, Pellin had purchased the two-story house on the property. After the subletting, he continued to own and maintain the building on the property.

On January 26, 1949, plaintiffs purchased the real property but not the building. On that date the original lessors and plaintiffs gave notice in writing to Pellin cancelling the lease as of March 31, 1949, and demanded possession on that date. Pellin did not remove the building from the property and Von Benzonheim did not vacate the premises, hence this action.

The court found that during April, 1949, Von Benzonheim was in possession, and

that Pellin was in possession as assignee of the lease and, in addition, as the owner of the building maintained by him on the property, and that the reasonable rental value of the property was $500 a month. Judgment was for possession of the property, $500 damages, and $150 attorney's fees.

Appellant claims that: 1) there is no competent evidence to support the finding that Pellin was in possession during the month of April, 1949; 2) there is no competent evidence to support the finding that the reasonable rental value of the property was $500 a month; 3) there was no privity of contract between plaintiffs and Pellin warranting the award of attorney's fees; 4) the superior court had no jurisdiction of the subject of the action.

[1, 2] Code of Civil Procedure section 1161, in pertinent part, provides that a tenant of real property, for a term less than life, is guilty of unlawful detainer "[w]hen he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without the permission of his landlord, or the successor in estate of his landlord, if any there be." The possession of the subtenant, insofar as the landlord is concerned, is that of the tenant. 15 Cal.Jur. 766, sec.18. Von Benzonheim testified he was in possession of the premises from January, 1949, to the day of trial, April 29, 1949. We understand appellant to concede that the building remained on the property during April. The evidence is sufficient to support the finding that Pellin was in possession during the month of April, 1949.

[3] Plaintiff Aaron Rosenkranz, owner of the property, testified that its reasonable rental value was $500 a month. This evidence is sufficient to support the finding as to the rental value of the property. 5 Cal.Jur. 10-Yr. Supp. 713, sec. 278, and cases there cited.

The original lessee assigned the lease to Pellin. Pellin agreed in writing with plaintiffs' predecessors in interest, Bicks and Lassars, to be bound by and comply with all the terms, covenants and agreements in the lease. Respondents purchased the property January 26, 1949. On that date the grantors and grantees served written notices upon Pellin and Von Benzonheim cancelling the lease *as of March 31, 1949.*

[4-6] The general rule is that a sale by a lessor of real property during an unexpired term does not of itself abrogate the lease. Its effect is to grant all the rights of the original lessor to the grantee of the reversion. The grantee then becomes the landlord by operation of law and the tenant becomes a tenant of the grantee of the reversion. Upton v. Toth, 36 Cal.App. 2d 679, 684, 98 P.2d 515. Civil Code section 821 says that a person to whom any real property is transferred, upon which rent has been reserved, is entitled to the same remedies for recovery of rent and for nonperformance of any of the terms of the lease, as his grantor might have had. A lessee is under a duty to his lessor to perform the covenants of the lease. An assignee who assumes a lease binds himself to perform these covenants. Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 245, 73 P.2d 1163. Pellin was bound to plaintiffs by the covenants of the lease which provided that the lessee would vacate the premises within 60 days from date of notice in the event the lessors exercised their option to cancel the lease. He was also bound to respondent by the covenant of the lease by which the lessee agreed to pay the lessors a reasonable attorney's fee in the event an action was filed to compel the performance of the terms and conditions of the lease or to terminate it.

[7, 8] Code of Civil Procedure section 89, subdivision (d), provides that the municipal court shall have original jurisdiction in all proceedings in unlawful detainer "where the rental value is three hundred dollars ($300) or less per month, and where the whole amount of damages claimed is three thousand dollars ($3,000) or less." In 1949 the respective amounts were increased from $200 to $300 per month, and from $2000 to $3000. Stats. 1949, ch. 1519, sec. 1. The amount sued for is the test of jurisdiction. Harris v.

Seidell, 1 Cal.App.2d 410, 416, 36 P.2d 1104. In the present case the complaint alleged that the reasonable rental value of the property is $500 a month, and prayed damages for the rent and that the damages be trebled. It was expressly held in Cook v. Winklepleck, 16 Cal.App.2d Supp. 759, 763, 59 P.2d 463, 465, that an action of unlawful detainer involving property having a rental value of "more than $200" a month is within the jurisdiction of the superior court.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



COMBS v. RITTER.

No. 14415.

District Court of Appeal, First District, Division 1, California.

Sept. 28, 1950.

Rehearing Granted Oct. 28, 1950.

See 223 P.2d 505.

Granville P. Combs sued Catherine Ritter for an accounting of rents and profits received by defendant from an apartment house owned as joint tenants by plaintiff and by defendant who was plaintiff's former wife. The Superior Court, City and County of San Francisco, Alfred J. Fritz, J., rendered a judgment for plaintiff for $326.10, and plaintiff appealed. The District Court of Appeal, Bray, J., held that evidence did not justify implying an agreement whereunder defendant was to be paid for her services in managing the apartment after separation of the parties, and that defendant was entitled to be compensated to the extent rents received exceeded rents which would have been received had apartments been rented unfurnished rather than furnished with defendant's furniture.

Judgment reversed and case remanded.

1. Tenancy in common ⇐31

In the absence of an agreement, express or implied, a cotenant is not entitled to compensation for services rendered in the care and management of the cotenancy property.

2. Joint tenancy ⇐8

That husband before separation from his wife received an allowance for serving as janitor for apartment building owned by himself and his wife as joint tenants would not justify implying agreement that after separation wife was to be paid for her services in managing apartment house.

3. Partnership ⇐83

Generally a partner is not entitled to compensation for services rendered by him to a partnership.

4. Partnership ⇐83

An agreement may be implied whereunder a partner is entitled to compensation for services rendered by him to partnership.

5. Partnership ⇐122

The existence or nonexistence of an implied agreement whereunder a partner is to be entitled to compensation for services rendered by him to partnership is for determination of court from facts and circumstances of case.

6. Appeal and error ⇐996

Inferences of fact which support conclusion of court as to existence or nonexistence of an implied agreement whereunder a partner is entitled to compensation for services rendered by him to partnership will not be disturbed on appeal even though trial court might with equal propriety have found the other way.

7. Joint tenancy ⇐8

Fact that after husband and wife separated wife managed apartment house owned by them as joint tenants did not justify implying an agreement whereunder wife was to be paid for such services.

8. Joint tenancy ⇐8

A joint tenant of apartment house whose furniture was used in furnishing apartments was entitled to be compensated to extent the rent received from apartments exceeded rent which would have been received had apartments been rented

unfurnished, notwithstanding absence of an agreement between joint tenants that a charge could be made for use of furniture.

Edmund J. Holl, San Francisco, for appellant.

Garton D. Keyston, San Francisco (William S. Sparks, San Francisco, of counsel), for respondent.

BRAY, Justice.

Plaintiff received judgment for $326.10 in an action for an accounting of the rents and profits received by defendant from an apartment house owned as joint tenants by plaintiff and defendant, his former wife. Contending that this did not constitute an equal division of the net profits, plaintiff appealed.

Contentions:

That neither the evidence nor the law justifies an allowance to a joint tenant (1) for services as manager of the tenancy property; (2) for rental for furniture and furnishings of one joint tenant used in the tenancy property.

Facts.

Plaintiff and defendant were married in 1928, at which time defendant owned the apartment house in question as her separate property. In 1938, at plaintiff's request, defendant, without any monetary consideration, executed a joint tenancy deed of the property to plaintiff and herself as joint tenants. In November, 1944, defendant obtained an interlocutory decree of divorce. There was no property settlement, nor disposition of the property in the decree. Prior to the separation of the parties, all rents from the apartments, and the salaries of the parties (both of whom were working) were deposited in a common account from which all expenses were paid. The action was for an accounting from November 4, 1944, the date of separation of the parties, to February 15, 1949, the date when the apartment house was sold. Except for the two items herein discussed, no objection was made to the accounts submitted by defendant. The court approved these accounts and allowed defendant $50 per month (or a total of $2050) for services as manager, and $100 per month (or a total of $4100) for the rental of furniture used in the apartments, which furniture was her separate property. After deducting these allowances there was a net profit of $652.21 of which the court awarded plaintiff half, or $326.10.

Is Defendant Entitled to Compensation as Manager?

[1] The rule is clear, and defendant concedes, that in the absence of an agreement, express or implied, a cotenant is not entitled to compensation for services rendered in the care and management of the cotenancy property. Goodenow v. Ewer, 16 Cal. 461, 472, 76 Am.Dec. 540; Raun v. Reynolds, 18 Cal. 275, 291; Freeman on Cotenancy and Partition, 2d ed., 1886, § 260; 33 C.J. 910; 48 C.J.S., Joint Tenancy, § 8, p. 931; 7 Cal.Jur. 349. "It appears to be a settled rule that a cotenant is not ordinarily entitled to compensation for services rendered in managing, operating, or taking care of the common property in the absence of an express agreement or a mutual understanding that the services should be paid for. An exception to this rule exists where one cotenant performs services which neither the law nor the relation of cotenancy imposes upon him. But leasing the property, collecting rentals, and looking after repairs do not fall within the exception." 14 Am.Jur. § 30, pp. 98-99.

Defendant testified that there had been no discussion with plaintiff on the subject of pay for her services. She concedes that there was no express agreement. She contends, however, that the evidence supports an implied agreement. The court made no finding as to an agreement, either express or implied, but allowed defendant $50 per month for her services. Defendant contends that thereby the court impliedly found that there was such an implied agreement and that the evidence supports such a finding. We have carefully examined the record and find no evidence to justify such a claim. The two matters which defendant claims give rise to an implied agreement

are (1) the income tax reports filed by plaintiff prior to the separation and (2) the fact of the services rendered.

[2] 1. Prior to the separation plaintiff had taken a deduction of $240 a year for "janitor services" in the joint income tax reports. This was with the consent and knowledge of defendant. There was no janitor; plaintiff stated "I was the janitor," and "I was allowing that for myself." The record does not show whether plaintiff actually received this sum personally, or whether it was merely a bookkeeping item for tax purposes only. Assuming, however, that plaintiff did receive such an allowance while the parties were living together, it affords no basis for implying an agreement that, after the separation, defendant was to be paid for her services.

[3-7] 2. Defendant testified and the court found that defendant "managed and operated said apartment house, and laundered all curtains, cleaned and washed the woodwork and stoves, cared for and operated the furnace and refrigeration unit, made minor plumbing repairs, collected rents, received and remedied complaints of tenants, paid all bills in connection with the operation of said apartment house, and did all things necessary in operating said apartment house * * *." Defendant contends that the fact of these services raises an implied agreement to pay for them. She has cited no case, nor have we been able to find any, supporting this theory. Cases like Dugan v. Forster, 104 Cal.App. 117, 285 P. 384, Neilsen v. Holmes, 82 Cal.App. 2d 315, 186 P.2d 197, cited by defendant, do not sustain the contention. They state the general rule that a partner is not entitled to any compensation for services rendered by him to a partnership. They then state that an agreement may be implied and that the existence or nonexistence of such a contract is a question for the court to determine from the facts and circumstances of the case, and that the inferences of fact which support the court's conclusions will not be disturbed on appeal, even though the trial court might with equal propriety have found the other way. There is no question but that this is the law and that the rule as to cotenants is the same as to partners in this respect. However, in these cases there were other circumstances than the mere fact of service alone. Thus in the Dugan case, the salaries of the defendants were entered in the books and the plaintiff did not claim that he was not aware of the fact that they were charging salaries. In the Neilsen case there was testimony that there was an express agreement to pay salaries.

In Thompson v. Salmon, 18 Cal. 632, also cited by defendant, the plaintiff was employed by his cotenants in an oral agreement to take charge of and sell their land in small tracts, and to receive a commission. During his employment he rendered five different accounts current, showing the amount of sales, his disbursements for taxes, and costs paid in certain suits against squatters. After the rendition of these accounts he brought suit against his cotenants for services in bringing twenty-seven suits against squatters, hunting up witnesses and other matters. The opinion states that the point of dispute was whether the commission on sales was to cover all services rendered by him. The trial court found that it did not. On appeal, the only point passed on was whether the fact that in the accounts presented plaintiff had not included the charge now being made, precluded him from claiming payment of it thereafter. The court held that it did not.

As there is no evidence of an implied contract to pay defendant for her services, the allowance to her of $50 per month was improper.

Use of Furniture.

Prior to the institution of this action, plaintiff brought suit against defendant to acquire title to the furniture in the apartment house. In that action it was held that a small portion of the furniture was community property and that the bulk of the furniture was defendant's separate property. In this action the court found (and the finding is not challenged): "that the furniture and furnishings in said apartment house were owned exclusively by defendant save and excepting the stoves therein and several pieces of furniture and wall beds and equipment; that said stoves and

several pieces of furniture and wall beds and equipment were owned by the parties hereto as tenants in common." The apartments were rented furnished. Defendant's counsel stated to the court (and this statement was not disputed in the trial court) that the difference in the rental value of all the apartments unfurnished and furnished was $120 per month. In her accounting defendant allowed $20 per month for the use of the community furniture and $100 per month to herself for the use of her separate furniture. No evidence was offered to contradict the reasonableness of this allocation or of the court's finding that it was reasonable. It is conceded that there was never any discussion between the parties concerning a charge for the use of the furniture. Plaintiff contends that in the absence of an agreement a cotenant may not charge for the use of his personal property in cotenancy business. This is not the law. The rule is well stated in Goodenow v. Ewer, supra, 16 Cal. 461, at page 472, 76 Am.Dec. 540: "He is also entitled to reasonable allowances, to be deducted from the rents, for the use of his individual property, when such use was required in order to let the premises themselves. It is not probable that he could have let the theater rooms, from time to time, as different theatrical companies required them, without, at the same time, letting the carpets, lamps, and scenery; and as these constituted his individual property, a reasonable allowance for them should be deducted from the rents received."

[8] In our case the apartments could not have been let as furnished apartments were it not for defendant's furniture. See also 7 Cal.Jur. 352-353. Here the rents were increased $100 per month because of defendant's furniture. She, therefore, is entitled to be compensated to that extent. This is in line with the general rule allowing compensation for repairs or improvements where made with the acquiescence of the other cotenants. See Freeman on Cotenancy and Partition, §§ 262, 279; 14 Am.Jur. 115, § 49. Plaintiff relies on three cases: Clement v. Duncan, 191 Cal. 209, 215 P. 1025, which held that a partner is not entitled without an agreement to interest on money advanced by him to the partnership. Carpenter v. Hathaway, 87 Cal. 434, 25 P. 549, involved an oral agreement of partnership in the buying and selling of certain lands. Defendant was to supply the money and plaintiff the services, the net profits to be equally divided. It was held that in arriving at the amount of the net profits, in the absence of an express agreement, defendant could not charge interest on the moneys invested. In Young v. Canfield's Estate, 33 Cal.App. 343, 164 P. 1134, an owner of land agreed to give another for his services one third of the net profits from the sale of the land. In a suit against the estate of the owner the trial court held that in determining what were the net profits on his investment the owner was entitled to interest. On appeal the higher court stated that the sole agreement between the parties was expressed in writing signed by the owner, and that the words "net profits" therein did not authorize a charge of interest. "The general rule is that the matter of the payment of interest must be made the subject of an express agreement, otherwise it cannot be charged * * *." 33 Cal. App. at page 345, 164 P. at page 1135. In view of the Goodenow case this rule cannot be held to extend to the use by a cotenancy of personal property where such use is required, as here. The allowance for use of defendant's furniture was proper.

The judgment is reversed, and the case remanded to the trial court to amend its findings of fact and conclusions of law as herein indicated, and to enter judgment for plaintiff in the sum of $1351.10.

PETERS, P. J., and FRED B. WOOD, J., concur.

99 Cal.App.2d 711

PEOPLE v. WESCOTT et al.

Cr. 2190.

District Court of Appeal, Third District, California.

Sept. 29, 1950.

Edward Wescott and Melvin Fehr were convicted in the Superior Court, Yuba County, Steel, J., of murder and defendant Wescott appealed from the judgment of conviction and from an order denying his motion for a new trial. The District Court of Appeal, Peek, J., held, inter alia, that evidence sustained the conviction.

Judgment and order affirmed.

1. Criminal law ⇐753(2)

To justify an instruction directing a verdict of acquittal in criminal prosecutions the evidence must be insufficient as a matter of law. Pen.Code, § 1118.

2. Criminal law ⇐745

Where there is evidence from which an inference of guilt is justified a criminal prosecution will not be taken from jury because an inference of innocence might also be drawn therefrom. Pen.Code, § 1118.

3. Homicide ⇐268

Where witness testified that while he and a companion were sleeping along levee, witness was awakened by blow on head and while trying to protect himself he heard companion call for help and noticed two men standing over companion and beating companion, and that witness could not identify assailants because of darkness, but witness described a part of assailants' clothing and testified that defendants charged with murdering his companion were similar in size to defendant and co-defendant, and witness described a pocket knife owned by his companion and later found in possession of co-defendant, defendant was not entitled to advisory verdict. Pen.Code, § 1118.

4. Homicide ⇐250

Evidence justified murder conviction.

5. Criminal law ⇐741(1), 742(1)

The strength and weakness of testimony and credibility of witnesses are solely within province of jury.

6. Criminal law ⇐1159(2)

If there is any substantial evidence, contradicted or uncontradicted, to sustain conviction for crime, a reviewing court will not interfere.

7. Criminal law ⇐1166½(12)

In murder prosecution, prejudicial effect of statement of trial judge intimating that some one other than co-defendant, possibly defendant, hit decedent during an assault on decedent, was removed by statement of trial judge made following objection and discussion between counsel and court that "if I am mistaken I am mistaken".

8. Criminal law ⇐1035(3)

Where counsel for defendant charged with murder failed to timely object to an alleged prejudicial remark made by trial judge when counsel for defendant was cross-examining a witness, defendant could not assign the remark as error for first time on appeal.

9. Criminal law ⇐814(2)

In a criminal prosecution instructions are always to be given or refused with reference to facts introduced before jury.

10. Criminal law ⇐807(1)

In murder prosecution trial judge properly refused to give an instruction which was merely an argument to jury based solely upon defendant's version and valuation of facts.

Harold D. Hadley, Marysville, for appellant.

Fred N. Howser, Attorney General, for respondent.

PEEK, Justice.

Appellant Wescott and his co-defendant Fehr were charged with the crime of murder, to which they both pleaded not guilty. At the conclusion of the prosecution's case Wescott moved for an advisory verdict and for a dismissal as to himself, both of which motions were denied. Following the jury's return of verdicts of guilty against both defendants, Wescott moved for a new trial

and now appeals from the denial thereof as well as from his judgment of conviction.

The evidence, viewed in the light most favorable to the respondent shows that immediately prior to the crime decedent Henry McAnally and a friend William Patrick Noonan were sleeping along the levee near the city of Marysville. Noonan, according to his testimony, was awakened by a blow on the head. While endeavoring to protect himself from further blows he heard McAnally "hollering" for help. He then noticed two men standing over McAnally, beating him. It was too dark to identify the assailants. However, as one Johnson approached armed with an automobile crank they ran away and Noonan noticed that they both wore T shirts and that one had dark vertical stripes on it. He further stated at the trial that defendants were approximately the same size as his assailants. Two police officers testified to seeing the defendants near the scene of the crime on three different occasions. Both defendants made statements to the officers following their arrests a few days later. Appellant Wescott denied any knowledge of the crime. But he did take the officers to the home of a friend where he obtained a T shirt which he said he was wearing that night. His co-defendant Fehr implicated them both in the fatal assault. However, his statement, having been out of the presence of Wescott, was admitted only as to himself. The remaining evidence against defendants consisted of testimony of a doctor that McAnally died as a result of the beating he received, and the introduction of certain exhibits, among which was a pocket knife identified by Noonan as the one McAnally had prior to the assault, and which Fehr gave to the officers with the statement that it was given to him by Wescott. Also identified by Fehr was a club which he said he had used.

The evidence so summarized was all that the record contained at the time of appellant's motion for an advisory verdict. It is now his contention that the testimony of Noonan, which he characterizes as being "contrary to statements of both defendants" and as being "vague" and "contradictory", was the only evidence in the record that appellant struck McAnally and that therefore on the authority of Penal Code section 1118 and People v. Ward, 145 Cal. 736, 79 P. 448, such motion should have been granted. We cannot agree with this conclusion. The evidence at the time of the motion showed that Noonan and McAnally were attacked without provocation as a result of which the latter died. Noonan described the participation by two men in the beating of decedent. He described a part of the assailants' clothing and that the defendants were similar in size to the assailants. He further described the pocket knife owned by decedent and found in the possession of Fehr. Wescott himself admitted being in the vicinity of the crime but denied giving the knife to Fehr or that he knew anything about the assault, saying he was asleep on the levee.

[1-3] From our examination of the record we cannot say that there is an "absence of any substantial evidence as to some fact that the prosecution was bound to prove." People v. Jackson, 78 Cal.App. 442, 248 P. 1061, 1064. To justify an instruction directing a verdict of acquittal the evidence must be insufficient as a matter of law. People v. Bannon, 59 Cal.App. 50, 63, 209 P. 1029; People v. Curtis, 36 Cal. App.2d 306, 324, 98 P.2d 228. See also 8 Cal.Jur. 284. Thus, where, as here, there is evidence from which an inference of guilt is justified a case will not be taken from the jury because an inference of innocence might also be drawn therefrom. People v. Cox, 117 Cal.App. 254, 256, 3 P.2d 581.

[4] Appellant's next contention is that the evidence was insufficient to sustain the verdict. Here it must be noted that following the denial by the court of appellant's motion he took the stand in his own defense and admitted that his statements to the police, to the effect that he had not seen the fight, were incorrect, his reason for this being that having been in trouble once before he was afraid they would not believe him and that he wanted to first get the advice of counsel. He also testified that on the evening in question he had had

quite a few drinks; that as he was following Fehr along the levee there was a sudden commotion and that he ran up ahead to see what was happening; that he noticed the decedent and Fehr struggling; that the man had a knife in his hand and he grabbed the man by the arm; that the man went limp and the knife he was trying to pry away came out of his hand.

His argument in support of such contention is principally predicated upon the weight of the evidence. In his reply brief, however, he endeavors to distinguish the case of People v. Le Grant, 76 Cal.App.2d 148, 172 P.2d 554, 557, which is strongly relied upon by the prosecution. In that case the evidence shows that the defendant Le Grant did not participate in the fatal fight but that during its progress kept people from attempting to stop it. The court, in rejecting the same argument as appellant makes herein, i. e. that the evidence shows no preconceived conspiracy or concert of action between the co-defendants as to any intended assault upon the victim, and that the evidence was also insufficient to show that Le Grant had participated directly or aided and abetted his co-defendant in the commission of the crime, stated: "The liability of a defendant for a criminal act is fixed by the provisions of sections 31 and 971, Penal Code, whereby all persons 'concerned' are principals, whether directly, or by aiding and abetting in its commission, and conspiracy or concert of action, comprehend nothing that is not included in the definition of 'who are principals'. (Citing cases.) One may aid and abet without having previously entered into a conspiracy to commit a crime. (Citing cases.)"

Thus, to sustain the conviction against Wescott there was no necessity that he be shown to have physically participated in the fight. And although the mere presence alone of appellant at the scene of the attack would be insufficient, nevertheless, as the court in the Le Grant case stated, it would be a "circumstance tending to support a finding that he is a principal." However, by his own statement, he aided Fehr by holding the decedent's arm and removing the knife from his hand. Thus, with full knowledge of Fehr's acts and that an assault was in progress and knowledge of the possible fatal consequences he held the arm of the deceased while Fehr struck him.

[5, 6] The rule is too well established to warrant citation of authority that the strength or weakness of the testimony and the credibility of the witnesses were matters solely within the province of the jury, and that if there is any substantial evidence, contradicted or uncontradicted, to sustain its conclusion, a reviewing court will not interfere.

[7, 8] Appellant's next contention is that the trial court committed prejudicial error in two instances, first, by making certain statements during the course of defendant Fehr's testimony relative to the number of times he struck the decedent and the inference which the court drew therefrom that some one else also participated, and second, statements concerning what the court apparently felt was an attempt to impeach a witness upon an immaterial matter. It is true that the court's first comment did intimate that some one in addition to Fehr, possibly Wescott, hit the decedent. However, following objection to the comment and a discussion between counsel and the court, the judge stated: "If I am mistaken I am mistaken." While, as we have said, it was unnecessary to a conviction of appellant that he actually struck McAnally, nevertheless even if such were not the rule the latter comment of the court would remove the prejudicial effect, if any, from the statement. Additionally it may be said that the questioning of the witness by the court could well come within the rule stated in People v. Butterfield, 40 Cal.App.2d 725, 105 P.2d 628. See also People v. Buratti, 96 Cal.App.2d 417, 215 P.2d 500, and cases therein cited. The second comment which appellant attacks, "Let's move along. You can't impeach a witness on an immaterial matter. Let's get going", was made after counsel for defendant, in cross-examining the witness Noonan, read a portion of his statement which was not inconsistent with his testimony at that moment. No objection was made to the remark. Even if such statement was objectionable (which under

the circumstances we doubt), appellant's counsel, having failed to timely object to the alleged prejudicial remark, cannot now assign it as error and raise it for the first time on appeal.

Appellant's final contention is that the court erred in failing to give the instruction proposed by him. The instruction is quite lengthy and no benefit would be served by quoting it at length. Suffice it to say that it was nothing more than an argument to the jury based wholly upon appellant's version and valuation of the facts.

[9, 10] In a criminal case instructions always are to be given or refused with reference to the facts introduced before the jury. People v. McCoy, 25 Cal.2d 177, 188, 153 P.2d 315. Thus it has been repeatedly held to be improper to give instructions which single out the testimony either of the defendant, or any other witness, and charge the jury with particular reference thereto. People v. McDonnel, 94 Cal.App.2d 885, 211 P.2d 885; People v. Harris, 128 Cal.App. 44, 16 P.2d 688.

The judgment and order appealed from are affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.



99 Cal.App.2d 664

In re GALLIMORE'S ESTATE.

Civ. 14536.

District Court of Appeal, First District, Division 1, California.

Sept. 27, 1950.

Rehearing Denied Oct. 27, 1950.

Hearing Denied Nov. 20, 1950.

Proceeding in estate of Sue Gallimore, deceased, wherein Elizabeth Gray and two others, three of the four remaindermen of a testamentary trust created by the will of Sue Gallimore, petitioned for a termination of the trust prior to the time fixed for its termination in the trust instrument on the ground that all purposes of the trust had been fulfilled. Robert Gallimore, Jr., and two others responded as trustees, and Robert Gallimore, Jr., individually objected as the fourth remainderman. The Superior Court, Santa Clara County, John D. Foley, J., denied the petition to terminate, and the three petitioning remaindermen appealed. The District Court of Appeal, Peters, P. J., held that trust could not be terminated on the ground that its purpose was accomplished over the objection of one of the four remaindermen.

Affirmed.

1. Trusts ⇐61(1)

A trust may not be terminated prior to time specified in trust instrument, over objection of a beneficiary, unless there is no possible purpose to be accomplished in continuing the trust.

2. Trusts ⇐61(1)

Where testamentary trust decree of distribution provided specified monthly payments to certain person for life, and payment of remainder of trust income to testator's sister-in-law and four remaindermen, and upon death of sister-in-law payment of net income to four remaindermen, survivor or survivors of them, and upon death of certain person and sister-in-law trust property would pass to four remaindermen, but three remaindermen acquired rights of certain person and sister-in-law, trust could not be terminated, on ground that its purpose was accomplished, over objection of the other remainderman.

Smith, Wool & Perren, Fred A. Wool, San Jose, for appellants.

Rea, Jacka & Frasse, San Jose, for respondents.

PETERS, Presiding Justice.

Three of the four remaindermen of a testamentary trust created by the will of Sue Gallimore petitioned for a termination of the trust prior to the time fixed for its termination in the trust instrument on the ground that all purposes of the trust had been fulfilled. One remainderman objected. The trial court denied the petition to terminate, and the three petitioning remainder-

men appeal. There is no merit to the appeal.

Sue Gallimore died testate. Elizabeth Gray, John and Margaret Gallimore, the three appellants, and Robert Gallimore, Jr., the objector, were her four surviving nieces and nephews. All are the children of Nellie Gallimore, the sister-in-law of Sue. The final decree of distribution was entered in Sue's estate in December, 1939, and Sue's will, by which the testamentary trust was created, was made part of that decree. The decree of distribution, which has long since become final, provides that the residue of the estate is distributed to three named persons as trustees for the following purposes:

"(a) To pay to Gong Yuen, the sum of Thirty Dollars ($30.00) a month, as long as he shall live.

"(b) To pay the net income from this Trust, after the payment of said monthly sum to Gong Yuen, to Mrs. Nellie Gallimore, Elizabeth Gray, Robert Gallimore, Jr., John Gallimore and Margaret Gallimore, share and share alike, until the death of Nellie Gallimore.

"(c) Upon the death of Nellie Gallimore, said net income shall be paid to Elizabeth Gray, Robert Gallimore, Jr., John Gallimore and Margaret Gallimore, the survivor or survivors of them, share and share alike.

"(d) Upon the death of both Gong Yuen and Nellie Gallimore, all of said property shall belong to and become the property of Elizabeth Gray, Robert Gallimore, Jr., John Gallimore and Margaret Gallimore, share and share alike."

All of the parties named in the testamentary trust are over the age of majority and fully competent. The trust estate presently consists of securities valued at $72,500 and a parcel of real property inventoried at $8,500. The real property produces an income of $300 per year, and the total expenses of maintaining the property amounts to about $400 a year. The various accountings by the trustees show that the total income produced by the trust estate has only been sufficient to pay all the costs of administration and the payments due to Gong Yuen under paragraph "(a)". In the past seven years no payments of income have been made to the income beneficiaries under clause "(b)". Nellie and Gong are still alive.

In February and March of 1949, the three appellants who are three of the four remaindermen named in paragraph "(d)", being all of the remaindermen with the exception of Robert Gallimore, Jr., acquired all of the rights of Gong Yuen and Nellie Gallimore in the trust. These three remaindermen then disclaimed all rights of their assignors in the trust. Thereupon, appellants, contending that there was no further purpose to be served by continuing the trust, demanded that the trustees terminate it and distribute the corpus to the four remaindermen. The trustees refused to comply, and refused to petition the probate court for instructions. Appellants then petitioned for an order terminating the trust and distributing the corpus. At the hearing, Robert Gallimore, Jr., one of the remaindermen, objected. After a hearing, the trial court denied the petition, and the three petitioning remaindermen appeal.

The appellants contended before the trial court and now urge that:

1. The essential and only purpose of the trust was to provide for the payment of income to Gong and Nellie, because as soon as the duty to distribute income to them terminated, the corpus was to be distributed to the trustor's four nephews and nieces.

2. By virtue of the assignments to the appellants by Gong and Nellie, and their disclaimers, no further purpose of the trust could be achieved.

3. The remaining rights of the nephews and nieces to receive income are identical with their rights as remaindermen. Hence, their rights have merged and the trust has terminated.

4. There is nothing in the trust instrument which indicates an intention of the trustor that the trust should continue until the deaths of Nellie and Gong.

Robert Gallimore, Jr., at the hearing, urged several reasons why the trust should not be terminated. The trial court recognized that the specific reasons assigned by Robert might not be sound, but concluded that there was a very good reason why the

trust should not be terminated. In this connection the court, in a memorandum opinion, stated: "It may be to his [Robert's] pecuniary advantage if the trust is allowed to continue until the time specified therein for its termination. The trust provisions and particularly the survivorship provision with regard to the payment of income upon the death of Nellie Gallimore [Clause "(c)"] indicate the possibility of this advantage to Robert Gallimore, Jr. if the trust is allowed to continue. In this situation it cannot be said that the termination of the trust at this time would not prejudice the rights of Robert Gallimore, Jr. as an income beneficiary."

It seems to us quite clear that the reason assigned by the trial court for not terminating the trust is sound. Obviously, Robert Gallimore, Jr., if he should survive Nellie during the lifetime of Gong, and should survive the other nephews and nieces, would be entitled, as such survivor, under Clause "(c)", to all of the income above that paid to Gong. By now terminating the trust he would lose that important and prospective right.

[1] Much has been written on the general subject as to whether a trust whose purposes have been fully performed may be terminated, over the objection of a beneficiary, prior to the time specified in the trust. Generally, under such circumstances, it is stated that a trust will not be terminated. 4 Bogert on Trusts and Trustees, Part 2, § 1002, page 491; 3 Scott on Trusts, pp. 1833, 1865, §§ 337, 340; 59 Harv.L.Rev. pp. 157, 201. It is true that there is authority to the effect that if the purposes of the trust have been fully accomplished, the trust will be terminated even if some of the beneficiaries object. 3 Scott on Trusts, p. 1865, § 340. That rule will never be applied, however, where the rights of any beneficiary will be adversely affected by the termination. The rule is that all of the beneficiaries must consent to a termination unless there is no possible purpose to be accomplished in continuing the trust. See 123 A.L.R. pp. 1427, 1449; 45 A.L.R. pp. 743, 749.

[2] The argument of appellants is that this case is one where no purpose can be served by continuing the trust. But this contention disregards Clause "(c)" of the trust. This is not a case where the interests of the holders of the beneficial life interests have merged with the vested remainder interests. Robert Gallimore, Jr., has a contingent survivorship interest in the income of the trust under Clause "(c)". This being so, the trial court properly refused to terminate the trust over his objections.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



99 Cal.App.2d 603

NULAND et al. v. PRUYN et al.

Civ. 7684.

Sac. 6029.

District Court of Appeal, Third District, California.

Sept. 25, 1950.

Hearing Denied Nov. 20, 1950.

Joe Nuland and Alva Leo Archer brought suit against S. R. Pruyn and J. R. Busby for an order dissolving alleged partnership, on ground that alleged partnership had been wrongfully terminated by defendants, for damages for breach of agreement to create alleged partnership and for an account. The Superior Court of Solano County, Harlow V. Greenwood, J., rendered a judgment for the plaintiffs, and the defendants appealed. The District Court of Appeal, Van Dyke, J., on rehearing, held that agreement between the parties was ambiguous as to whether relationship created was that of partnership or of employment, and that therefore evidence was admissible to show the intent of the parties, that evidence was insufficient to establish a wrongful dissolution of the alleged partnership, and that Superior Court committed prejudicial error in determining rights of the parties on theory that there had been a wrongful dissolution.

Judgment reversed and new trial ordered on all issues.

Prior opinion 216 P.2d 526.

1. Appeal and error ⇐1008(3)

Whether a contract is in any of terms ambiguous or uncertain is a matter of determination in the first instance by the trial court, and, if it is found so to be, it is primarily the duty of the trial court to construe it, after a full opportunity afforded the parties to produce evidence of the facts, circumstances, and conditions surrounding its execution, and the conduct of the parties relative thereto.

2. Appeal and error ⇐1008(3)

Where a writing is so uncertain that either of two constructions urged might be sustained, it is not within the functions of a court of review to declare that the interpretation given by the trial court should be supplanted by the other construction of which the instrument is susceptible.

3. Contracts ⇐175(2)

Contract providing that defendants owned radio repair and service business, that plaintiffs represented that they were expert radio service and repairmen, that defendants desired plaintiffs to devote their services to the business, that equipment and stock was reasonably worth $2,500, that 50 per cent of gross receipts of business would be deposited in bank account until defendants received $2,500 as repayment, that thereafter a fund of at least $1,000 was to be maintained, and that excess was to be withdrawn and divided equally between the parties as dividends, was ambiguous as to whether relationship of parties was a partnership or merely one of employment, and evidence was admissible to aid in interpretation.

4. Partnership ⇐328(3)

In action for an order dissolving alleged partnership because of alleged wrongful termination of alleged partnership by defendants, for damages for breach of agreement to create alleged partnership, and for an accounting, evidence was insufficient to sustain finding that defendants wrongfully terminated alleged partnership, and it was reversible error to render accounting on theory that alleged partnership was wrongfully dissolved.

5. Partnership ⇐75, 300

If partnership was by notice rightfully dissolved by defendants, plaintiffs would have been entitled to have their ownership in assets determined as of date of dissolution and to have payment made to them in money or in kind, and if such was not done and plaintiffs' property was used in partnership business, they would be entitled to an election to receive their property and to share in the profits made thereafter in proportion their property bore to the whole or to be paid interest on the value of their property so used.

6. Partnership ⇐273

In case of a wrongful expulsion of partners from partnership and continued use of the expelled partners' assets, right of expelled partners would be based on an assumption of a continued partnership with full participation in profits according to a ratio set up in articles of partnership, at least for a period from wrongful expulsion to actual dissolution by circumstances or decree of court.

Taft, Wright & Hopkins, of Vallejo, for appellants.

Brunswig Sholars, of Schofield, Hanson & Sholars, and Ralph Bancroft, all of San Francisco, Leo C. Dunnell, of Fairfield, for respondents.

VAN DYKE, Justice.

After decision of this cause by an opinion heretofore filed we granted a rehearing on the petition of respondents. Our purpose in doing so was to give further consideration to the decision so made and to certain points in respect thereto raised by respondents' petition. Further consideration of these matters, however, leads us to the conclusion that the opinion heretofore filed herein correctly and adequately disposes of the issues raised on the appeal and for that reason we adopt the opinion heretofore rendered as our present opinion. That opinion is as follows:

"By their complaint in this action the plaintiffs alleged that on June 26, 1944, they and the defendants entered into a written agreement whereby the parties thereto agreed to the creation of a partnership for the operating of a radio repair and service business in Vallejo, California, for a period of five years. This written agreement is not set out in haec verba in the complaint, but its alleged legal effect is pleaded. Plaintiffs further alleged that they entered upon the performance of the agreement and fully performed their obligations thereunder until on or about September 6, 1944, on which date they were by the defendants wrongfully excluded from participation in the business and prevented from further performance. They pleaded that on that date and in contravention of the partnership agreement the defendants, without cause, served upon them a written notice of election to terminate the partnership and that the service of the same was a part of a joint and concerted action and conspiracy by defendants against them for the purpose of excluding them from participating in the management and profits of the partnership. They alleged that thereupon defendants immediately took exclusive charge and possession of the partnership business and wrongfully excluded the plaintiffs therefrom thereafter, in the meantime refusing them access to the partnership records and refusing any accounting of the business. They claimed these acts made a dissolution of the partnership necessary; that defendants thereby caused a dissolution of the partnership in contravention of the partnership agreement. They alleged resulting damages consisting of the loss by them of their share of the profits of the partnership from the date of the exclusion to the date of accounting and that an accounting of the partnership affairs was necessary. They prayed for an order dissolving the partnership and, based upon a requested finding that the dissolution was wrongfully caused in contravention of the partnership agreement, they asked damages for the breach of the agreement, an account of the business to determine their share of profits, the appointment of a referee to take such account and for judgment for any amount found due them.

"The defendants answered, denying virtually all of the foregoing allegations of the complaint.

"Upon the pleadings so framed the case went to trial. At the outset the question of whether the written agreement, admittedly executed but denied as to the alleged legal effect, created a partnership or merely an employment of plaintiffs by defendants, received the attention of the trial court. Considerable evidence was taken concerning the facts, circumstances and conditions surrounding the execution of the agreement and of the conduct of the parties thereafter. The court then announced its determination that the contract not only spoke for itself, but that it was a partnership agreement. The court thereupon ordered that an account be taken of the partnership business and referred the taking of that account to a referee, who thereafter proceeded to take the account and upon completion thereof filed with the court her referee's report. The court adopted this report, which determined that there was due to the plaintiffs the sum of $4,039.05 each and thereafter entered judgment in their favor, adjudging that each of them recover that sum against the defendants jointly and severally. From this judgment this appeal is taken.

"Herein the appellants contend that the court misconstrued the contract. To the determination of this contention it will be necessary to refer to the terms and provisions of the agreement somewhat at length. By the terms of the agreement appellants here, S. R. Pruyn and J. R. Busby, are collectively referred to as the first party thereto and the respondents here, Joe Nuland and Alva Leo Archer, are collectively referred to as the second party. The agreement recites that the first party is the owner and operator of a certain radio repair and service business in Vallejo, and the second party represents and declares that they are expert radio service and repairmen, experienced and qualified in the matter of repairing, rebuilding, and servicing radio receiving sets and kindred items. It is then

recited that the parties desire that the second party devote their services to the radio repair and service business under the terms and conditions set forth. In consideration of these premises detailed provisions are made concerning the proposed actions and obligations of the parties thereunder. It is agreed that the first party (appellants here) shall not be called upon to render any services whatever in the conduct of the business, but may do so if they desire. On the other hand, Nuland is required to devote to the business not less than five eight-hour days each calendar week. Archer is required to devote his full and exclusive time to said business and is forbidden to accept other or different employment of any kind or character whatsoever. He agreed to work not less than six eight-hour days each calendar week. The parties agreed that the initial value of the tools, equipment, materials, supplies and stock in trade of the business was reasonably worth $2,500. It was stipulated that 'fifty (50%) per cent of the gross receipts' of the business should be deposited in a bank account to be known as 'the fund' from which only the first party jointly or severally might draw; that from this fund moneys would be withdrawn by the first party from time to time until they had received $2,500 as 'repayment for their investment and/or purchase price' of the aforesaid property. Then the funds were to be accumulated, never falling below a balance of $1,000. The excess over that was to be withdrawn not less than once a month and divided equally between the parties 'as dividends from the operation of said business.' However, if it should turn out that said balance was insufficient to properly operate the business, then the parties agreed that they might, by mutual agreement, increase the amount of the balance. All operating expenses of the business were to be paid from 'the fund'. It was further agreed that the remaining fifty per cent of the 'gross receipts' should be equally divided between the first and second parties not less than once each calendar month. The second party was charged with the duty of purchasing supplies and materials, but could not make such purchases in excess of $50 from any source without written consent of the first party and no power was given to incur obligations otherwise without first obtaining such written consent. The parties agreed to keep accurate books of account to which all should have access. The agreement provided the term thereof would be a period of five years, but if Nuland or Archer were inducted into the armed forces or for any reason became physically incapable of performing their duties then the 'first party may, at his option or election, terminate the within agreement by giving notice in writing to the second party or any member thereof of his intention so to do, fifteen (15) days in advance of such termination.' If the second party either jointly or severally violated or breached the agreement the first party could forthwith cancel and terminate the same by giving written notice of intention so to do to either member of the second party. If second party faithfully performed their duties then upon the expiration of the term of the agreement the personal property constituting the physical assets of said business should be divided equally between the first party and the second party. Finally, it is declared to be the intention of the parties that Nuland and Archer shall devote their best interests and efforts towards the success of the business, conduct themselves in a sober and businesslike manner and refrain from intoxication or other practices which might tend to injure the reputation or good name of the business.

"Over the proper interpretation of this agreement as constituting a partnership or, on the other hand, a contract of employment, the parties to this appeal, both in their briefs and in their arguments, have wholly disagreed. Appellants contend that without regard to the evidence and merely taking the agreement 'by its four corners' the object to be attained by the original owners of the business was to secure the services of competent men to be employed in the radio repair business. They point to the way in which the agreement makes a unit of Pruyn and Busby and the second unit of Nuland and Archer; to the stated purpose of the first party to obtain expert and experienced repairmen; to the stated purpose of the second party to devote their services;

to the control by the first party of all the funds; to the limitations placed on the second party in respect of the expenditure of moneys and the incurring of obligations; to the expressed giving to the first party of the power of termination, whereas no such power is stated to be in the second party; to the requirements concerning conduct of the second party without such restrictions being placed upon the first party; to there being no declared obligation moving from the first party to the second party other than the payment of compensation; to the lack of a provision for the sharing of profits and the presence of a provision for 'compensation' from 'gross profits'; to the lack of any express declaration of intent to form a partnership; to there being no requirement for capital contribution by the second party nor pledge of credit thereby nor provision expressed for liability for losses. And from these things they conclude that *on its face* the contract is one of employment only.

"On the contrary, the respondents say the contract fully measures up to the code definition of a partnership, to-wit, 'an association of two or more persons to carry on as co-owners a business for profit' (Corp.Code, Sec. 15006, subd. (1)); that the code further declares (Corp.Code, Sec. 15007, subd. (2)) the receipt by a person of a share of profits is prima facie evidence that he is a partner, although no such inference is to be drawn if profits are received as payment; that the use of the word 'partnership' is not essential to the formation of one; that the question of partnership or not is a matter solely of the intention of the parties to do the things which partners do; that the agreement refers to an agreed value of personal property then being used in the business and provides for the withdrawal of the agreed amount 'as repayment for their investment and/or purchase price' thereof, meaning that the then owners agreed to accept the stipulated value in payment for such property which would thereafter belong to the business, that is, to the parties in common as co-owners. They point to the provision for maintenance of the balance in the business funds of $1,000, thus providing working capital and to the final provision for equal division of all assets upon expiration of the agreed term. They cite authorities to the effect that the lack of capital contribution by one or more partners does not prevent the relationship of partners. They argue that the absence of any reference to liability for debts is supplied by inference and is absent from many agreements of partnership. They say the inequality of control is a matter which can be agreed upon between partners inter se and they conclude that the agreement has all of the content necessary to the formation of a partnership.

[1-3] "It seems apparent that we have here an instrument which presents, in so far as its interpretation is concerned, questions of fact rather than of law. The agreement is ambiguous and uncertain in respect of the matters here in question and comes within the rules governing the interpretation of such documents.

"'* * * Whether a contract is in any of its terms ambiguous or uncertain is a matter of determination in the first instance by the trial court. If it is found so to be, it is primarily the duty of such court to construe it, after a full opportunity afforded the parties to produce evidence of the facts, circumstances and conditions surrounding its execution, and the conduct of the parties relative thereto. * * * And where a writing is so uncertain that either of the two constructions urged might be sustained, it is not within the functions of a court of review to declare that the interpretation given by the trial court should be supplanted by the other construction of which the instrument is susceptible.' (6 Cal.Jur. 327, sec. 192.)

"Illustrative of this principle is the case of Slama Tire Protector Co. v. Ritchie, 31 Cal.App. 555, 562, 161 P. 25. In that case an agreement had been made concerning the sale and distribution in a given territory of a certain tire protector device and the question before the court was whether the contract was one of sale or one whereby an agency was created and the goods which were the subject of the agency had been consigned to the agent and not sold to him. After discussing the terms of the contract

and pointing out the uncertainties therein, the court said:

" 'Thus we could proceed and point out other language of the contract which, taken alone or viewed in connection with the provisions of the instrument above referred to, clearly implies that the contract was intended to establish the relation of principal and agents between the parties and not intended as a contract for the sale of the goods; but it is unnecessary further to examine the contract for this purpose. The instrument is presented herein in full, and there can be no difficulty in observing from its language that the conclusion arrived at by the court below as to its legal nature, scope, and effect involves a reasonable view of the language of the writing.

" 'We do not say that the provisions of the contract above specifically adverted to are wholly inconsistent with the theory that the transaction was intended as a contract of sale. What we do say is that the provisions are perfectly consistent with a contract creating an agency. * * *

" 'As suggested, however, it must be admitted that the contract contains some language which, if considered by itself or without reference to or consideration of other language of the instrument, might warrant the construction to which the writing is subjected by the plaintiff, viz., that it involves an agreement for the absolute sale of the tire protectors to the defendants. Indeed, it may justly be assumed to be true that the instrument is so characterized by ambiguity and uncertainty as to the nature of the relation which the parties intended thereby to create between themselves that either of the two constructions of the contract urged by the respective parties might, upon reasons equally cogent, be sustained. The question, therefore, then arises, assuming, of course, that no competent testimony extrinsic to the writing itself reflecting light upon the real intention of the parties has been received: Is it, in such a situation, within the proper or legal functions of a court of review to declare that the construction given the writing by the trial court should be rejected and supplanted by the other construction of which the instrument is susceptible? Manifestly, no reason can be conceived which would support an affirmative reply to that question. The appeal court could not adopt such a course in such a case without resorting to the exercise of arbitrary power.'

"The principle declared in the foregoing authority has found approval in later cases, among which may be cited Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 582, 300 P. 34. Therein, concerning the principle here involved, the Supreme Court said:

" '* * * The construction given the instrument by the trial court appears to be consistent with the true intent of the parties and where that is the case the appellate court will not substitute another interpretation though it seem equally tenable.' See, also, Manley v. Pacific Mill & Timber Co., 79 Cal.App. 641, 648, 250 P. 710.

"As of July 31, 1946, the court made and filed findings of fact and conclusions of law, whereby it found to be true all of the allegations of plaintiffs' complaint and in addition specifically found that the partnership was entered into in writing on the 26th of June, 1944; that no accounting had been had of the partnership assets; that such account was necessary in order to ascertain the amounts due the plaintiffs from defendants; that defendant Busby was presently in possession of all partnership assets, having purchased all right, title and interest therein of defendant Pruyn; that all of the allegations of defendants' answer to the complaint were untrue, and that defendants had wrongfully caused a dissolution of the partnership, the plaintiffs being without blame therein. As conclusions of law the court declared:

" '1. That the partnership heretofore existing between the plaintiffs and the defendants be and the same is hereby declared to be dissolved, the defendants having wrongfully caused the same by their conduct.

* * * * * *

" '3. That the defendants be, and they are hereby required to render to the above entitled court a full and complete accounting of all transactions of the said partner-

ship including all profits arising therefrom from the beginning of said venture up to and including the dissolution thereof.'

"On April 9, 1947, the court entered an interlocutory decree. This decree recited that on February 13, 1946, the court 'did cause to be entered in its minutes that there was since on or about the 26th day of June, 1944, a partnership' existing between the parties; that it had theretofore filed findings of fact and conclusions of law; that it now appeared no final decree in the cause could be made until an accounting had been had for the purpose of determining the value of the properties and business of the partnership and of plaintiffs' interest therein. It then ordered that the partnership theretofore existing be and it was thereby declared to be dissolved; that Georgia H. Crowley be appointed a referee to take the account, the parties being ordered to produce before the referee all books, papers and writing in their possession and under their control, relating to the business. The referee was empowered to examine the parties and the witnesses and was declared to have all the powers conferred on referees by law.

[4] "It is to be noted that the court by the findings of fact which it had made and entered had found that on September 6, 1944, appellants had, in contravention of the partnership agreement, wrongfully served on plaintiffs written notice of their election to terminate the partnership; that plaintiffs had not committed any breach of the agreement; that the serving of the notice was part of a joint and concerted action and conspiracy by defendants against plaintiffs with the intent of excluding plaintiffs from the management of the business and participation in profits and that thereupon respondents had wrongfully taken exclusive charge and possession of the partnership business, and had excluded and still continued to exclude plaintiffs therefrom. Appellants contend these findings are utterly without support in the evidence. This contention must be sustained.

"Respondents' only witnesses were the appellants themselves, called under Section 2055 of the Code of Civil Procedure. Their testimony, in so far as it relates to the matter now under discussion, contains nothing that could be construed as sustaining the above findings and on the contrary would support a conclusion that the notice of termination was given for good cause. Busby testified that Nuland purchased the bulk of the parts that were acquired and never obtained defendants' permission as required by the agreement. Pruyn testified that Nuland and Archer did not close their radio store in San Francisco, although the agreement specifically provided that Nuland was to devote not less than five eight-hour days each calendar week to the partnership business and Archer was required to devote his full and exclusive time thereto, accepting no other or different employment of any kind. He was to work not less than six eight-hour days each calendar week. Finch, who had been employed in the shop between the date of the agreement and the giving of notice, testified that he never saw Nuland in the shop and that Archer was not an experienced or qualified radio repairman, but on the contrary was an amateur. In entering into the agreement both men had represented that they were expert radio service and repairmen, experienced and qualified in the matter of repairing, rebuilding and servicing radio receiving sets. The foregoing is the only testimony contained in the record bearing on the question of whether or not the notice of termination was given without cause. Although respondents were present in court, they did not take the stand to deny or refute or explain such evidence, but remained silent. Under this state of the record, not only were the trial court's findings above referred to without support in the testimony, but they were in conflict with the only testimony given in the case. The significance of this lack of support for the court's finding of wrongful exclusion will now be discussed.

[5] "The notice of termination given by appellants to respondents on September 6, 1944, was in writing and it was stated therein that it was for cause. It was declared to be effective as of its date. Partners may among themselves contract free-

ly concerning many matters, including the right on the part of any of the members to terminate the partnership. On this matter the agreement contained the following provision: 'In the event of a breach or violation of the terms and conditions of the within agreement by the party of the second part, either jointly or severally, the first party may at its option and election, forthwith cancel and terminate the within agreement by giving written notice of its intention so to do to the second party or any member thereof.' If this notice of termination was in fact given for just cause, as the only evidence taken upon that point indicated that it was, then the partnership ended as of the date of its giving, and while the respondents, even so, might well have been entitled to an accounting on the theory that the parties had been co-partners, yet that accounting must have proceeded upon different principles than did the accounting which was actually taken. If the partnership was by the notice rightfully dissolved on September 6, 1944, appellants' rights would have been as follows: They would have been entitled to have their ownership in the assets determined as of that date and paid over to them in money or in kind; if this was not done and their property was used in the business they would have had, on account being taken, an election to receive their property and to share in the profits made thereafter in the proportion their property bore to the whole or to be paid interest on the value of their property so used. See Annotation to Forbes v. Becker, 80 A.L.R. 12, concerning accountability of partner or joint adventurer for profits earned subsequently to death or dissolution, Subdivision VI (p. 58). It is therein stated that: 'Admitting the liability of a partner to an accounting for profits earned subsequently to dissolution, as established by cases cited in prior divisions of the annotation, the question is at once presented, to what extent the other partner or his legal representatives shall be entitled to share in such profits, or, in other words, how shall the subsequently earned profits be apportioned between the parties. * * * The basis upon which a partner or his legal representative is held entitled to an accounting for profits earned after dissolution has been said to be, the use to which his interest in the capital of the firm has been put in earning such profits.' White v. Reed, 124 N.Y. 468, 26 N.E. 1037, is cited by the author of the annotation as holding that 'the granting relief of that character does not proceed on the ground that the party seeking it is a member of a continued partnership, but rests upon the fact that, when he retired from the firm, he had some remaining interest in the capital appropriated and used in the continuance of business by the other partners.' Massachusetts cases are cited as holding 'the liability of the surviving members is simply to make compensation for the money they have used.' It is then stated that 'In accordance with this view, it has been held that one claiming an interest in profits earned subsequently to the dissolution of a partnership is entitled to such share of the profits as his interest in the capital of the firm bears to the total capital, or, in other words, such share of the profits as can rightly be attributed to the continued use of his property or capital in the business. Such would seem to be the generally accepted rule.' Cited in support of this statement are the following California cases: Painter v. Painter, 4 Cal.Unrep. 636, 36 P. 865 (later appeal in 6 Cal.Unrep. 677, 65 P. 135); Ruppe v. Utter, 76 Cal.App. 19, 243 P. 715.

[6] "On the contrary, for wrongful expulsion and continued use of assets, as found by the court, a different rule applies generally, based upon an assumption of a continued partnership, with full participation in profits according to the ratio set up in the articles of partnership, at least for the period from the wrongful expulsion to actual dissolution by circumstances or decree of court.

"It is apparent in this case that it was this latter theory upon which the court here made its final judgment after the referee had filed her report.

"From the report filed by the referee, it sufficiently appears that she determined the liability of appellants to respondents upon the basis of profits to be equally shared by

all of the parties, including in the amounts going to make up her ultimate findings the money received on sale of the business. In effect, the referee found that from the beginning of the partnership to the closing-out sale the appellants were chargeable with an excess of receipts over disbursements in the sum of $16,156.20, one-fourth of which each partner was entitled to. And the court, adopting this result, gave judgment in accordance therewith, adjudging that each of the respondents should recover from the appellants jointly and severally the sum of $4,039.05, together with interest at the rate of seven per cent upon such sum from the 19th day of March, 1946, which appears to mark the end of the period over which the accounting was taken.

"From what has been said it is apparent that the judgment given by the court cannot be sustained in the absence of a finding justifiably made and supported by the evidence that from the time the notice of termination was given the appellants wrongfully excluded respondents from the partnership affairs. As we have pointed out heretofore, such a finding has no support in the evidence, and on the contrary is in opposition to the only evidence addressed to the question of whether or not respondents had so breached their agreement that the appellants were given and exercised the right to terminate the partnership.

"For these reasons the judgment must be reversed, and in reversing the same we deem it proper to order a new trial as to all of the issues tendered by the pleadings, including those involving the interpretation of the contract between the parties. We have heretofore expressed no opinion as to a proper interpretation of that document and deem it best that no such opinion be expressed. We hold that the instrument is unclear and ambiguous in respect of this matter to a degree requiring that the parties be afforded an opportunity to introduce evidence of the facts and circumstances attending its execution and of the conduct of the parties thereunder in aid of its interpretation by the trial court. It is apparent from this record that the issue was not approached from that point of view. While the trial court did not refuse to receive such evidence, it is clear from the record that the learned trial judge considered the document to be of such nature that it could and must be construed by consideration of its terms alone, in which conclusion we cannot join. It may well be that when the matter is approached from the point of view that such evidence is admissible, testimony may be forthcoming which will definitely clear away the uncertainties inherently within the written contract, and, as stated by the Supreme Court in Barlow v. Frink, 171 Cal. 165, 152 P. 290, it is advisable that we leave 'the matter of its construction to be determined by the trial court under such evidence as the parties desire to present, unrestrained or controlled by any expression of opinion on the subject by this court.' "

The judgment is reversed and a new trial ordered upon all issues in conformity with this opinion.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; EDMONDS, CARTER, and SPENCE, JJ., dissenting.



99 Cal.App.2d 643

WEST et al. v. HOUSE et al.

Civ. 17510.

District Court of Appeal, Second District, Division 3, California.

Sept. 26, 1950.

Homer West and another brought an action against Irvin B. House and another to recover for damages resulting from an automobile collision. The Superior Court, Los Angeles County, Fred Miller, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Wood, J., held that there was evidence from which the trial court could have inferred that the named plaintiff was negligent in operating his automobile and that such negligence was the sole proximate cause of the accident.

Affirmed.

1. Automobiles ⇐245(17)

In action for damages resulting from collision between moving automobile and open door of parked automobile, accident having occurred on Aug. 2, 1947, it was question of fact whether or not driver of parked automobile was negligent in relying upon rear view mirror in opening door without looking backward to ascertain whether vehicles were coming. Vehicle Code, § 596.6.

2. Automobiles ⇐247

In action by driver of moving automobile for damage resulting when moving automobile collided with open door of parked automobile, finding that driver of parked automobile had not so negligently operated his automobile as to cause vehicle to come in contact with moving vehicle was implied finding that driver of parked vehicle was negligent but not so negligent that he caused accident.

3. Automobiles ⇐247

In action by driver of moving automobile for damage resulting when moving automobile struck open door of parked automobile, trial court's finding that it was not true that injuries or damages sustained by occupants of moving vehicle were due to any carelessness, negligence or recklessness of driver of parked vehicle was in effect finding that any negligence of driver of parked vehicle was not proximate cause of damages.

4. Appeal and error ⇐1008(1)

In action by motorist to recover for damage resulting when his automobile struck open door of parked vehicle, whether negligence of driver of parked vehicle was proximate cause of accident was question of fact for trial court.

5. Automobiles ⇐244(58)

In action by motorist for damage incurred when his automobile struck open door of parked automobile where there was evidence that plaintiff was driving 20 to 25 miles per hour and that he drove within three inches of parked automobile, trial court could have inferred that negligence of plaintiff was sole proximate cause of accident, in that he was driving too fast on narrow street and too close to parked automobile.

6. Automobiles ⇐247

In action by motorist to recover for damage incurred as result of collision with open door of parked automobile, where trial court found that plaintiff had operated his motor vehicle in negligent manner and that damage sustained by plaintiff was not due to any negligence of defendant, trial court impliedly found that negligence of plaintiff was sole proximate cause of accident.

7. Automobiles ⇐201(5)

In action brought by passenger in moving automobile to recover for injuries incurred as result of collision of moving automobile with open door of parked automobile, where trial court impliedly found that negligence of driver of parked automobile was not proximate cause of accident, plaintiff was not entitled to recover against driver of parked automobile even though trial court found that passenger and driver of moving vehicle were not engaged in joint enterprise and that any negligence on part of driver of such vehicle was not imputable to passenger.

8. Trial ⇐397(2)

In action brought by passenger in moving automobile against operator of parked automobile to recover for injuries resulting from collision of moving automobile with open door of parked automobile, where trial court found that there was no liability on part of driver of parked automobile, trial court did not err in refusing to make findings as to extent of passenger's injuries and medical expenses.

9. Automobiles ⇐247

In action by automobile passenger to recover from operator of other vehicle for injuries resulting from collision, where trial court impliedly found that negligence of plaintiff's driver had been sole proximate cause of collision and entered judgment for defendant, there was no fatal inconsistency in trial court's finding untrue allegations of defendant's third defense, presenting basic issue as to whether plaintiff and her driver were engaged in joint enterprise, notwithstanding that trial court had inadvertently

failed to except from that finding defendant's allegation that plaintiff's driver was negligent.

James C. Webb, Long Beach, for appellants.

Eugene S. Ives, Los Angeles, for respondents.

WOOD, Justice.

In this action for damages resulting from a collision of automobiles, judgment was for defendants. Plaintiffs appeal from the judgment.

Plaintiff Mr. West was driving his automobile east on 10th Street in Long Beach. The street extends easterly and westerly, is 36 feet wide, and a single white line is in the center of it. Plaintiff Mrs. Buell, who is a sister of Mr. West, was riding with him as a passenger.

Mr. West testified that he was driving about 12 miles per hour, about 4 feet from the white line, and about 2½ feet from the automobiles parked on the south side of the street; he was driving slowly because the street is narrow, dangerous, and a bad spot; he did not know there was going to be an impact; that "it seemed like there was a sort of a flash, and something came towards me, and that is all I know"; the right side of his automobile came in contact with the door of an automobile parked on the south side of 10th Street, and it threw his automobile out of control and over in the other lane, the north half of 10th Street, and an automobile going west in that lane hit his automobile and turned it over on the sidewalk on the north side of the street; he did not notice the parked automobile before the accident; there was no damage to the front of Mr. West's automobile.

At the time of the accident, defendant Mr. House was in the driver's seat of his automobile which was parked (facing east) on the south side of 10th Street—the right wheels being about 6 inches from the south curb, and the rear wheels being about 14 feet from the intersection of 10th Street and Hoffman Street. (Hoffman Street extends northerly and southerly and is west of the scene of the accident.) The left front door of his automobile is 4 feet wide, is hinged at the front and opens from the rear. He looked, by use of the rear-view mirror, to the rear of his automobile and did not see any automobile approaching. Then he opened the left front door about 10 inches, that is, about 3 inches beyond the outer edge of the "fender line." (It is 7 inches from the closed door to the outer edge of the fender.) He held the door open, to that extent, about 40 seconds or "not over 2 minutes," and then it was struck by Mr. West's automobile. The impact did not pull the door out or away from the automobile—just pushed the door, "kind of telescoped it." There was no damage to any other part of Mr. House's automobile.

Mr. Lee, the driver of the automobile which struck Mr. West's automobile, testified that he (Mr. Lee) was driving west on 10th Street about 25 miles per hour and about 2 feet from the center line; a few automobiles were traveling in each lane on that street, and some automobiles were parked at each side of the street; he saw Mr. West's automobile very shortly before he struck it; that automobile was going "pretty fast" diagonally across 10th Street and toward Mr. Lee's automobile; Mr. Lee applied his brakes but the front of his automobile struck the "midsection" of the right side of Mr. West's automobile; Mr. Lee's automobile stopped immediately after the impact but Mr. West's automobile went on across the street, over the curb, across the sidewalk and turned over; after that impact Mr. West's automobile went 18 or 20 feet before it turned over; Mr. West said to him, "Why did you run into me?" Mr. Lee replied: "I couldn't help it. You came across the street right in front of me, and you hit the car parked over there." Mr. West said, "What car? I didn't know I hit a car." (Mr. West denied that he had that conversation or conversation to that effect.)

Mr. English, a witness called by defendants, testified that he saw Mr. West's automobile prior to the accident when it was about 50 feet away from Mr. House's automobile and it was going about 20 to 25 miles per hour; and the door of Mr. House's automobile was open 8 or 10 inches.

[1] Appellants (plaintiffs) contend that the evidence is insufficient to support the finding that Mr. House did not negligently cause the door of his automobile to come in contact with Mr. West's automobile. They argue that as a matter of law Mr. House was negligent. In support of that argument they refer to the facts that the street was narrow, and that only the door of Mr. House's automobile was damaged. They refer further to the testimony of Mr. House that he held the door open for 40 seconds or not over 2 minutes; that when he opened the door he did not look backward to ascertain whether vehicles were coming but he looked in the rear-view mirror. They argue further that he should not have relied on the rear-view mirror, but he should have looked to the rear and continued to look there while the door was open. Whether or not the defendant Mr. House was negligent was a question of fact for the determination of the trial court. There was evidence that Mr. House's automobile was parked properly, that he looked to the rear through a mirror and did not see any approaching automobile, and that he opened the door to the extent of 3 inches beyond the fender line. It was not unlawful on August 2, 1947, the date of the accident, to open a door of a vehicle on the side available to moving traffic. It is true that at present there is a provision in the Vehicle Code, Sec. 596.6, to the effect that no person shall open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so, nor shall any person leave a door open on such side for a period longer than is necessary to load or unload passengers. That section became effective September 19, 1947. Under the circumstances here, it cannot be concluded as a matter of law that Mr. House was negligent.

[2] It appears, however, that the court did not find that Mr. House was not negligent. The court found that it is not true that the defendants or either of them did so negligently operate, manage and control said defendants' vehicle "as to cause, or it did cause," said vehicle to come in contact with plaintiff's vehicle, or did cause plaintiff's vehicle to go out of control and into the path of an on-coming vehicle from the opposite direction. It is to be noted that the finding is to the effect that neither of the defendants did *"so negligently"* operate their automobile *"as to cause"* or that *"it did cause"* their vehicle to come in contact with Mr. West's vehicle. (Italics added.) In other words, it appears that the court found that Mr. House did not operate or control the automobile so negligently "as to cause" the accident or so negligently that "it did cause" the accident. It is implicit therein that Mr. House was negligent but not so negligent that he caused the accident.

[3-6] The court also made a finding, under the heading of Conclusions of Law, that "it is not true that the injuries or damages sustained by the plaintiffs, or either of them, was due to any" carelessness, negligence, or recklessness of the defendants or either of them. That is in effect a finding that any negligence of defendants or either of them was not a proximate cause of the damages. Whether or not negligence of Mr. House was a proximate cause of the accident was a question of fact for the trial court. The court could have inferred that, under the circumstances here, negligence of Mr. West was the sole proximate cause of the accident, in that, he was driving too fast on the narrow street and too close to the parked automobile. There was evidence that he was driving 20 to 25 miles per hour and "pretty fast," and after the impact his automobile crossed the street, went over the curb and turned over; and that he drove within 3 inches of the parked automobile. The court found that immediately prior to and at the time of the occurrence of the accident Mr. West was negligent in that, among other things, he operated his vehicle in a negligent manner in that he failed to exercise for his own safety that degree of care which a reasonably prudent person under the same or similar circumstances would have exercised. In view of that finding and the finding above mentioned that it is not true that the damages sustained by plaintiffs were due to any negligence of either defendant, it appears that the court found impliedly that the negligence of Mr. West was the sole proximate cause of the accident.

[7] Appellants also contend that appellant Mrs. Buell was entitled to judgment. She was a passenger in Mr. West's automobile, and the court found that she and Mr. West were not engaged in a joint enterprise, and that any negligence on his part was not imputable to her. Since, as above mentioned, the findings were to the effect that negligence of Mr. House was not a proximate cause of the accident, she was not entitled to a judgment in her favor.

[8] Appellants also contend that the court's refusal to make findings respecting paragraphs III and IV of the second cause of action constitutes prejudicial error. The allegation in said paragraph III is in substance that as a direct and proximate result of the aforesaid negligent acts of defendants the plaintiff Mrs. Buell was thrown violently about and she sustained personal injuries and was forced to incur medical expenses to her damage in certain sums of money. The allegation in said paragraph IV is that her injuries are permanent and that in the future she will suffer pain therefrom and will be forced to incur additional medical expense to her further damage in a certain sum of money. In the findings it is stated that it is not necessary to the decision to make findings as to the injuries or damages sustained by plaintiff Mrs. Buell and therefore the court makes no findings as to said paragraph III and IV. It was not necessary to make findings as to the extent of Mrs. Buell's injuries and medical expenses, since the court found there was no liability on the part of defendants or either of them. As to the allegation in paragraph III regarding the "proximate result of the aforesaid negligent" acts of defendants, it was not necessary to make a finding with special reference thereto, since the matter of negligence was covered in other findings.

[9] Appellants contend further that the court made inconsistent findings with respect to whether Mr. West was contributively negligent. One of the findings referred to, paragraph (4), was made by stating that the allegations of the *second* defense *are true*. Those allegations, in part, were substantially as follows: That Mr. West was himself negligent in that he operated his vehicle in a negligent manner in that he failed to exercise for his own safety that degree of care which a reasonably prudent person under the same circumstances would have exercised. The other finding referred to, paragraph (5), stated that the allegations of the third defense *are not true*. Those allegations, in part, were substantially as follows: That Mr. West in the operation of his automobile failed to exercise that degree of care for his own safety, as well as that of Mrs. Buell, which a reasonably prudent person under the same circumstances would have exercised. All the allegations of the second defense, considered together, show that the issue presented therein was contributory negligence on the part of Mr. West. In addition to finding the allegations of that defense to be true, the court found, under the heading of Conclusions of Law, that such injuries as plaintiffs sustained were proximately caused by the negligence of Mr. West. It is clear that the court found that Mr. West was guilty of negligence proximately causing the accident. All the allegations of the third defense, considered together, show that the basic issue presented therein was that Mrs. Buell was engaged in a joint enterprise with Mr. West. As a part of the defense based on that issue it was alleged further that Mr. West was negligent, as above stated, and that his negligence was imputable to her. In finding that the allegations of that defense are not true, it is apparent, in view of the basic issue of joint enterprise therein and in view of findings elsewhere that Mr. West was negligent, it was intended to find that they were not engaged in a joint enterprise and that any negligence on his part was not imputable to her. It is apparent that the court, in making the finding by reference to all the allegations of that defense, inadvertently failed to except, from the finding that those allegations were not true, the allegation that Mr. West was negligent.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

99 Cal.App.2d 707

LAURENT v. CITY & COUNTY OF SAN FRANCISCO et al.

No. 14282.

District Court of Appeal, First District, Division 2, California.

Sept. 28, 1950.

Frank Laurent filed a petition against the City and County of San Francisco, a municipal corporation, Philip F. Landis and others, as members constituting the Public Utilities Commission of the City and County of San Francisco, and others, for a writ of mandate to compel respondents to formally accept the bid of petitioner and to execute a lease with petitioner covering land devoted to airport purposes. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., rendered a judgment adverse to the petitioner, and petitioner appealed. The District Court of Appeal, Goodell, J., held that under charter the Commission and not the Director of Property had power in its discretion to reject the bid.

Judgment affirmed.

1. Municipal corporations ⇐58

A city charter provision is subject to same rules of interpretation as a statute.

2. Municipal corporations ⇐226

The mode prescribed by city charter for entering into contracts constitutes the measure of the power.

3. Counties ⇐110
Municipal corporations ⇐722

Under charter of city and county authorizing Public Utilities Commission to lease lands devoted to airport purposes, and requiring Director of Property to arrange for lease, the Commission and not the Director of Property had power in its discretion to reject a bid.

4. Mandamus ⇐84

When Public Utilities Commission of City and County of San Francisco has exercised its discretion to reject a bid for a lease of land devoted to airport purposes, commission cannot be compelled by mandate to accept the bid.

Walter H. Duane, Joseph P. Lacey, San Francisco, for appellant.

Dion R. Holm, City Attorney, A. Dal Thomson, Public Utilities Counsel, San Francisco, for respondents.

GOODELL, Justice.

Appellant filed in the Superior Court his petition for a writ of mandate to compel respondents as members of the Public Utilities Commission and J. H. Turner as manager of Public Utilities and B. M. Doolin as manager and chief engineer of the Airport department "to formally accept the bid of petitioner and to execute a lease with petitioner, * * *" covering a certain area at the San Francisco Airport near South San Francisco. Respondents' return raised issues of law and fact. The court's ruling denying the writ amounted to the sustaining of a demurrer to the petition.

The petition alleges that at the direction of the Commission a call for bids was issued by the Director of Property, reciting that sealed bids would be received up to October 21, 1948 at 10 a. m. for leasing for automobile parking and "U" Drive purposes an area approximately 229 feet by 310 feet at the Airport, north of the Administration Building. The call recited that the lease would be for 3 years, subject to the covenants, terms and conditions set forth in the proposed lease on file in the office of the Director and that it would be "awarded to the highest responsible bidder subject to confirmation by the Public Utilities Commission." It concluded with the statement "Right reserved to reject any and all bids" and was signed by Eugene J. Riordan, Director of Property.

The petitioner alleges that at the time and place mentioned he and others were present and "bids were opened and examined and your petitioner was thereupon publicly declared by the respondent Turner to be the highest bidder and the winner of the lease."

There are allegations that appellant thereupon made arrangements and purchases preparatory to entering into posses-

sion under the prospective lease, and disposed of other business interests.

It is then alleged that about November 22, 1948, the Commission adopted a resolution rejecting petitioner's bid and on the 24th notified him in writing of such resolution and rejection. It appears from the record that the Commission rejected not only appellant's bid but all bids.

Appellant argues that "The mode provided for the leasing of lands devoted to airport purposes is clearly and intelligibly set forth in section 93 of the charter and no mode other than that provided by the statute may be followed."

[1, 2] We agree with appellant that a charter provision is "subject to the same rules of interpretation as a statute". Braun et al. v. McGuire, 201 Cal. 134, 143, 255 P. 808, 811. We agree, also, that the rule that the mode constitutes the measure of the power is one of long standing. Zottman v. San Francisco, 20 Cal. 96, 102, 81 Am.Dec. 96.

The sole inquiry on this appeal is, "Where does the authority reside to accept or reject bids?"

Section 93 of the charter provides *inter alia* that "the public utilities commission may provide, by resolution, that lands now devoted to airport purposes or lands that may hereafter be acquired and devoted to airport purposes may be leased or rented for a period not to exceed forty years, and the director of property shall arrange for such lease to the highest responsible bidder at the highest monthly or annual rent, and thereafter the administration of any and all such leases shall be by the public utilities commission; * * *."

There is no express language in § 93 respecting the right to reject bids, but appellant concedes "that the right to reject any and all bids may be reserved." However, that concession is coupled with the claim that "such right may be reserved *only* by the official authorized to call for and accept bids."

The charter vests in the Director the authority to "arrange" for the lease "to the highest responsible bidder" and that is all the authority the Director is expressly given by the charter. Appellant in contending that the Director "was the only person empowered to accept or reject the bid" does not point to any charter language or any other authority supporting his contention. His petition, however, is inconsistent with that contention since it alleges that the "Director of Property * * * *at the direction of the* * * * *Commission,* caused to be published" the invitation for bids, and its prayer is for a writ "commanding respondents composing the Public Utilities Commission * * * and J. H. Turner, as Manager * * * and B. M. Doolin, as Manager and Chief Engineer of the Airport Department * * * to formally *accept the bid* of petitioner and to *execute a lease* with petitioner, in accordance with the terms set forth in *its* call for bids * * *." (Emphasis added). Thus the pleader recognizes that the duties to accept the bid and make the lease reside in the Commission and that the call for bids was "its"—the Commission's—call. If so, then of course the reservation of the right to reject was the Commission's reservation. The provision in the call "subject to confirmation by the Public Utilities Commission" is simply an amplification of the reservation of the right to reject bids, designed "to make assurance doubly sure."

To hold that the call was made by the Commission (although arranged by the Director) and that the right reserved to reject bids was *its* right, is not at all at war with the language of the charter, but wholly consistent with it. Respondents argue that "Since neither the charter nor any municipal ordinance enacts any procedure with reference to a lease of this character, it follows that the Director * * * may insert, in the call for bids, such reasonable provisions as are appropriate for the protection of the city. Among these provisions is the clause that the bid is subject to confirmation by the * * * Commission." This is a reasonable view, and we agree with it.

If the charter, instead of using general language (as such organic instruments ordinarily do) had prescribed definite procedural machinery with respect to bidding, and the call for bids had gone beyond it or

the Director or the Commission had imposed other or more burdensome or inconsistent provisions, then an entirely different problem would arise, such, for example, as was presented in Neal Publishing Co. v. Rolph, 169 Cal. 190, 146 P. 659, and City of San Buenaventura v. Ventura County Star, Inc., 29 Cal.App.2d 41, 83 P.2d 975, cited by appellant. But no such problem is presented.

Appellant states in his brief that the Director accepted *the check for $1000* but does not state that he accepted the *bid*, and does not so allege in his petition. The petition alleges that when the bids were opened "your petitioner was thereupon publicly declared by the respondent Turner to be the highest bidder and the winner of the lease." Respondent Turner is the manager of Public Utilities, but it nowhere appears that he has authority to speak or act for the Commission in such a matter as this. It is argued that the Director was present when respondent Turner made the announcement (the record does not show this), but it does not appear that he said anything, and his silence is understandable on the assumption that he considered the acceptance or rejection of bids no concern of his, although he was the one to receive them together with the accompanying checks.

[3, 4] The appellant, as we have seen, contends that the authority and power to accept or reject bids resided in the Director and not the Commission. Notwithstanding this claim the appellant does not allege in his petition that the Director accepted the bid, and, as the trial judge points out, the Director was not joined as a respondent in the proceeding. The petition alleges that appellant's bid was declared to be the highest and winning bid by respondent Turner who, of course, is not the Director of Property. It prays for a writ compelling the Commission to formally accept the bid and execute the lease. If, as we have held, the power and authority reside in the Commission, it was within the Commission's discretion to reject all the bids tendered, and it cannot be compelled by mandate to do otherwise. Stanley-Taylor Co. v. Board of Supervisors, 135 Cal. 486, 488, 67 P. 783. The petition does not state facts sufficient to justify the issuance of a writ of mandate.

Respondents' motion to dismiss the appeal on the ground that the questions raised by the petition have become moot is denied.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



99 Cal.App.2d 585

BENNETT v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

Civ. 4222.

District Court of Appeal, Fourth District, California.

Sept. 22, 1950.

Proceeding on petition of Vernon F. Bennett for a writ of certiorari against the Superior Court of the State of California, in and for the County of San Diego, and Honorable Dean Sherry, Judge of said Superior Court, to review an order of respondent court adjudging petitioner guilty of contempt. The District Court of Appeal, Mussell, J., held that the record did not sustain the charge that the conduct of the petitioner amounted to contempt.

Order annulled.

1. Contempt ⇐60(3)

In personal injury action, where attorney for plaintiff was adjudged guilty of contempt, record showed that although trial could have been more expeditiously conducted fault, if any, was not that of plaintiff's attorney alone, and that therefore prolongation of trial by objections, interruptions and statements made by plaintiff's attorney had not constituted contempt of court.

2. Contempt ⇐60(3)

In personal injury action tried to court, where judgment was entered for defendant and plaintiff's attorney was adjudged guilty

of contempt, record did not sustain trial court's charge that plaintiff's attorney had attempted to prevent defendant from having fair trial.

3. Depositions ⇐92

Documents not signed by witness were not admissible in evidence as depositions.

4. Witnesses ⇐379(8)

Sworn statements made by witness before notary public and court reporter could be used for purpose of cross-examination. Code Civ.Proc. § 2052.

5. Contempt ⇐67

In reviewing order of Superior Court adjudging attorney guilty of contempt, judgment was to be construed strictly in favor of accused and no intendments or presumptions could be indulged against him. Code Civ.Proc. § 1963, subd. 1.

6. Contempt ⇐3

Contempt of court is a specific criminal offense.

7. Contempt ⇐67

In certiorari to review contempt proceeding, unless record shows affirmatively upon its face existence of all necessary facts upon which jurisdiction depends, order must be annulled.

8. Contempt ⇐30

The power of court to punish for alleged contempt of its authority, though undoubted, is in its nature arbitrary and its exercise is not to be upheld except under circumstances and in manner prescribed by law.

9. Contempt ⇐10

Attorney has duty to protect interests of his client, and has right to press legitimate argument and to protest erroneous rulings, and if in discharging his duty he happens to be persistent or vehement, or both, in presentation of his points, he is still within his legitimate rights as attorney, so long as his language is not offensive or in contravention of common rules of decorum and propriety.

10. Contempt ⇐60(3)

Record was insufficient to sustain order adjudging attorney guilty of contempt on grounds of constant and repeated interruptions of his adversary, interposition of objections, indulgence in argument in bad faith, attempt to introduce in evidence certain documents as depositions, argument of objections after court's ruling thereon and making irrelevant and immaterial statements, quarreling and bickering with opposing counsel, and including in his questions repetitious and immaterial matter.

Vernon F. Bennett, San Diego, in pro per.

MUSSELL, Justice.

In this proceeding in certiorari, petitioner, an attorney, seeks to annul an order of the superior court adjudging him guilty of contempt and assessing a fine therefor in the sum of $500.

Petitioner, representing plaintiff Ruth E. Hunt, filed an action for damages for personal injuries in the superior court of San Diego county against the San Diego Transit System. The trial was had before respondent judge, without a jury, and at the conclusion thereof, the court ordered a judgment in favor of the defendant and also issued a written order adjudging petitioner guilty of contempt. The order recites "That during said trial the conduct thereof was unduly delayed by conscious, wilful and contumacious action and conduct upon the part of said Vernon F. Bennett, with a view of preventing the defendant named from having a fair and just trial in said action upon the issues joined, and of unnecessarily consuming the time of said court. All of said contumacious conduct of said Vernon F. Bennett herein mentioned was committed in the immediate presence of the court, while the court was in session, and during said trial, and said conduct is shown in part by the quotations from the testimony and proceedings at said trial, particularly as follows:" Numerous excerpts from the testimony and proceedings, which were relied upon by the court to show the alleged contumacious conduct of petitioner, are then set forth. These excerpts, according to the order, show constant and repeated interruptions and statements by the petitioner

during the examination of witnesses by opposing counsel; the interposition of objections and the indulgence in argument in bad faith; the attempt to introduce in evidence certain documents as depositions; the argument of objections after the court's rulings thereon; the making of irrelevant and immaterial statements, frequent quarreling and bickering with opposing counsel; and the inclusion in questions of repetitious and immaterial matter. The gist of the charge set forth in the order is that the conduct of the trial was unduly delayed by the acts of petitioner and that his actions and conduct constituted an attempt to prevent the defendant from having a fair trial.

It appears from the petition for the writ herein, the allegations of which are not denied, that the trial of the action began on June 14, 1950; that on the 16th day of June the trial judge, at his own instance, continued the matter to June 19th at 2:00 o'clock P. M.; the trial proceeded from 2:00 o'clock P. M. to 4:30 P. M. on that date and was continued by the trial judge to June 21st, without request of counsel for either of the parties. The trial was resumed at 2:00 o'clock on June 21st and continued throughout that day. The following day it was again continued by the trial judge to June 26th and the taking of evidence was concluded on June 27th; that the court was always recessed by the trial judge at 4:30 P. M. each afternoon and on a few occasions before that time; that on many occasions the recesses in the morning and afternoon sessions extended for longer than ten minutes; that many witnesses were produced and testified upon behalf of plaintiff and defendant; that the examination of the witness was very lengthy and repetitious and consumed a great deal of time; that the trial court "took off" two full days during the trial of said cause and the court was not always convened promptly at the morning or afternoon sessions; that different persons came frequently to see the trial judge and the trial of the case was either not begun or delayed while matters were being discussed with the trial judge.

In addition to the matters set forth in the petition, it appears from the excerpts set forth in the order that considerable of the time of the court and of the trial was consumed and delay occasioned by the conduct of the attorney for the defendant in said action. It also appears that the trial court, in many instances, interrupted counsel on both sides. Its comments made in connection with rulings on objections and statements of counsel consumed much of the time of the trial.

[1, 2] A careful examination of the contents of the order and of the reporter's partial transcript of the proceedings impel us to conclude that the trial could have been more expeditiously conducted, and the fault, if any, lies not alone upon petitioner. The prolongation thereof by objections, interruptions and statements of the petitioner, under the circumstances shown, did not constitute a contempt of court. The charge that the petitioner was attempting to prevent the defendant from having a fair trial does not find substantial support in the record. This was not a jury case and judgment was entered for the defendant.

The questions asked by the petitioner and his statements to the court which evidently precipitated the trial court's action in adjudging petitioner guilty of contempt, as shown by the partial transcript and the excerpts therefrom set forth in the order, occurred during the cross-examination of a defense witness in reference to a so-called deposition and were as follows:

"By Mr. Bennett: Q. And you were also asked on this same day, were you not, as to how long you had been a student operating buses and you refused to answer, did you not? A. I don't remember.

"Q. You don't remember? A. (No answer.)

"Mr. Bledsoe: I am going to object, if the Court please, to Counsel attempting to impeach the witness with that unsigned deposition. It is not a deposition. He has refused to have the deposition drawn up. That is only a portion of it. The witness has never had an opportunity to sign and subscribe to it. I don't know what the rest of it says. I have that portion myself, a copy.

"The Court: You can ask him questions. Unless you have the deposition, it is not admissible. You cannot ask him about any document, sir.

"Mr. Bledsoe: This is not a party, if the Court please, and he can call the reporter in or anything else. If the reporter says it is it, I—

"Mr. Bennett: I call your attention to page 15, line 15 and the question:

"Q. How long had you been a student, Mr. Lovett—" And he never was permitted to answer the question, and:

"Do you refuse to answer the question? A. Yes."

And Mr. Bledsoe knows it and—

"The Court: You can ask him then.

"Mr. Bennett: All right. I will ask him.

"The Court: No, because the charge that that document you have there before you is an unsigned document.

"Mr. Bledsoe: Not only that, but isn't complete and he was asked the question here. Counsel tried to take the deposition in two parts and he was—

"The Court: He has answered your question anyway. He said he doesn't remember. Go on.

"Mr. Bennett: He also said—

"The Court: I don't care to hear from you. Either go on with this cross-examination or the witness will be excused.

* * * * * *

"By Mr. Bennett: Q. And did you, as you read over the transcript of the questions asked you and the answers given by you on April 20, 1950, did you make any corrections in the copy that you read? A. No.

"Q. You didn't. You saw no occasion to make any corrections, is that right?

"Mr. Bledsoe: Objected to as argumentative.

"The Court: Objection sustained.

"By Mr. Bennett: Q. And you answered on and found in reading that, that you refused, did you not, to answer the question as to how long you had been a student?

"Mr. Bledsoe: I want to object to that as already asked and answered.

"Mr. Bennett: I haven't got an answer yet, your Honor.

"The Court: Objection sustained. He said he didn't remember.

"Mr. Bennett: Well, I can refresh his recollection by a document he has read and a transcript of the statement that he made.

"Mr. Bledsoe: I object to that. If he wants to impeach this witness—he brought this about. Let him call the reporter in and have the reporter go through his notes. Alan Randol.

"The Court: Objection sustained.

"Mr. Bennett: May I say, your Honor, he read this and made no corrections.

"The Court: Now, if there are any more voluntary statements such as now, I will excuse this witness. You have done enough procrastinating here. Just nothing but down right pettifogging, sir.

* * * * * *

"By Mr. Bennett: Q. And when you appeared before Judge Glen and you were ordered to answer the question, you answered, did you not, that you did not know whether you had operated on any other route that day or not? A. I don't know. I don't know what questions were asked me that day.

"Q. I see. And then you were asked at the time of the taking of that deposition as to whether you recalled Mr. Street speaking to you between First and Sixth Streets and you refused to answer that question, did you not? A. I don't remember.

"Q. You don't remember. Calling your attention to page 23—

"Mr. Bledsoe: Now, I want to make that same objection. The Court has ruled on it and walks up there—

"The Court: Now, Mr. Bennett, the Court will take rather unusual measures to prevent you and warns you now that you shall not show that witness that document again. The Court has already passed on it and it is contemptuous conduct for you to persist in trying to get that matter in the record and if you persist any more, you will do so at your peril.

"Mr. Bennett: May I discuss it with your Honor?

"The Court: What?

"Mr. Bennett: May I discuss it with your Honor?

"The Court: No, sir, you may not discuss it.

"Mr. Bennett: All right, your Honor.

* * * * * *

"By Mr. Bennett: Q. Mr. Lovett, how is your recollection with reference to the circumstances connected with the happening of this occurrence on December 2, 1947? A. Well, very good, I think.

"Q. You do. Now, have you refreshed your recollection in any way before coming to testify yesterday? A. No, nothing more than just reading over that deposition.

"Q. You read over the deposition, did you? A. Sometime ago.

"Q. And that was in Mr. Cameron's office or Mr. Bledsoe's office? A. Yes.

"Q. And you read it over completely? A. No.

"Q. You didn't read all of the deposition? A. No.

"Mr. Bledsoe: Well, it isn't all written up, Mr. Bennett.

"By Mr. Bennett: Q. That is, did you read—

"Mr. Bledsoe: I want to object to Counsel referring to this as a deposition. If he wants to refer to questions and answers —We have gone into this. There is an affidavit in the file it was taken but he used this to cross-examine two witnesses we had under—present since they were necessary parties, then immediately dismissed and didn't write up half of it.

"The Court: Well, whether or not that was an ethical practice—

"Mr. Bledsoe: I can't go into that.

"The Court: —is certainly questionable, but is not now here for decision.

"Mr. Bledsoe: I have argued—

"The Court: However, what Counsel uses to cross-examine a witness, this Court has nothing to do with. He can look at the Holy Bible or a funny sheet and use that as a basis for cross-examination. However, he has been admonished not to refer to a book and page number in the document that is—may be termed for the purpose of convenience, an unsigned deposition.

"Mr. Bledsoe: No. It is only a partial transcript of a deposition.

"The Court: He can take a partial transcript that a reporter or somebody that made a transcript—he can take that transcript and do anything he wants, but he cannot ask this witness, 'Didn't you testify such and such a thing on such and such an occasion'—

"Mr. Bledsoe: I think the Court is aware of the authorities a deposition has to be taken in manner provided by the Code.

"The Court: No question about that.

"Mr. Bledsoe: Can we refer to it as a document when it isn't a deposition?

"The Court: Yes, and Mr. Bennett has been admonished not to refer to a deposition that does not exist. That is going outside the record. It is highly improper and unethical for an attorney to do that and if he does that in the face of the admonition of the Court, he does it at his peril in this department. Let's understand each other. I have warned you yesterday about it. If it happens once more, I shall not warn you again. What is the question please?

"Mr. Bennett: May I say this, your Honor? You have listened to Counsel. I would like the privilege of presenting some authorities of my own.

"The Court: What is the question? (Record read.)

"The Court: Now, I warned you yesterday not to refer to this document which is admittedly unsigned as a deposition. I don't want to hear it any more, sir.

"Mr. Bennett: I will do my best to comply with your Honor—

"The Court: If you don't, you do it at your peril. I assure you, I have warned you the last time.

"Mr. Bennett: May I say this, your Honor? If this proceeding—if there had been another trial of this matter or this matter had been questioned about this witness and a transcript had been made of the testimony of this witness, I would have a perfect right to refer to that transcript of his testi-

mony without the witness even having had an opportunity to refer to it or to read it. I could show it to him on the witness stand. Now, it so happens a deposition was taken or attempted to be taken on the 20th day of April, 1950, with the proper proceedings leading up to the taking of that deposition. A reporter was present and took the—

"The Court: We have gone into that. I don't care to hear any more about it. I understand the circumstances. I have been told several times as to the circumstances under which that statement of the witness was made. Call it testimony if you want, but it is no deposition and you know it is no deposition. Now, I don't want to hear any more about that document.

"Mr. Bennett: Very well, your Honor.

"By Mr. Bennett: Q. At—on April 20, 1950, you appeared in my office pursuant to a subpoena and you there answered certain questions which were propounded to you, did you not? A. Yes.

"Q. And at the time that was being done, you were under oath at that time, were you not? A. Yes.

"Q. You were sworn to testify to the truth and nothing but the truth, so help you God, at that time by Mr. Alan Randol, a notary public and court reporter, were you not? A. Yes.

"Q. And during all of the time that you were in my office on April 20, 1950, Mr. Alan Randol, the reporter and notary, was present, was he not? A. Yes.

"Q. And during all of that time he was taking down the questions and the answers which were asked and the answers given by you, did he not?

"The Court: You don't know whether he was taking it down or not, do you?

"The Witness: No. He was—

"By the Court: Q. You know he was writing there? A. He was writing. That's all I know.

"By Mr. Bennett: Q. And since that time, you have read over a transcript of what took place on April 20, 1950, have you not?

"The Court: Mr. Bennett, the Court finds you in contempt of Court and sentence will be deferred until the conclusion of the trial.

"Mr. Bledsoe: May I—

"The Court: All right.

"Mr. Bledsoe: A transcript, of course, if certified by the reporter. We don't have anything. It hasn't been drawn up yet. Nobody can certify— * * *."

The record before us contains many pages of questions and answers, interruptions, and statements of similar nature as those set forth in the quoted portions of the transcript and that which is set forth herein serves to illustrate the conduct of the trial of the instant action.

[3, 4] The documents referred to as depositions, not having been signed by the witness, were not admissible in evidence as depositions. Thomas v. Black, 84 Cal. 221, 226, 23 P. 1037. However, the use of statements made by the witness under the circumstances shown was permissible for the purpose of cross-examination. Code Civ. Proc. Sec. 2052.

[5] In reviewing the proceedings before us, the judgment is to be strictly construed in favor of the accused and no intendments or presumptions can be indulged against him. Bennett v. Superior Court, 73 Cal. App.2d 203, 224, 166 P.2d 318. There is also the presumption "that a person is innocent of crime or wrong". Code Civ.Proc. sec. 1963, subd. 1.

[6, 7] "Contempt of court is a specific criminal offense". Hotaling v. Superior Court, 191 Cal. 501, 504, 217 P. 73, 74, 29 A.L.R. 127. Unless the record before us, reviewed in the light of the foregoing rules, shows affirmatively upon its face the existence of all the necessary facts upon which jurisdiction depended, the order must be annulled. Bennett v. Superior Court, supra, 73 Cal.App.2d 211, 166 P.2d 318.

As was said in Re Lake, 65 Cal.App. 420, 426, 224 P. 126, 128: "There is no deviation from the rule that, unless the affidavit charging constructive contempt 'contains a statement of facts which shows on its face

that a contempt has been committed the court is without jurisdiction to proceed in the matter, and any judgment of contempt thereon is void.' 5 Cal.Jur., pp. 938, 939. There is the same unanimity of opinion supporting the rule that in cases of direct contempt the order of commitment is void, 'unless it shows on its face acts sufficient to constitute a legal contempt. The order must contain a statement of facts equivalent to those which the law says must be incorporated in an affidavit for constructive contempt; and such facts must prove the contempt. Mere conclusions are not sufficient.' 5 Cal.Jur., pp. 950, 951."

[8] In Re Shortridge, 5 Cal.App. 371, 375, 90 P. 478, 479, quoting from Batchelder v. Moore, 42 Cal. 415, the court said: "'The power of the court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld except under the circumstances and in the manner prescribed by law. It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support.'"

The first specification of alleged contemptuous conduct, according to the order, is that there were constant and repeated interruptions by the petitioner of his adversary in the examination of witnesses and in making statements to the court. However, interruptions of opposing counsel are not always improper.

As was said in Re Shortridge, supra, 5 Cal.App. 377, 90 P. 480: "Every interruption of the proceedings of the court is not a contempt, nor unlawful, nor necessarily improper. Many interruptions are lawful and proper. Every time an attorney in the performance of his duty objects to a question asked a witness, or objects to any other proceeding in the action, he may be said to interrupt the proceedings. The particular circumstances of the interruption—the concrete facts constituting the interruption—must be set forth, in order that the commitment shall show upon its face and without the aid of presumptions that the accused has been guilty of a contempt."

[9] In Gallagher v. Municipal Court, 31 Cal.2d 784, at page 791, 192 P.2d 905, at page 910, the court, quoting from Platnauer v. Superior Court, 32 Cal.App. 463, 475, 163 P. 237, stated the following rule as applicable to an attorney: "'If, in discharging his duty, he happens to be persistent or vehement, or both, in the presentation of his points, he is still, nevertheless, within his legitimate rights as an attorney, so long as his language is not offensive or in contravention of the common rules of decorum and propriety. As well may be expected in forensic polemics, he cannot always be right, and may wholly be wrong in his position upon the legal question under argument and to the mind of the court so plainly wrong that the latter may conceive that it requires no enlightenment from the argument of counsel. But whether right or wrong, he has the right to an opportunity to present his theory of the case on any occasion where the exigency of the pending point in his judgment requires or justifies it.'"

It was further stated, 31 Cal.2d at page 796, 192 P.2d at page 913: "An attorney has the duty to protect the interests of his client. He has a right to press legitimate argument and to protest an erroneous ruling."

This court said in Bennett v. Superior Court, supra, 73 Cal.App.2d 218, 166 P.2d 326: "We know of no rule of law permitting a court to punish an attorney because he is honestly mistaken in his interpretation of the law when he presents his mistaken views to the court in a proper and respectful manner."

In this connection, it should be observed that there is no claim that the questioning of witnesses by the petitioner or his remarks to the court were in any instance of a disorderly, contemptuous or insolent character. There is no question raised as to the tone, look or the manner and emphasis placed upon petitioner's remarks, as in Re Hallinan, 126 Cal.App. 121, 14 P.2d 797 and Rose v. Superior Court, 140 Cal.App. 418, 35 P.2d 605.

The record before us indicates that petitioner's tones were unmarked by excitement or anger. His conduct was apparently respectful and courteous toward both the court and opposing counsel, and even, at times, apologetic.

[10] We conclude from a careful examination of the entire record in this case that while there was no doubt an appreciable prolongation of the trial by interruptions, statements of counsel and the court, the conduct of the petitioner did not amount to a contempt within the meaning of the rules set forth in the preceding decisions.

The order is annulled.

GRIFFIN, Acting P. J., concurs.



99 Cal.App.2d 658

PEOPLE v. NORRIS.

Cr. 823.

District Court of Appeal, Fourth District, California.

Sept. 26, 1950.

Will E. Norris was convicted in the Superior Court of Tulare County, Glenn L. Moran, J., for grand theft of jewelry entrusted to defendant by jeweler for sale by defendant on a commission basis, and he appealed from the judgment of conviction and from the order denying defendant's motion for a new trial. The District Court of Appeal, Mussell, J., held that evidence justified conviction.

Judgment and order affirmed.

1. Embezzlement ⇐47

Existence of felonious intent to embezzle property entrusted to a defendant by owner is a question to be determined by jury. Pen.Code, §§ 484, 506.

2. Criminal law ⇐1159(5)

In prosecution for grand theft of property entrusted to a defendant by owner, jury determination as to felonious intent of defendant is conclusive on appeal unless determination is without substantial support in evidence. Pen.Code, §§ 484, 506.

3. Embezzlement ⇐44(1)

In prosecution for grand theft in that defendant fraudulently appropriated to his own use jewelry entrusted to defendant by jeweler for sale by defendant on commission basis, evidence justified conviction. Pen.Code, §§ 484, 506.

4. Criminal law ⇐371(2)

In prosecution for grand theft in nature of embezzlement, evidence is admissible of acts of a similar nature committed by defendant before and after date of act upon which conviction was predicated. Pen.Code, §§ 484, 506.

5. Criminal law ⇐371(2)

In prosecution for grand theft in that defendant fraudulently appropriated to his own use jewelry entrusted to defendant by jeweler for sale by defendant on commission basis, evidence that defendant, representing himself as an insurance adjuster, had previously obtained a ring from another jeweler, and that a memorandum was drawn up for ring, and that defendant left with ring and never returned, was admissible. Pen.Code, §§ 484, 506.

6. Criminal law ⇐1169(11)

In prosecution for grand theft in that defendant fraudulently appropriated to his own use jewelry entrusted to defendant by jeweler for sale by defendant on commission basis, admission of evidence that defendant had failed to remit funds due to insurance company for which defendant as agent sold policies, if error, was not reversible error. Pen.Code, §§ 484, 506.

7. Criminal law ⇐1129(3)

Where particular questions objected to by defendant, charged with grand theft in nature of embezzlement, as being an attempt to introduce evidence solely to defame character of defendant, were not set forth in specification of error, but only conclusion that it was misconduct was set forth in specification, conduct of prosecuting attorney would not be held to have been prejudicial or offensive to defendant. Pen. Code, §§ 484, 506.

8. Criminal law ⇐745

In prosecution for grand theft in that defendant fraudulently appropriated to his own use jewelry entrusted to defendant by jeweler for sale by defendant on commission basis, question as to why defendant left state after he obtained the jewelry was for jury under evidence that defendant left state and was arrested in sister state approximately 10 months later. Pen.Code, §§ 484, 506.

9. Criminal law ⇐778(11)

In prosecution for grand theft in that defendant fraudulently appropriated to his own use jewelry entrusted to defendant by jeweler for sale by defendant on commission basis, evidence that defendant left state after receiving jewelry and was arrested in sister state approximately 10 months later justified giving of instructions regarding flight. Pen.Code, §§ 484, 506.

10. Criminal law ⇐824(2)

In prosecution for grand theft in that defendant fraudulently appropriated to his own use jewelry entrusted to defendant by jeweler for sale by defendant on commission basis, failure to give an instruction on definition of a trustee, in addition to instruction given stating that a trustee is one who is in a fiduciary relationship to another and that a fiduciary is under duty to act for benefit of other as to matters within scope of relation, was not error, particularly where no such additional instruction was requested. Pen.Code, §§ 484, 506.

Arthur J. May, Tulare, for appellant.

Fred N. Howser, Attorney General, and Gilbert Harelson, Deputy Attorney General, for respondent.

MUSSELL, Justice.

Defendant was charged with the crime of grand theft and by a jury was found guilty as charged in the information. He applied for probation, made a motion for a new trial, and after the denial of probation and of the motion, was sentenced to the state prison at San Quentin.

This appeal is from the judgment of conviction and from the order denying the motion for new trial. The grounds of appeal are (1) That the evidence is insufficient to sustain the judgment of conviction; (2) That the court erred in the admission of evidence; (3) That the prosecuting attorney was guilty of prejudicial misconduct; and (4) That the court misdirected the jury in matters of law.

On October 18, 1948, defendant obtained a watch and a diamond ring from Mr. Lewis, a jeweler in Tulare. The watch (sales price $342) and the ring (sales price $125) were delivered to defendant at the Lewis jewelry store and were taken by defendant on "memo" for the purpose of sale on consignment. Defendant agreed to sell the articles on commission and to return the property or pay for it. It was understood that the title thereto did not pass by virtue of the "memo" and that the accounting period under such circumstances was generally from five to fifteen days.

On October 30th defendant again went to the Lewis store and stated that he had some prospects for the ring and watch previously taken out and that he had a "hot" prospect for some diamonds and wanted to know if he could take some diamonds out on "memo" on the same arrangement as before. Mr. Lewis agreed and the defendant signed a memorandum for two diamonds, valued at $1,135 retail, and a 17 jewel diamond Bulova wrist watch of the retail value of $674. Defendant stated that he would sell these articles on the same basis as the merchandise he obtained on the 18th of October, but if he didn't sell them, he would bring them back.

On November 1st defendant purchased a topaz ring from Mr. Lewis and on November 26th brought a lady's wrist watch to Mr. Lewis and requested that he obliterate the name inscribed on it.

On or about the 28th day of November, defendant took a pair of lady's earrings and a lady's small diamond ring to Lewis and asked that the diamond be taken out of the ring and mounted on one of the earrings. Defendant then ordered an addition-

al diamond, left the store and did not thereafter return or communicate with Mr. Lewis. The jewelry received by defendant was not returned to Lewis or paid for.

On December 3d a statement was sent to defendant for all the merchandise that he had taken out on memorandum and for the amount remaining due on the topaz ring which he had purchased. Defendant's wife brought the statement to the Lewises and informed them that defendant was gone. Mr. Lewis then swore out a warrant for defendant's arrest. He was apprehended in Houston, Texas, in October of 1949, and returned to California for trial in January, 1950.

The defendant testified in his own behalf and stated that it was agreed between him and Mr. Lewis that he (defendant) was to sell the jewelry on commission and was either to return it or the money therefor; that he had received the statement for the jewelry and left Tulare on December 5, 1948, because of family difficulties; that just before he left Tulare, he placed the stones that he had obtained from Mr. Lewis in an envelope at the Owl Cafe with instructions for his wife to return them. He stated that he had not sold any of the jewelry and had not checked to see if it had been given back to Mr. Lewis.

Defendant's wife testified that she was running the Owl Cafe in Tulare on December 4 and 5, 1948, and that the defendant had left town on December 5th. She testified that no package or envelope containing the jewelry was ever left with her and denied that the defendant had left a package of jewelry addressed to her at the cafe.

Appellant's contention that the evidence does not sustain the judgment of conviction is without merit. The evidence is sufficient to show the commission of embezzlement under section 484 of the Penal Code, defining theft.

Defendant was the agent of the complaining witness and entrusted with the control of the personal property of Mr. Lewis for the purpose of sale on commission. Defendant fraudulently appropriated such property to his own use, contrary to the provisions of section 506 of the Penal Code, which provides generally that any person entrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement. People v. Applegate, 91 Cal.App.2d 163, 173, 204 P.2d 689.

Defendant contends that when he was billed for the jewelry on December 3, 1948, it was the intention of Mr. Lewis that it was merely an account between them and that title vested in defendant to the property entrusted to him. However, the defendant and Mr. Lewis both testified that the memorandum did not pass title but only turned over custody of the jewelry. Defendant's contention is further refuted by his testimony that he returned the jewelry to the Owl Cafe with directions to return it to Mr. Lewis. The demand mailed to defendant on December 3d was a request for the return of the jewelry or the money therefor, if it had been sold, and was in accordance with the prior agreement between the two men. The jewelry was never returned to the complaining witness nor was it sold in accordance with the terms of the agreement. The intent of the defendant to unlawfully deprive the prosecuting witness of his jewelry was a question of fact provable like any other fact by the acts, conduct and circumstances connected with the offense. People v. Fewkes, 214 Cal. 142, 148, 4 P.2d 538; People v. Van Wyke, 91 Cal.App.2d 839, 843, 206 P.2d 53.

[1-3] The defendant left the State of California and failed to communicate with the complaining witness as to the disposal of the jewelry. These and other circumstances shown by the record were sufficient to justify the implied finding of the jury as to felonious intent. Intent is a question to be determined by the jury under the evidence before it, People v. Payne, 117 Cal.App. 108, 112, 3 P.2d 328, and unless the determination of intent is without any

substantial support in the evidence, the finding of the jury as to such intent is conclusive upon appeal. People v. Raines, 66 Cal.App.2d 960, 962, 153 P.2d 424. The defendant's denials and assertions with reference to the circumstances under which he took the jewelry and his subsequent disposition of it merely created a conflict in the evidence which the jury resolved against him. Since the circumstances reasonably justify the verdict of the jury, its finding will not be here interfered with. People v. Huizenga, 34 Cal.2d 669, 675, 213 P.2d 710.

The defendant's contention that the court erred in the admission of evidence has to do with the testimony relating to other offenses and was introduced by the prosecution for the purpose of establishing fraudulent intent. This testimony was substantially that the defendant, representing himself as an insurance adjuster for the Farmers Insurance Company, in October of 1948, obtained a ring from a jeweler in Oakland; that a memorandum was drawn up for the ring and defendant left with it, never to return.

Evidence was also introduced to the effect that the defendant was employed as an agent by the Farmers Insurance Group on June 21, 1948, and left their employ on September 13th of that year; that he sold eight policies during the time of his employment and failed to remit funds due his employer.

[4-6] The evidence as to the Oakland transaction was clearly admissible under the circumstances, as in the prosecution of grand theft in the nature of embezzlement, evidence is admissible of acts of a similar nature committed by the defendant before and after the date of the act upon which the conviction is predicated. People v. Kendall, 65 Cal.App.2d 569, 570, 151 P.2d 39; People v. Thompson, 85 Cal.App.2d 261, 264, 192 P.2d 802. While the admission of the evidence relating to the defendant's failure to remit moneys to the Farmers Insurance Group was questionable, the error, if any, is not sufficient to justify the reversal of the judgment.

[7] It is contended that the prosecuting attorney was guilty of misconduct in introducing the testimony relative to other offenses and in attempting to introduce evidence for the sole purpose of defaming the character of the defendant. The particular questions objected to are not set forth in this specification of error but only the conclusion that it was misconduct. In the absence of a showing that the prosecuting attorney asked questions solely for the wanton purpose of creating a prejudice against the defendant or that his acts mitigated against a fair and orderly procedure, it cannot be said that his conduct was prejudicial or offensive. People v. Horowitz, 70 Cal.App.2d 675, 693, 694, 161 P.2d 833.

[8, 9] Finally, it is contended that the trial court erred in instructing the jury on the subject of flight. It is not contended that the instruction was in itself faulty but it is argued that there was no evidence of flight. The defendant left California on December 5, 1948, and went to Houston, Texas, where he was arrested in September of 1949. The question as to why he left this state was one for the jury. People v. Gregoris, 70 Cal.App.2d 716, 720, 161 P.2d 568; People v. Goodwin, 202 Cal. 527, 541, 261 P. 1009. The evidence was sufficient to warrant the giving of the instructions regarding flight. People v. Peak, 66 Cal.App.2d 894, 910, 911, 153 P.2d 464. The jury, under the circumstances herein, could not have been misled by the instruction given.

[10] The defendant complains of an instruction defining a trustee. This instruction merely stated that a trustee is one who is in a fiduciary relationship to another and that a fiduciary is under a duty to act for the benefit of the other as to matters within the scope of the relation. We see no error in not giving additional instructions on the definition of a trustee, particularly where no such additional instructions were requested.

The judgment and order are affirmed.

GRIFFIN, Acting Presiding Justice, concurs.

FOWLER v. KEY SYSTEM TRANSIT LINES et al.

Civ. 14131.

District Court of Appeal, First District, Division 2, California.

Sept. 22, 1950.

Rehearing Denied Oct. 21, 1950.

Hearing Granted Nov. 20, 1950.*

Action by Jessie Fowler against the Key System Transit Lines, a corporation, and others, for damages for personal injuries arising when plaintiff fell after alighting from defendant's bus. The Superior Court in and for the County of Alameda, A. J. Woolsey, J., entered a verdict in favor of defendants and plaintiff appealed. The District Court of Appeal, Goodell, J., held that where issue of contributory negligence was at issue in case, evidence relating to a custom whereby defendant's bus usually stopped at intersection in question on the crosswalk so that alighting passengers would not have to step into a gutter, as plaintiff did in case, was admissible.

Reversed.

1. Negligence ⇐124(3)

Evidence of custom is ordinarily admissible in negligence cases.

2. Carriers ⇐345

In action for damages arising when a passenger on defendant's bus stepped off bus on a dark night at an intersection into a gutter which caused passenger to fall and injure herself, where contributory negligence of passenger was an issue in case, evidence relating to a custom, whereby bus usually stopped at intersection in question at crosswalk and thereby passengers alighting from bus would not have to step into gutter as plaintiff did, was admissible, notwithstanding that a positive statute prevented a bus from stopping at crosswalks. Vehicle Code, § 586.

3. Appeal and error ⇐216(1)

Where appellant did not request trial court to give a particular instruction, appellant could not claim upon appeal that trial court erred in failing to give instruction in question.

4. Appeal and error ⇐110, 870(6)

Order of trial court denying a new trial is not an "appealable order," and is only reviewable on appeal from judgment itself. Code Civ.Proc. §§ 956, 963.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Appealable Order".

James G. Quinn, Jr., William H. Quinn, Oakland, Max Radin, Berkeley, for appellant.

Donahue, Richards, Rowell & Gallagher and Bryant M. Bennett, all of Oakland, for respondent.

GOODELL, Justice.

Appellant sued for damages for personal injuries. The verdict was in favor of respondent for its costs. A new trial was denied and this appeal was taken.

On Sunday evening July 7, 1946 about 8:30, appellant, a woman of 70, was a passenger on a Key System bus traveling easterly on San Jose Avenue in Alameda. She signalled for a stop at Paru Street and the bus stopped at the southwest corner of the two streets with its front door a short distance westerly of the north-and-south crosswalk. The night was dark and the intersection was but dimly lighted. As appellant left the bus by its front door she stepped into the gutter, which was about 8 inches deep, its bottom paved with cobble-stones; it was rough and uneven and contained debris, rocks and pebbles. She lost her balance and fell against the curb before getting a foothold on the sidewalk, and fractured her left hip. When the bus stopped it was inclined toward the sidewalk, on an angle, which left the appellant very little room, and put her in fear of being struck by it when it started up. Appellant was found lying where she fell, by a police officer, who had to use the spotlight on his car to make sure a human being was lying there.

Appellant's principal contention is that the court erred in excluding the testimony of two witnesses as to the customary stopping place of the busses.

At San Jose Avenue and Paru Street the crosswalk is flush with the sidewalk so that a pedestrian crossing the avenue

* Subsequent opinion 230 P.2d 339.

would not have to step up or down at a curb and over a gutter, but would keep walking along on the same plane as the sidewalk, which situation appears clearly in three photographs in evidence. The gutter into which appellant stepped was at the opening of the culvert which runs under the crosswalk.

The two witnesses testified that the customary bus stops were within the area of the crosswalk, which the witnesses marked on the photographs. It is evident that had the bus stopped at any of the accustomed places within the flat area as they portrayed them, appellant would have stepped onto the crosswalk and not into the gutter as she did.

The testimony of both witnesses was stricken out on defendant's motion, which left the record as if it had been rejected in the first place. Appellant's counsel in urging its retention assured the court that Mrs. Fowler would testify "that it was the place where the bus always stopped to permit her to alight in the past," and that he had "under subpoena several witnesses to testify in addition to the two already, that use that bus regularly, that that is the regular place * * *."

Appellant does not contend that the failure to stop at the accustomed place on this occasion was negligence *per se,* but she does contend that "The custom of the bus in stopping regularly at a particular place on the route, the place at which the plaintiff expected to alight and at which she thought she was alighting, was brought into the trial as one of the elements necessary to show the defendant's negligence in this particular case." She contends further that she "was entitled to show the custom of this respondent as establishing a standard of safety in this case and this case only, and her reliance upon that standard so adopted by respondent itself."

In Ross v. San Francisco, etc., Railways Co., 47 Cal.App. 753, 766, 191 P. 703, 709, the court said "The settled practice of stopping a streetcar at a particular place becomes a rule of conduct upon which the public has a right to rely to a reasonable extent, and a departure from such rule is a vitally important element in determining the question of negligence, for it constitutes a departure from the standard of safety which the defendant has itself adopted. [Citations.]"

[1] There can be no doubt that evidence of custom is ordinarily admissible in negligence cases. Cases so holding are Hennesey v. Bingham, 125 Cal. 627, 635-636, 58 P. 200; Adamson v. City of San Francisco, 66 Cal.App. 256, 260, 225 P. 875; Thomas v. Southern Pacific Co., 116 Cal.App. 126, 131-132, 2 P.2d 544; Mace v. Watanabe, 31 Cal.App.2d 321, 323, 87 P. 2d 893; Burke v. John E. Marshall, Inc., 42 Cal.App.2d 195, 203-204, 108 P.2d 738; Scott v. Gallot, 59 Cal.App.2d 421, 425-426, 138 P.2d 685.

The evidence rejected in this case was not that of a general custom, but of respondent's own custom and practice, such as that spoken of in Ross v. San Francisco, etc., Railways Co., supra.

In Adamson v. San Francisco, 66 Cal. App. 256, 260, 225 P. 875, 876, this court said: "Where * * * a usual practice or custom has obtained, and * * * the claim is made that one of the parties has, to the discomfiture of the other, without notice, departed from the usual custom, or practice, the courts have by an unbroken line of decisions held that the *question of negligence on the part of the defendant, and the question of contributory negligence on the part of the plaintiff,* are both questions for the jury to determine in the light of all of the facts, *including the evidence tending to establish the alleged custom or practice and the alleged deviation therefrom.* [Citations.]" (Emphasis added.)

This was cited approvingly in Polk v. City of Los Angeles, 26 Cal.2d 519, 531-532, 159 P.2d 931, 937, where it was said "Whether negligence or contributory negligence may be predicated upon departure from custom is a question for the jury." The Adamson opinion contains a pertinent quotation from Carter v. Sioux City Service Co., 160 Iowa 78, 89, 141 N.W. 26, 30, on the subject of departure from custom.

From these and other authorities it is settled law that evidence of custom is admissible for its bearing on either negligence or contributory negligence.

Respondents pleaded that plaintiff failed to "exercise ordinary care and caution in conducting herself so as to avoid the alleged accident" and that it was "directly and proximately caused by the contributory negligence of said plaintiff." Contributory negligence thus became an important issue in the case, and if the evidence of custom bore on that issue it should have been admitted for that reason if for no other.

In Scott v. Gallot, supra, 59 Cal.App.2d 421, 138 P.2d 685, the trial court granted a new trial because it had stricken out certain evidence of custom, relevant under the affirmative issue of contributory negligence. The order granting the new trial was affirmed.

In Muir v. Cheney Bros., 64 Cal.App.2d 55, 63, 148 P.2d 138, 141, the court in discussing plaintiff's testimony respecting the *customary course of traffic,* said: "From the reported decisions it is apparent that the evidence was not admissible for the purpose of excusing the plaintiff for the violation of any provisions of the law. However, it was admissible as a part of the res gestae *for the purpose of giving to the jury full knowledge of all the facts and circumstances which existed at the time and place of the accident, which were known to the parties,* so as to permit the jury to pass upon the question of whether plaintiff conducted himself as an ordinary and reasonable person would have conducted himself in the light of all of the circumstances. [Citations.]" (Emphasis added.) Carter v. Sioux City Service Co., quoted in the Adamson case, supra, is substantially the same.

Respondents attempt to justify the court's ruling by invoking the familiar rule that "Custom cannot overcome unequivocal statutory provisions." The basis for this is the provision of § 586, Vehicle Code, that "No person shall stop * * * any vehicle * * * on a crosswalk." Of the five California cases they cite on this point only one is a negligence case. None of them is in point since appellant had no such purpose as those cases disclose. In Hurtel v. Albert Cohn, Inc., 5 Cal.2d 145, 52 P.2d 922, the plaintiff sought to excuse her own violation of an ordinance dealing with stop-and-go signals by showing that everybody violated it. In Kohn v. Sacramento, etc., Co., 168 Cal. 1, 141 P. 626, 629, it was contended that non-negotiable bonds should be treated as negotiable instruments because for years everybody had so treated them, and the courts should "make the letter of the statutes bend" to the custom. Respondents' cases are not to be criticized for they all enforce the rule stated above, but they simply do not touch this case.

The excluded evidence was not offered for the purpose of opposing custom to statute law. Appellant had not disobeyed any law and was not seeking to excuse any violation by invoking custom.

The evidence might have shown repeated violations of § 586 but they were not appellant's violations. If respondent railway habitually stops its busses in the crosswalk, that is a matter between it and the law enforcement authorities, and appellant is concerned therein only in so far as such stops tend to establish the bus line's own standard of safety for its passengers, and in so far as such stops had afforded appellant a safe place to alight.

Appellant is no more affected or concerned with the violations of § 586 than was the passenger-plaintiff in Clarkson v. United Railroads et al., 67 Cal.App. 372, 227 P. 710, 712, concerned with the written contract between the United Railroads and the Western Pacific. There the custom, which departed from the contract, of handling trains was put before the jury and an instruction on the subject was given. With respect to the attack on the instruction this court said: "* * * this is an action based on the alleged negligence of the parties to the alleged written agreement, and the action is being maintained by one who was not a party to that written agreement. As to each of the defendants the issue in this case was negligence or no negligence." The court then restated what it said in Adamson v. San

Francisco, supra, and concluded: "As between the two defendants in this case we think it is clear that the same rule should apply. The question was not what each of the defendants had agreed to do, but the question distinctly was what custom or practice theretofore had obtained."

By relying on § 586 respondents in effect say to appellant: "In giving you in the past a safe place to alight we violated § 586, but you are now foreclosed from proving our custom for the very reason that we were transgressors." Respondents are thus taking advantage of their own violations of law, Civ. Code, § 3517; Hedlund v. Sutter Medical Service Co., 51 Cal.App. 2d 327, 333-334, 124 P.2d 878, to keep from the record evidence which otherwise would be clearly admissible.

The precise question is, whether evidence of a custom which violates positive law is to be rejected for that reason alone, or whether it is nevertheless admissible if it bears on negligence or contributory negligence. Neither side has produced any California authority on precisely this problem. There are, however, cases in other jurisdictions directly in point, the leading one of which seems to be Langner v. Caviness et al., 1947, 238 Iowa 774, 28 N.W. 2d 421, 423, 172 A.L.R. 1135. Therein it appears that the law of Iowa requires persons in vehicles meeting each other on the highway to give half the traveled way by turning to the right, and a violation is prima facie evidence of negligence. However, a well-established custom existed between truckers when working upon public works that the driver of an empty truck would yield the right of way to the driver of a loaded truck when about to meet in a narrow or defective place in the highway. Defendants in a negligence case arising out of a collision between trucks filed a counter-claim, wherein they pleaded the existence of such custom. On plaintiff's motion, that part of the answer was stricken out on the ground that it stated "no defense or excuse for failure to exercise the statutory care required of defendants in the operation of their truck." A verdict was returned for plaintiff and defendants appealed, contending that the stricken allegations properly bore on the issue of plaintiff's freedom from contributory negligence. The appeal was "presented by both sides largely as if the trial court had ruled directly against the admissibility of evidence in support of the pleaded custom", 28 N.W.2d 423, which is the way the problem arose here. The court in reversing held that the custom was properly pleaded and that the allegations should not have been stricken out. It said, at 28 N.W.2d 423: "It is generally held * * * that a custom which conflicts with a statutory provision will not be enforced. Where there is such conflict, the statute must control [citations] * * * However, there are decisions that evidence of custom is admissible even for the purpose of excusing noncompliance with a state or municipal regulation. Dugan v. Fry, 3 Cir., 34 F.2d 723, 724, 725; Pollock v. Hamm, 177 Ark. 348, 6 S.W.2d 541; Tobin v. Goodwin, 157 Wash. 658, 290 P. 215. See also Hensen v. Connecticut Co., 98 Conn. 71, 118 A. 464, 467. As stated, defendants do not contend the custom upon which they rely could excuse the negligence charged against Woolums but argue only it may be considered on the issue of plaintiff's freedom from contributory negligence. * * * We think the custom pleaded here cannot be invoked to supersede or nullify the above statute. But it does not follow that such custom cannot be considered in determining whether plaintiff was free from contributory negligence."

The court then cites *inter alia* Mann v. Standard Oil Co., 129 Neb. 226, 261 N.W. 168, and then reaches into California for further authority, citing Muir v. Cheney Bros., supra, and saying: "Muir v. Cheney Bros., 64 Cal.App.2d 55, 148 P.2d 138, 141, involves the question of right of way at an intersection and holds evidence of the customary course of traffic at the intersection was properly received, not to excuse plaintiff's failure to yield the right of way, but *to give the jury full knowledge of the circumstances at the time and place of the collision, which were known to the parties,* so as to permit the jury to decide whether plaintiff acted as an ordinarily prudent person in the light of such circumstances." (Emphasis added.)

Langner v. Caviness cites authorities from several other states, and at 28 N.W. 2d 424 summarizes the Mann case as follows: "Our conclusion is amply supported by authority. In Mann v. Standard Oil Co., 129 Neb. 226, 261 N.W. 168, defendant offered evidence of a recognized custom to signal a left turn by opening the left door and that its truck driver gave such signal. The statute required an arm signal. The court holds the custom could not supersede the statute but the evidence was admissible upon the issue of plaintiff's contributory negligence."

Respondents cite Glaum v. Cummings et al., decided by the Illinois Appellate Court, and have supplied the full text of the opinion. It is unreported but the syllabi are found in 317 Ill.App. 655, 47 N.E.2d 359. Judgment was entered on a directed verdict for the defendants, which was affirmed. Glaum was injured while alighting from a street car and his claim of negligence was based on the failure to furnish him with a reasonably safe place to alight, and in failing to stop at the regular stopping place. His attempt to prove that it was the railway's custom to stop at a place other than that where he was injured, was met by the railway's showing that the law prohibited it. The court rejected the offer of proof and in affirming the judgment the Appellate Court said: "It has been consistently held that a custom cannot be invoked to avoid a settled rule of law or to prevail against or overcome a statute, and such an alleged custom is therefore not binding. [Citations.]"

The case, while similar, is not in point since Glaum's contributory negligence was so flagrant that the court took the case away from the jury. Hence the rule just discussed was not brought into play, and probably not even considered. What the court said respecting custom is no different from what our California courts have said, and none of the three cases cited in the Glaum opinion is a tort case.

[2] We are satisfied that the evidence in question should have been admitted, and that its rejection was prejudicial error.

Appellant complains of an instruction on "alighting" because as given it "could not help suggesting to the jury that * * * the relation of carrier and passenger had in fact ceased." Counsel suggest that to make the instruction correct "the court should have supplemented this statement with the contrary rule, that when the passenger had not safely alighted, the relation of passenger and carrier had not ceased." It is not necessary to decide whether this instruction was correct. The real complaint is that it should have been amplified and balanced off as indicated. This can be readily accomplished on the next trial by counsel preparing their own conception of how it should be balanced and amplified and tendering it to the court. See Rogers v. Interstate Transit Co., 212 Cal. 36, 44, 297 P. 884.

[3] Appellant also claims the court erred "in not charging the jury specifically that the defendant * * * owed the duty of the highest care and not merely ordinary care." Appellant did not request such an instruction hence she cannot complain. Rogers v. Interstate Transit Co., supra, 212 Cal. 36, 44, 297 P. 884; Peckham v. Warner Bros. Pictures, 42 Cal.App.2d 187, 189, 108 P.2d 699; Greenleaf v. Briggs, 78 Cal.App.2d 720, 178 P.2d 459. On the next trial there is no reason why it should not be tendered and given.

In view of the reversal, nothing is to be gained by discussing the other alleged errors.

[4] In addition to the appeal from the judgment, an appeal was taken from the order denying a new trial, which is not an appealable order. Code Civ. Proc. § 963; 2 McKinney's Dig. Recompiled, p. 161, § 74. Such order is reviewable on the appeal from the judgment itself, Code Civ. Proc. § 956; Casner v. Daily News Co., 12 Cal.2d 402, 404, 84 P.2d 1032. Accordingly, that appeal is dismissed.

The judgment is reversed.

NOURSE, P. J., and DOOLING, J., concur.

99 Cal.App.2d 683

UNITED STATES FIDELITY & GUARANTY CO. v. JUSTICE COURT OF VISTA TP., SAN DIEGO COUNTY, et al.

Civ. 4204.

District Court of Appeal, Fourth District, California.

Sept. 27, 1950.

Rehearing Denied Oct. 23, 1950.

Hearing Denied Nov. 20, 1950.

Certiorari proceedings by the United States Fidelity & Guaranty Company against Justice Court of Vista Township, San Diego County, and others, to review an order forfeiting bail bond. The Superior Court, San Diego County, John A. Hewicker, J., entered judgment for petitioner, and defendants appealed. The District Court of Appeal, Mussell, J., held that bonding company was obligated until defendant complied with judgment of conviction and that bond was not exonerated by operation of law on day sentence was imposed on defendant.

Reversed.

1. Criminal law ⇐1001

Court has no power to suspend execution of sentence except as incident to granting probation, and an order suspending sentence is in legal effect the equivalent of an order granting probation. Pen.Code, § 1203.

2. Bail ⇐75

Where defendant was at liberty under bail bond which provided that defendant would appear for judgment and render himself in execution thereof, and defendant was subsequently convicted, but court at his request extended time of payment of fine 10 days, and suspension was not intended as exercise of authority under probation law, and it did not appear that bail was present in court at time of sentence or made any demand or request that bail be exonerated, bonding company was obligated until defendant complied with judgment and bond was not exonerated by operation of law on day sentence was imposed.

3. Bail ⇐74(1)

Sureties on a bond conditioned that principal shall abide judgment of court, or that he will appear for judgment and render himself in execution thereof, are not discharged by a conviction and pronouncement of sentence, and principal must further submit to such punishment as shall be adjudged.

James Don Keller, District Attorney, and Duane J. Carnes, Deputy, San Diego, for appellants.

Louis Elowitt, Los Angeles, for respondent.

MUSSELL, Justice.

On June 27, 1947, one Cyrus L. Morris was convicted in the Justice Court of Vista Township, county of San Diego, of a violation of Vehicle Code section 502. Morris was at liberty under a bail bond issued by the United States Fidelity and Guaranty Company, which bond contained the following language: "Now we, United States Fidelity and Guaranty Company, a Maryland corporation, hereby undertake that the above named defendant, Cyrus L. Morris, will appear and answer the charge above mentioned in whatever court it may be prosecuted and will at all times hold himself amenable to the orders and process of the court, and if convicted, will appear for judgment and render himself in execution thereof; or, if the said defendant fails to perform either of these conditions, that we will pay to the people of the State of California the sum of Two Hundred Fifty Dollars lawful money of the United States. If the forfeiture of this bond be ordered by the court, judgment may be summarily made and entered forthwith against the United States Fidelity and Guaranty Company, a Maryland corporation, and the said defendant if he be a party to the bond, for the amount of their respective undertakings herein as provided by Section 1305 and 1306 of the Penal Code."

After conviction, Morris waived time and sentence was imposed that he pay a fine of $250 or serve ninety days in jail. Morris then requested, and the court granted, ten days time to pay. The fine

was not paid within the ten-day period and Morris failed to appear and surrender himself in execution of the judgment.

On July 11, 1949, the bail bond was declared forfeited and on October 11, 1949, a summary judgment of forfeiture was made and entered and a bench warrant was issued at the request of the bonding company. However, the defendant Morris was not thereafter apprehended.

The bonding company filed a petition in the superior court in San Diego, praying that a writ of certiorari be issued to the respondent Justice of the Peace commanding him to certify and return to the court the proceedings had against the defendant Morris in order that the same might be reviewed. The writ was issued and after hearing thereon, the trial court concluded that the surety bond was exonerated by operation of law on the 27th day of June, 1949, the day sentence was imposed upon Cyrus L. Morris. Judgment was entered accordingly and this appeal followed.

The principal question presented is whether the trial court was correct in its conclusion that the bond was exonerated under the facts related, which facts are not questioned. The question must be answered in the negative.

When the justice court granted Morris ten days within which to pay the fine, it thereby stayed the execution of the judgment for that period and Morris was not required to surrender himself in execution of the judgment until that time had expired.

The bond, by its plain language, provides that the defendant will appear for judgment and render himself in execution thereof. He appeared for judgment and at his request the time when he should again appear for the purpose of surrendering himself in execution thereof was fixed. He failed to comply with the condition of the bond that he render himself in execution of the judgment. The petitioner herein, as surety, was liable for his appearance in accordance with the terms of the bond. County of Los Angeles v. Maga, 97 Cal. App. 688, 690, 276 P. 352.

The question of the liability of a surety on its bail bond, where pronouncement of sentence was continued at the defendant's request for a period of forty days, was before this court in General Casualty Co. v. Justice's Court, 41 Cal.App.2d 784, 107 P.2d 663. In that case several authorities were discussed bearing upon the question involved, among them being Commonwealth v. Turpin, 98 Ky. 9, 32 S.W. 133; State v. Blum, 57 N.D. 619, 223 N.W. 697; State v. Helgerson, 59 S.D. 516, 241 N.W. 325, and In re Howard, 72 Cal.App. 374, 237, P. 406.

It was held in the Commonwealth v. Turpin case, supra, where, in a prosecution for a misdemeanor, the court permitted the defendant to go to his home for the purpose of making arrangements to pay his fine, that the surety was liable upon his disappearance without its payment. The bond in that case, as here, contained the condition that the defendant, if convicted, should render himself in execution of the judgment.

In State v. Blum, supra, the undertaking of bail was conditioned that the defendant would appear for judgment and render himself in execution thereof and after plea of guilty, and the passing of sentence upon him, the defendant escaped from the courtroom and failed to surrender himself to the sheriff in execution of the judgment. The court held that the sureties on the undertaking of bail were liable because of the defendant's failure to comply with the order of the court.

In State v. Helgerson, supra, the defendant was on bail. Judgment was entered against him on November 23, 1929, he being present in court at the time. The court then ordered the commitment to be stayed until December 14, 1929. The defendant did not appear at the conclusion of the stay and his bond was declared forfeited. The court said, 241 N.W. at page 326: "After sentence, without express order to the contrary, there is an implied legal change of custody from the bail to the law, especially where the bond contains no condition requiring the defendant to abide the final judgment or, if convicted, to render himself in execution of the judgment. 20 A.L.R. 629, note; 6 C.J. 1032; Detroit Fidelity & Surety Co. v. United

States, 6 Cir., 36 F.2d 682, 683. But here the bond contained the condition that the principal therein should 'render himself in execution of the judgment.' Furthermore, the very part of the judgment which respondents claim freed them from liability on their bond, negatives any implication of change of custody from the bail to the law. As stated by the Court of Appeals in Detroit Fidelity & Surety Co. v. United States, supra; 'Nothing in the judgment, either expressly or by implication, changed the right of the surety to arrest and deliver its principal as authorized by law.' The bondsmen in the case at bar had less cause to be released from their liability than the bondsmen in the case last cited, because the language of the present bond was more comprehensive, and there was nothing whatever to prevent respondents from arresting their principal and surrendering him to the law."

In Re Howard, supra, the defendant pleaded guilty to a misdemeanor charge on May 13, 1924, and was sentenced to imprisonment in the county jail for the term of 180 days. At the same time, the court made this order "execution suspended for 3 days." At that time the defendant was in fact allowed his leave without any order of court to that effect, other than a supposed implication from the suspension of execution. On February 17, 1925, the defendant was arrested and imprisoned in the city jail to begin service of said sentence. The commitment bore the date of May 13, 1924. It was contended that the imprisonment was illegal because the defendant was allowed to remain at liberty throughout the maximum term of his sentence and during that period of time there was no revocation of the suspension of execution and no authority thereafter existed to imprison him in satisfaction of such judgment. The court, in discussing the effect of the three-day suspension, of execution, held that an order of suspension of execution for such a brief period as three days should not be presumed to be an attempted exercise of authority under the probation law, and said, 72 Cal.App. at pages 378, 379, 237 P. at page 408: "Common sense indicates that none of the purposes of probation would be advanced by an unexplained three-day order of this kind. We think that in such an order, thus briefly limited as to time, there should be something further on the face of the order to indicate that it was an exercise of authority under the probation law, before it can be construed as of that character. * * *"

[1] It seems well settled that since the enactment of Penal Code section 1203, the court has no power to suspend execution of sentence except as an incident to granting probation, People v. Sidwell, 27 Cal. 2d 121, 162 P.2d 913; People v. Williams, 93 Cal.App.2d 777, 779, 209 P.2d 949, and that an order suspending sentence is, in legal effect, "the equivalent of an order granting probation". In re Herron, 217 Cal. 400, 404, 19 P.2d 4, 6.

It has also been held that "Probation is not a judgment", People v. Williams, supra, 93 Cal.App. page 779, 209 P.2d 950, and that where the rendition of the judgment and imposition of sentence is suspended and a defendant granted probation, no final judgment has been entered and no appeal lies from the "judgment". People v. Guerrero, 22 Cal.2d 183, 184, 137 P.2d 21.

In Re Phillips, 17 Cal.2d 55, 58, 109 P.2d 344, 346, 132 A.L.R. 644, the court, in discussing the power of the trial court to grant probation after conviction, used the following language: "The power of the trial court to grant probation after a conviction may be exercised in either of two ways: the court may suspend the imposition of the sentence, in which case no judgment of conviction is rendered, or it may impose the sentence and thereafter suspend its execution. Penal Code, §§ 1203.1, 1203.2. In the latter case a judgment of conviction has been rendered from which an appeal can be taken, and upon affirmance, it becomes a final judgment. In the former situation, however, where the court suspends the imposition of the sentence, that is, the rendition of a judgment of conviction, there is no judgment from which the defendant can prosecute an appeal. (People v. Von Eckartsberg, 133 Cal.App. 1, 3, 23 P.2d 819; People v. Noone, 132 Cal.App. 89, 92, 22 P.2d 284; People v. DeVoe, 123

Cal.App. 233, 236, 11 P.2d 26; 8 Cal.Jur. 493), and thus there can be no final judgment of conviction."

[2] In the instant case, as in the Howard case, supra, there was nothing on the face of the order of the justice court to indicate that it was intended as an exercise of authority under the probation law. No change of custody of the defendant was contemplated by the court or the defendant. No reference of the case was made to the probation officer, and if such a reference had been made, it would not have had the effect of placing the defendant in custody of such officer. In re Giannini, 18 Cal.App. 166, 169, 122 P. 831. The court, in effect, pronounced judgment that the defendant pay a fine of $250 within ten days or serve ninety days in jail. In this connection it should be noted that the bonding company had the right to surrender the defendant at any time if it so desired and that no proceedings were had at the time of pronouncement of judgment indicating that the surety desired to be relieved from its obligation under the bond.

According to the plain terms of the order, the defendant was required to render himself in execution of the judgment if the fine imposed was not paid within ten days from the time of the entry of the judgment. The order was valid whether it be considered as a granting of probation or not. Since the bond provided that the defendant would at all times hold himself amenable to the orders and process of the court, and render himself in execution of the judgment, the bonding company was obligated until a compliance with the judgment.

[3] As is said in 8 C.J.S., Bail, § 79, subd. g, p. 158: "Sureties on a bond conditioned that the principal shall abide the judgment of the court, or that he will appear for judgment and render himself in execution thereof, are not discharged by a conviction and pronouncement of sentence, and the principal must further submit to such punishment as shall be adjudged."

It is argued that the bail bond was exonerated upon pronouncement of judgment by the court where the defendant was present in court for that purpose, and as authority for this contention, two cases are cited: Rodman v. Superior Court, 13 Cal. 2d 262, 89 P.2d 109, and People v. Fidelity & Deposit Co., 107 Cal.App. 160, 290 P. 59. In the Rodman v. Superior Court case the defendant, after his conviction, was before the court for the pronouncement of judgment and a motion for exoneration of bail was made. The question of the disposition of cash bail was the only problem considered. The question as to whether after sentence and prior to execution thereof the bail remained in force was not directly passed upon. The court pointed out that a bail has a right to surrender the defendant in exoneration thereof and that this was, in effect, done; that where cash bail has been deposited in a criminal case, not by the defendant but by a third party, the third party is entitled to the return of his money upon application therefor when the defendant has, in effect, surrendered himself by appearing in court for the pronouncement of judgment. The Fidelity and Deposit case, likewise, did not involve the problem of probation or suspension of sentence. Neither case is decisive of the question before us.

As heretofore noted, in the present case it is not shown by the record that the bail was present in court at the time of sentence or that any demand or request was then made that the bail be exonerated. The defendant did not thereafter appear and the judgment was still in force and unsatisfied.

In view of what we have here said, it is not necessary to pass upon other points raised.

Judgment reversed.

GRIFFIN, Acting P. J., concurs.

99 Cal.App.2d 625

WOODS et al. v. EASTRIDGE et al.

Civ. 3961.

District Court of Appeal, Fourth District, California.

Sept. 25, 1950.

Action by Willie H. Woods and another against Gladys Eastridge, Betty A. Pierce, and others, for damages sustained in automobile collision. The Superior Court, San Diego County, L. N. Turrentine, J., entered judgment for plaintiffs, but, upon motion by second named defendant, entered an order setting aside and vacating the judgment, and entered judgment for defendant, and plaintiffs appealed, and defendant appealed from original judgment. The District Court of Appeal, Griffin, Acting P. J., held that defendant's motion was filed within statutory limit of 60 days from date of original judgment, and that where transferor, upon sale of automobile, made endorsement and delivery of certificates of ownership and registration to transferee, transferor was not liable for subsequent negligent operation of automobile by another.

Affirmed. Defendant's appeal dismissed.

1. Time ⇐9(5, 8)

Where original judgment for plaintiffs was entered on September 14, motion for order setting aside judgment and directing another and different judgment filed by defendant on November 13 was filed within statutory limit of 60 days. Code Civ.Proc. §§ 12, 663, 663a; Rules on Appeal, rules 2, 3.

2. Automobiles ⇐19

Statutory provision requiring that transferor of motor vehicle make proper endorsement and delivery of certificates of ownership and registration to transferee as provided in code for his release from liability for negligence as owner was not inconsistent with statutory provisions requiring that transferor notify Motor Vehicle Department of the transfer, and that transferee deliver to department such certificates with transfer fee. Vehicle Code, §§ 177, 178, subd. 1, 186, 402.

3. Automobiles ⇐56, 192(1)

Transferor, who made endorsement and delivery of certificates of ownership and registration of automobile to transferee, was not liable for subsequent negligent operation of automobile by another, although transferor had not given notice and transferee had not delivered such certificates with transfer fee to Motor Vehicle Department, and rule of estoppel could not be applied. Vehicle Code, §§ 177, 178, subd. 1, 186, 402.

4. Appeal and error ⇐790(1)

Defendant's appeal from original judgment became moot and would be dismissed when defendant prevailed on plaintiff's appeal from order setting aside the original judgment and from judgment subsequently entered.

Charles B. Provence and William F. Reed, San Diego, for plaintiffs-appellants-respondents.

Burton D. Wood, San Diego, for defendant-respondent-appellant Betty A. Pierce.

GRIFFIN, Acting Presiding Justice.

This action arose out of an automobile collision in which the plaintiff Willie H. Woods was the driver, plaintiff Otis Nelson was the guest in that car, defendant Gladys Eastridge was the driver, and defendant Betty A. Pierce was the alleged owner of the other car. After a trial by the court a judgment was entered on September 14, 1948, in favor of plaintiff Woods for $1316, and in favor of plaintiff Nelson for $1000 against defendant Betty A. Pierce, based on a finding that Betty A. Pierce was the owner of the car which was being driven by defendant Gladys Eastridge. During the trial defendant Gladys Eastridge was dismissed from the action, as were the fictitious defendants. Thereafter, defendant Pierce made a motion under sections 663 and 663a of the Code of Civil Procedure for an order setting aside and vacating the judgment and directing another and different judgment, which motion was granted by an order dated December 13, 1948. A second judgment, so

signed, amended the conclusions of law by finding that the defendant Pierce, at the time of the accident, was not the owner of the automobile responsible for plaintiffs' injuries, and directed a judgment in favor of the defendant Betty A. Pierce. On February 3, 1949, plaintiffs appealed from the order granting the motion setting aside the judgment and from the judgment that followed. On February 24, 1949, defendant Betty A. Pierce appealed from the original judgment entered on September 14, 1948, pursuant to Rule 3(b) (2), Rules on Appeal. The appeals are on the judgment roll.

Plaintiffs first claim that the judgment made by the trial court, entered on September 14, 1948, which was in favor of plaintiff, became final, so that it would deprive the trial court of jurisdiction to make and enter the second judgment.

[1] It is argued that under Rule 2 of the Rules on Appeal, the notice of appeal should have been filed within 60 days from the date of entry of the judgment unless extended by Rule 3; that since the judgment was entered on September 14, 1948, in computing the time, September 14 is counted as the first day, and under this computation the 60 days would expire on November 12. Therefore, since the motion to set aside the judgment was not filed until November 13, it did not extend the time under Rule 3, and the original judgment became final and the court had no jurisdiction to set it aside and make a different judgment, citing Municipal Improvement Co. v. Thompson, 201 Cal. 629, 632, 258 P. 955. We see no merit to this argument. Section 12 of the Code of Civil Procedure provides that the time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded. See, 24 Cal.Jur. p. 579, sec. 9. This section has been construed as applicable to the filing of a notice of appeal, Hoover v. Sweitzer, 34 Cal.App.2d 441, 93 P.2d 831; as to a motion for new trial, Payne v. Hunt, 214 Cal. 605, 7 P.2d 302; and as to the time for filing a verified claim against municipalities, Shea v. City of San Bernardino, 7 Cal.2d 688, 695, 62 P.2d 365. See Ley v. Dominguez, 212 Cal. 587, 299 P. 713, as to a discussion of the holding in Municipal Improvement Co. v. Thompson, supra, cited by defendant.

Apparently the trial court found, in the first instance, that defendant Pierce's liability was based on her ownership of the car. On the motion to enter a different judgment the court concluded, from the detailed statement of facts found, that she was not an owner within the meaning of sec. 402 of the Vehicle Code.

The facts found are that defendant Gladys Eastridge negligently operated the automobile in which she was riding and that plaintiffs were injured to the extent mentioned. The court found that plaintiffs were not guilty of contributory negligence; that it was not true that defendant Eastridge was the agent or servant of defendant Pierce in the operation of the automobile. It then specifically found that defendant Pierce purchased the automobile and became the registered owner in August, 1944; that the Pacific Finance Corporation became the legal owner; that in January, 1946, and at all times subsequent to August, 1944, the records of the Department of Motor Vehicles showed defendant Pierce as registered owner and the finance corporation as the legal owner; that in the early part of 1945, defendant Pierce made a bona fide conditional sale of the car to one Luevano, and at the time of making such sale delivered possession of the automobile and of the certificate of registration issued by the department to Luevano; that Luevano had possession of said car and the certificate of registration and that defendant Pierce did not at any of said times have possession or use thereof or of said certificate of registration; that on November 15, 1945, the finance company endorsed the certificate of ownership in such manner as to effect a relinquishment of its rights as legal owner and delivered the said certificate of ownership, so endorsed, to defendant Pierce; that defendant Pierce had possession of the certificate of ownership so endorsed at all times subsequent to November 15, 1945, until approximately the hour of 5 o'clock p. m. of January 5, 1946; that on January 5, at the hour mentioned, Luevano delivered and

paid to defendant Pierce the balance due from him to her on account of the purchase price of the automobile pursuant to a conditional sales agreement; that at that hour defendant Pierce properly endorsed the certificate of ownership, so bearing the endorsement of the finance company, as aforesaid, by writing her signature in the appropriate space on the certificate of ownership for the transfer, by the registered owner, of the motor vehicle described, and at the same time delivered the certificate of ownership, as so endorsed by her and the finance company, to Luevano. This transfer and delivery of the certificate of ownership happened approximately three and one-half hours prior to the accident here involved. It then found that prior to the happening of the accident, and without the knowledge of defendant Pierce, Luevano delivered said certificate of ownership, so endorsed by defendant Pierce and the finance company, to defendant Gladys Eastridge; that defendant Eastridge, at some time subsequent to January 5, 1946, and a day or two prior to January 28, 1946, wrote her signature and address on the reverse side of that certificate of ownership in the space provided therefor as transferee and forwarded the certificate of ownership by mail to the Motor Vehicle Department and that it was received in that office on January 28, 1946, and the department then issued a new certificate of ownership showing defendant Eastridge both as registered and legal owner thereof; that defendant Pierce did not give to the department any notice of the transfer of any interest in the automobile except such notice as above mentioned; that defendant Eastridge was driving the automobile with the express permission of Luevano and that defendant Pierce never gave defendant Eastridge permission to operate or drive the car. The amended conclusions then recite that from the facts found defendant Betty A. Pierce was not the owner of the automobile within the meaning of section 402 of the Vehicle Code, and therefore plaintiffs were not entitled to recover from her.

The facts found show that defendant Pierce fully complied with sec. 178, subd. (1) of the Vehicle Code as a bona fide sale was made, possession was delivered, and under subdivision (1) thereof, the owner made proper endorsement and delivery of the certificate of ownership and certificate of registration prior to the hour of the accident.

As we construe the plaintiffs' argument, in addition to complying with subdivision (1) of section 178, supra, defendant Pierce was also required to comply with secs. 177 and 186 of the Vehicle Code in regard to the sale of her car to Luevano. It is claimed that she failed to have the transfer of title made on the Motor Vehicle Department records and failed to give notice as required by those sections and that such failure to so record the transfer of the vehicle allowed her, under the holding of the trial court, to use sec. 178 of the Vehicle Code as a shield to defeat the liability imposed upon her under sec. 402 of the Vehicle Code and that a member of the public who sustains injury, under those circumstances, should be entitled to rely on the records of the Motor Vehicle Department to fix her liability and that defendant Pierce should be estopped from invoking the provisions of sec. 78, subdivision (1) of the Vehicle Code, citing Boles v. Stiles, 188 Cal. 304, 204 P. 848, and Dennis v. Bank of America, 34 Cal.App.2d 618, 94 P.2d 51. In the last case cited, a fraud of the transferor was involved. The other case involved a car registered in a partnership name. There is no fraud or negligence of the transferor found in the instant action and the instant case is factually dissimilar to the cases cited.

Probably defendant Pierce, for her own protection, should have given the notice provided by section 177 of the Vehicle Code during the period before the sale to Luevano ripened into an absolute sale upon the delivery by her to him of the properly endorsed certificate of ownership. During such period, and in the absence of compliance with that section, she may have been liable for the negligent operation of the automobile. However, that question became moot upon the consummation of an absolute sale and transfer by the delivery of the certificate of ownership, because she was then

in a position to, and did comply with the alternative provision by which she could secure relief from liability.

Section 177 of the Vehicle Code does direct that when an owner sells a car and delivers possession thereof, he shall notify the Department of Motor Vehicles on an appropriate form. Section 179 of the Vehicle Code requires the transferee to apply for transfer, when he has received a properly endorsed certificate of ownership and registration card, and make application for transfer of registration. Section 186 of the Vehicle Code provides that no title passes until the parties have fulfilled either of two requirements: (1) The transferor shall have made proper endorsement and delivery of the certificate of ownership and delivery of the registration card to the transferee, and the transferee has delivered to the department such certificate and card, etc.; or (2) The transferor shall have delivered to or mailed to the department the appropriate documents for the transfer of registration of such vehicle pursuant to such sale (except as provided in sec. 178). The exception noted in sec. 178, pertaining to liability for negligence, is that if a bona fide sale is made of a vehicle and possession delivered and the owner either has made a proper endorsement and delivery of the certificate of ownership *"as provided in this code"* or has delivered or mailed to the department either a notice required by sec. 177, or appropriate documents for registration of such vehicle, he shall not be deemed the owner for the purpose of subjecting such owner to civil liability by reason of such ownership.

[2] Plaintiffs lay considerable stress upon the words "as provided in this code" under subdivision (1), section 178 above italicized. They argue that these words require a compliance with secs. 177 and 186 of the Vehicle Code. This same question was presented in Piacun v. Hexem, 18 Cal. App.2d 145, 63 P.2d 315, and decided adversely to plaintiffs' argument. Those sections deal solely with the transfer of title or interest and declare when such title or interest shall pass. Section 178 of the Vehicle Code is an exception mentioned in subdivision (2) of section 186 and relates solely to the release from liability for negligence of an owner who has made a bona fide sale or transfer of a vehicle. This section is not inconsistent with the other sections mentioned. The provisions of sec. 178 are not new. Sec. 45¾ of the Vehicle Code of 1931, Stats. 1931, chap. 1026, had a similar provision in reference to the owner notifying the Division of Motor Vehicles of a sale, but provided that in the event said notice is given or in the event of the failure to give said notice, an owner who has made a bona fide sale and delivered possession and who has made proper endorsement and delivery of the certificate of ownership, shall not, by any provisions of the act, be deemed the owner so as to subject him to liability under sec. 1714½ of the Civil Code. In 1935 that section was redrafted as section 178 of the Vehicle Code, Stats. 1935 chap. 27, p. 115, and contained a similar provision. In 1941 that section was revised and amended to its present form, Stats. 1941, chap. 1053. The leading case of Piacun v. Hexem, supra (hearing denied by the Supreme Court), was decided under section 45¾, supra. The facts of that case are in many respects strikingly similar to those of the present case. In its opinion the District Court of Appeal expressly recognized that under the applicable statute, which is essentially the same in substance as the one with which we are here concerned, an owner who has made an unconditional sale or transfer of an automobile and who has made proper endorsement and delivery of the certificate of ownership to the transferee is forthwith relieved from liability. It expressly holds that it is not necessary for him to give any notice to the Motor Vehicle Department. To the same effect is Weinberg et al. v. Whitebone et al., 87 Cal.App.2d 319, 196 P.2d 963.

[3] Since there was sufficient compliance with the statute by defendant Pierce relinquishing her ownership liability at the time of the accident and no sufficient finding is made whereby the doctrine of estoppel might be properly applied, no liability could be imposed. To rely on the

rule of estoppel in any case involving the transfer of a motor vehicle, a good factual basis must be presented for its application. Wargin v. Wargin, 29 Cal.2d 843, 180 P.2d 349; Weinberg v. Whitebone, supra, 87 Cal.App.2d page 323, 196 P.2d 963.

[4] Since the defendant prevailed on plaintiffs' appeal from the order setting aside the original judgment and from the judgment subsequently entered, defendant's appeal from the original judgment becomes moot and should be dismissed.

Appeal from original judgment dismissed. Order setting aside original judgment, and the judgment thereafter entered affirmed.

MUSSELL, J., concurs.



99 Cal.App.2d 616

CLARK v. STATE et al.

Civ. 7724.

District Court of Appeal, Third District, California.

Sept. 25, 1950.

Hearing Denied Nov. 20, 1950.

Action by Lyman Clark against the State and another for death of plaintiff's wife, when struck by state automobile driven by its employee while decedent was crossing highway at dusk. The Superior Court, Butte County, Ben R. Ragain, J., entered judgment on a verdict in favor of defendants and plaintiff appealed. The District Court of Appeal, Adams, P. J., held that refusal to give requested instructions defining proximate cause and setting forth right of a person exercising ordinary care to rely on assumption that others will perform their duty under the law and the giving and repetition of defective instructions as to contributory negligence constituted reversible error.

Judgment reversed and new trial ordered.

1. Appeal and error ⇐1067

In action for death of pedestrian struck by automobile while she was crossing highway, refusal to give requested instruction defining proximate cause was serious error in view of facts of case and jury's evident concern over issue of contributory negligence.

2. Death ⇐58(1)

In wrongful death action, decedent was presumed to have taken ordinary care for her own safety. Code Civ. Proc. § 1963, subd. 4.

3. Automobiles ⇐242(8)

In action for death of pedestrian struck by automobile while she was crossing highway, defendants had the burden of proving contributory negligence of decedent. Code Civ. Proc. § 1963, subd. 4.

4. Appeal and error ⇐1067
Automobiles ⇐246(58)

In action for death of pedestrian who, while crossing highway at dusk, was struck by automobile displaying only parking lights, plaintiff was entitled to instruction as to right of one exercising ordinary care to rely on assumption that others will perform their duty under the law, in view of defendants' contention that decedent must have been contributorily negligent in failing to look before crossing highway or she would have seen approaching automobile, and refusal to give such requested instruction was grave error.

5. Trial ⇐260(8)

Where Approved Form instructions containing basic definition of negligence and elaboration thereof were given, refusal to give requested instructions defining negligence and ordinary care was not error.

6. Appeal and error ⇐1067
Automobiles ⇐246(50)

Instruction as given as to statutory duty of driver of vehicle to yield right of way to pedestrian crossing roadway at intersection sufficiently covered question of right of way as presented by evidence in action for death of pedestrian struck by automobile while she was crossing highway and refusal to give instructions requested by plaintiff defining right of way was not substantial error. Vehicle Code, § 560.

7. Trial ⇐296(4)

Instructing jury to measure conduct of decedent, in determining whether she was contributorily negligent, by the standard of the average person of her age and intelligence was erroneous, but harmless in view of other instructions correctly stating the standard of care.

8. Negligence ⇐82

If negligence of plaintiff, amounting to absence of ordinary care, contributes proximately, in any degree, to injury, plaintiff cannot recover therefor, but it cannot be said that any degree of negligence, however slight, which directly concurs in producing injury will bar recovery.

9. Appeal and error ⇐1064(1)

In action for death of pedestrian when struck by automobile while she was crossing highway, instructing jury to find for defendants if decedent was guilty of contributory negligence, no matter how slight, which proximately contributed to accident and death and repetition of such instructions without stating reciprocal duties of driver when jury requested further instructions as to contributory negligence constituted prejudicial error, since jurors were thereby permitted to continue in mistaken belief that they were concerned with degree of negligence as distinguished from degree of proximate contribution of such negligence to happening of accident.

Clewe, Deahl & McClarrinon, Oroville, for appellant.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, and Goldstein, Barceloux & Goldstein, all of Chico, for respondents.

ADAMS, Presiding Justice.

Appellant, Lyman Clark, brought this action to recover damages for the death of his wife alleged to be due to the negligence of James F. McClaskey, an engineer for the State Division of Highways, in the operation of a state automobile. Contributory negligence on the part of decedent was alleged by defendants. A jury returned a verdict in favor of defendants and from the judgment which followed this appeal has been taken.

Appellant relies upon asserted error on the part of the trial court in the giving and in the failure to give certain instructions.

When the accident occurred Mrs. Clark was on her way to her home after her day's work in Oroville, and, when struck by respondents' car, had just alighted from a Greyhound bus and was in the act of crossing the highway at a point in front of the entrance to what was designated as "Old Army Barracks," and at the intersection of Harlan Street with the highway. The bus after crossing the entrance to the Barracks on the east side of the highway moved forward up a rise. Mrs. Clark then started across the road to the southward, bound for her home which was on the southwest corner of the highway and Harlan Street, which street intersected the highway at a right angle from the south, just opposite the entrance to the Barracks. In the meanwhile defendant McClaskey, traveling eastward, topped the rise above the place of the accident. His speed, he said, was then about forty-five miles per hour which he reduced to about forty miles per hour when he saw the bus. His car was dark green in color, and was being operated with parking lights only. The date was October 23, 1947. The time of the accident was in controversy, the testimony varying as to whether it was between 5:45 and 6:00 p. m., or between 5:30 and 5:45 p. m. Testimony as to visibility was conflicting, but it was generally agreed that it was dusk or twilight, and the bus driver and an investigating patrolman testified that it was dark enough for headlights. McClaskey, though, in an apparent effort to offset his failure to use headlights, said that it was not dark, yet he said that when he first saw decedent about 20 to 25 feet away she appeared only as a "dark object." After being struck Mrs. Clark's body was carried on defendants' car some distance and her clothing

and personal articles scattered along the road. Defendants' car came to rest about 84 feet from the point of impact, but decedent's body was found eastward therefrom about 19 feet.

Appellant's first assignment of error is the court's failure to give instruction 21 (BAJI 104), which appellant had requested. It reads:

"Negligence is of no consequence unless it was the proximate cause of an injury.

"The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies."

The court refused to give this instruction, indicating that it had been given, though no instruction defining proximate cause is found in the record of those given. It is conceded by respondents that such an instruction is usually given. The term "proximate cause" was used by the trial court in sixteen of the instructions given. Failure to define the term was held to be error in Spear v. Leuenberger, 44 Cal.App. 2d 236, 246, 112 P.2d 43, though there were other errors in that case and all the errors were considered, collectively, to constitute ground for reversal. Also in Brower v. Arnstein, 126 Cal.App. 291, 298-299, 14 P.2d 863, 865, failure to define proximate cause was said to be a "most serious omission," but was not held sufficiently serious to justify a reversal of a judgment for plaintiff, the court saying that defendants had not requested an instruction defining proximate cause, and that it was incumbent upon them to do so. In Long v. Barbieri, 120 Cal.App. 207, 217-218, 7 P.2d 1082, 1087, failure to give what was designated as "this always related and ever essential principle of the doctrines of negligence and contributory negligence" was one of the errors for which the judgment for defendant was reversed.

[1] Here respondents urge that any negligence on the part of decedent must have been the proximate cause of decedent's death and that therefore failure to define proximate cause was harmless. But the instructions on contributory negligence which were given plainly puzzled the jury, for after some consideration they returned to the courtroom for further instructions, whereupon the foreman said they desired a re-reading of the instructions as to negligence on the part of decedent, saying that the jury seemed to be under the impression that the instructions stated that negligence of the decedent "in even the tiniest little bit, that would go against the plaintiff, they would have to render decision for the defendant." He said further, "I think if there is the least bit of negligence on the part of the plaintiff, if we found there is negligence there of any kind, we would have to find for the defendant." The court then reread several of defendants' requested instructions dealing with what, if found, would constitute negligence on the part of decedent. They are discussed hereinafter. But the omission of any definition of the term "proximate cause" was not supplied. In view of the specific request and of the facts as hereinbefore stated and of the jury's evident concern over the issue of contributory negligence, we think it was error of a serious nature to refuse the requested instruction.

Appellant's second assignment of error is the court's failure to give his requested instruction No. 36 of the Approved Forms of Instruction (BAJI No. 138) which reads:

"A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another. However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is

not going to perform his duty. [One is not justified in ignoring obvious danger although it is created by another's misconduct, nor is he ever excused from exercising ordinary care.]"

Respondents' contentions in this case are that regardless of whether or not McClaskey was negligent, the jury was justified in finding that Mrs. Clark was guilty of contributory negligence in these respects, to wit: That she could not have looked up the road prior to reaching the center line for, had she done so, she would have seen the approaching car; that before crossing the highway she did not make the effort of a reasonably prudent person to determine whether it was safe for her to do so; and that had the jury been given the requested instruction it "would not have changed the jury's task with respect to contributory negligence."

[2] We are not in accord with this conclusion. For instance, Mrs. Clark, who is presumed to have taken ordinary care for her own concerns, Code Civ. Proc. section 1963 (4), may have looked up the road prior to reaching the center line, and have failed to see the approaching car because of its failure to use regulation headlights instead of parking lights. The bus driver testified that he was looking continuously up the highway and that he did not see McClaskey's car until it was directly upon him. She might have seen the parking lights of McClaskey's car but because of their dimness been unable to estimate the speed of his car; she might have looked and not have seen the parking lights, and have assumed that any approaching car would carry headlights, and, since none were visible, it was safe for her to cross. One of the purposes of requiring lighted headlights is to warn a pedestrian of a vehicle's approach; and the other is to enable the driver to see the highway ahead of him and thus avoid striking obstacles thereon. In Sawdey v. Producers' Milk Co., 107 Cal.App. 467, 475, 290 P. 684, 687, the court said:

"It must be borne in mind that the purpose of lights is twofold, namely, to enable one to see and to be seen. And in this section the intent of the Legislature is manifest. When darkness is of a density to obscure an object 200 feet distant it provides that there must be lights. Obviously, to overcome the darkness existing to the extent of disclosing the presence of the car, which otherwise would not be clearly discernible."

Also see Mardorf v. Penniman, 68 Cal. App. 696, 698-699, 230 P. 12; Tieman v. Red Top Cab Co., 117 Cal.App. 40, 43, 3 P.2d 381.

In Robbiano v. Bovet, 218 Cal. 589, 596-597, 24 P.2d 466, it was said that plaintiff had the right to presume that those using the highway in front of him were obeying the law and were performing their duty in having their machines properly equipped with headlights. From all the evidence as to the amount of light there was, including the specific testimony of McClaskey that at twenty-five feet decedent appeared to him as just a dark object, the jury may have felt that it was dark enough to have made headlights imperative. Had the requested instruction been given they might further have believed decedent had a right to assume and did assume that no car was coming because no headlights were visible, and that, so rightfully assuming, she went forward to her death.

[3, 4] The burden of proof to show contributory negligence on the part of Mrs. Clark was upon defendants, and we think that plaintiff was entitled to have this requested instruction given to be weighed against the foregoing assumptions upon which respondents rely. There is nothing to show negligence on decedent's part as matter of law. See Dickinson v. Pacific Greyhound Lines, 55 Cal.App.2d 824, 827, 131 P.2d 401. The refusal of the instruction was, we think, under the facts of this case, error of grave import.

[5] Appellant's third assignment of error is that the court failed to give his requested instructions defining negligence and ordinary care. He proposed instructions 18 and 20 of the Approved Forms (BAJI 101-A and 102-A), the former defining

negligence, and the latter adding to the definition given in BAJI 101 the fact that it is a relative term. The court gave BAJI instructions Nos. 101 and 101-B, the basic definition of negligence, and the elaboration thereof; and while 101-A, and 102-A, might well have been given we do not consider failure to give them as serious error.

[6] The fourth assigned error is the court's refusal to give any of plaintiff's requested instructions on right of way, to wit: BAJI 150, 160-A, and 150-B. The court gave an instruction on section 560 of the Vehicle Code, to the effect that the driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any unmarked crosswalk at an intersection, and followed that by an instruction defining "roadway", "crosswalk" and "intersection", adding that conduct in violation of section 560 constitutes negligence per se, but also adding that such a presumption is not conclusive. The instructions which plaintiff requested on this subject matter are concerned mainly with a description and a definition of what is meant by the phrase "right of way." They might properly have been given, but we do not think that the failure to give them, standing alone, would be sufficient to constitute substantial error, since the instructions as a whole sufficiently took care of the question of right of way as presented by the evidence in the case.

Appellant further contends that the court committed error in giving at defendants' request the following instruction:

"In determining whether or not Susie Mae Clark, the deceased, was guilty of contributory negligence, you must measure her acts and conduct by the standard of the average person of her age and intelligence as the same are shown by the evidence in this case. If you believe from the evidence that she was guilty of the slightest degree of negligence, measured by that standard, and that such negligence proximately contributed to the accident and her death, the plaintiff is not entitled to a verdict and your verdict must be for the defendants."

[7, 8] First, appellant complains that this instruction sets up as the standard of care to be applied by the jury "the standard of the average person of her age and intelligence." From a critical point of view the criticism is sound, but we do not think in view of other instructions correctly stating the standard of care that any harm came from this part of the instruction. But appellant more justly complains of a group of instructions given by the court at defendants' request which as to the point now under consideration may be summarized as follows: The court told the jury that if the decedent was guilty of contributory negligence, no matter how slight, which proximately contributed to the accident their verdict must be for the defendants. Again the court said that in determining whether or not decedent was guilty of contributory negligence "if you believe from the evidence that she was guilty of the slightest degree of negligence * * * and that such negligence proximately contributed to the accident and her death" the verdict must be for the defendants. As said by the Supreme Court of California in Strong v. Sacramento & P. R. R. Co., 61 Cal. 326, 328:

"The rule is, not that any degree of negligence, however slight, which directly concurs in producing the injury will prevent a recovery; but, if the negligence of the plaintiff, amounting to the absence of ordinary care, shall contribute proximately, in any degree, to the injury, the plaintiff shall not recover."

[9] Ordinarily we would not be disposed to attach great importance to this defect in the instructions, but there is, in the record here, matter which we have hereinbefore referred to, indicating that the defect may have wrongfully damaged plaintiff's case. We refer to what has been hereinbefore said concerning the situation presented when the jury returned to the court for further instructions, particularly on the matter of contributory negligence. What the foreman said to the court at that time amounted in substance to a statement that the jury were discussing the question

of decedent's negligence exactly in the light of the court's erroneous statement. The foreman said: "We would like to have a re-reading of your instructions as it pertains to any negligence on the part of the plaintiff. They seem to be under the impression that your instructions are that negligence in even the tiniest little bit, that would go against the plaintiff, they would have to render decision for the defendant." The court replied: "It is not quite clear, is it?" And the foreman answered: "I think if there is the least bit of negligence on the part of the plaintiff, if we found there is negligence there of any kind, we would have to find for the defendant." The court then, among other instructions, re-read to the jury the same faulty instructions we are now considering, which were repetitious and tended to overemphasize the obligations of decedent, without stating the reciprocal duties of the defendant driver. As was said in Taha v. Finegold, 81 Cal.App.2d 536, 544-545, 184 P.2d 533, the stress placed upon the duties of the pedestrian in this case may well have been the deciding factor in the minds of the jurors.

While the lawyer and also the layman recognize that there are differing degrees of negligence, here ordinary negligence was the only degree of negligence involved, and to permit the jury to continue in their mistaken belief that they were concerned with the degree of negligence as distinguished from the degree of proximate contribution of that negligence to the happening of the accident and the infliction of the injury, was detrimental to plaintiff's interests, to say the least.

Appellant urges that errors were committed other than the foregoing, but as we consider those above discussed as sufficient to justify reversal, other suggested errors need not be considered.

The judgment appealed from is reversed and a new trial as to all issues is ordered.

PEEK and VAN DYKE, JJ., concur.

99 Cal.App.2d 596

MEHERIN v. MEHERIN.

Civ. 17600.

District Court of Appeal, Second District, Division 1, California.

Sept. 25, 1950.

Action by Thomas J. Meherin against Florence Meherin, to determine rights to proceeds of insurance policy. The Superior Court, Santa Barbara County, Ernest D. Wagner, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Doran, J., held that under a property settlement agreement, wife was not entitled to proceeds of the insurance policy.

Judgment affirmed.

Insurance ⇐585(3)

Where husband and wife entered into agreement whereby they settled their rights as to community property and whereby wife released to husband all interest in husband's life policy wherein she was named beneficiary and agreed to execute instruments necessary to carry out agreement, although wife never executed any other instrument and husband had not reserved right to change beneficiary, wife was not entitled to proceeds of policy.

Charles C. Morrison, West Los Angeles, for appellant.

Canfield & Westwick, Santa Barbara, for respondent.

DORAN, Justice.

This is an appeal from the judgment; the record on appeal is the judgment roll only.

The facts as recited in appellant's brief are as follows:

"The defendant, Florence Meherin and decedent, John B. Meherin were married on June 1, 1916, at Bakersfield, California.

"That said John B. Meherin died on or about December 2, 1944 leaving said Florence Meherin as his surviving widow.

"That on or about the 28th day of August, 1918, the Metropolitan Life Insur-

ance Company issued its policy of insurance on the life of said John B. Meherin and agreeing to pay on receipt of due proof of the death of said insured, the sum of $1,000.00 to the beneficiary named therein, Florence Meherin, the wife of said John B. Meherin.

"That at all times since said policy of insurance was issued, and at the time of the death of said John B. Meherin, said Florence Meherin, wife of decedent, was the named beneficiary of said policy of life insurance herein referred to.

"That the Metropolitan Life Insurance Company paid the sum of $1,324.18 into Court as proceeds of said insurance policy and the action as to said company was dismissed.

"That on or about the 28th day of July, 1942, said John B. Meherin and said Florence Meherin entered into an agreement settling their rights as to their community property and creating a division of the same, by the terms of which the policy of insurance herein involved was assigned to John B. Meherin.

"That the portion of the agreement by which said policy of insurance was assigned to John B. Meherin reads as follows:

"1. The wife hereby released to the husband and he shall be entitled to all the interest in and to that certain insurance policy with the Metropolitan Life Insurance Company, bearing the number 918996-7-C, and the wife does hereby grant, assign and sell to the husband all of her right, title and interest in and to said policy and the interest and benefits therein. Wife further agrees to execute any instrument or documents required by the husband or the Metropolitan Life Insurance Company to carry out the intention of this paragraph.

"The husband, John B. Meherin executed a will on December 2, 1944, the day of his death, in which he left all of his property to his brother, Thomas J. Meherin, plaintiff and respondent herein.

"That the estate of John B. Meherin was probated in the County of Kern, State of California, and on the 29th day of September, 1947, all of the property and estate of John B. Meherin, deceased, was distributed to Thomas J. Meherin, the respondent.

"While not raised by the pleadings, the Court found that it was the intention and belief of John B. Meherin that Florence Meherin would take no part of the proceeds of said policy, either as beneficiary or otherwise.

"Florence Meherin claims the proceeds of said insurance as the beneficiary named in said policy on the date of death of the insured.

"Thomas J. Meherin claims the proceeds of said insurance under the decree of distribution dated September 29, 1947."

It is appellant's contention that,

"1. The Court's interpretation of the property agreement was unreasonable.

"2. The Court erred in finding as to the belief and intent of one of the parties only.

"3. Appellant was not deprived of her right to receive the proceeds of the insurance as the named beneficiary.

"4. The findings of fact do not support the judgment."

The property settlement agreement was quite comprehensive and clearly established that a complete and final settlement was intended. For example, it further provided, "That said parties hereto each hereby waives any and all right to the estate of the other left at his or her death, and forever quitclaims any and all right to share in the estate of the other, by the laws of succession and said parties hereby release, one to the other, all right to be administrator or administratrix or executor or executrix of the estate of the other, and hereby release and waive all right to inherit under any will of the other, and the said parties hereby waive any and all right to the estate, or any interest in the estate, of the other". It should be noted also that the insurance policy in question provided "that the insured, John B. Meherin, had no right to change the beneficiary thereof".

Appellant argues that, "A wife as beneficiary under an insurance policy retains her status as such unless it clearly appears from the agreement that in addition to the

segregation of the property of the spouses, it was intended to deprive her of the right to take under the insurance contract as beneficiary. * * * Such rights are waived only when it appears that the attention of the parties was directed to such expectancies and their intention to disclaim future rights that might develop from such expectancies was made clear in the contract." Appellant relies in particular on the provision in the contract above noted that, "The wife further agrees to execute any instrument or documents required by the husband or the Metropolitan Life Insurance Company to carry out the intention of the parties". It is urged in this connection that, "Under this provision her rights as the named beneficiary remain vested subject to becoming divested upon the happening of a future contingency, i. e., the execution of any instrument or document required by the husband or the Metropolitan Life Insurance Company. No request has ever been made by either on the appellant to execute any instrument or document whatever and her rights remained vested in her at the time of the death of John B. Meherin, the insured."

It is quite evident, from an examination of the record, that the trial court's interpretation of the agreement is not unreasonable as contended by appellant. It is also evident that although the findings perhaps could have been more comprehensive nevertheless, in effect, the court's judgment was based on the intention of the parties as expressed in the agreement. The findings of fact support the judgment.

The court in effect found that the provision upon which appellant relies, namely, the "wife further agrees to execute any instrument or documents", etc., above quoted, when considered in connection with the other provisions does not establish the intention of the parties as contended by appellant. The trial court obviously considered the above provision with relation to the other provisions of the contract and concluded that whether "any instrument or document" was "required by the husband or the Metropolitan Life Insurance Company to carry out the intention of this paragraph" was for them to determine and did not effect the disposition of the property as the contract elsewhere provided.

There are no errors in the record and the judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



99 Cal.App.2d 690

SPOLTER et al. v. FOUR-WHEEL BRAKE SERVICE CO. et al.
Civ. 14173.

District Court of Appeal, First District, Division 2, California.

Sept. 28, 1950.

Rehearing Denied Oct. 28, 1950.

Actions by Annette Spolter and others, by Ethel Truncale and Helen J. McNeill and by Morris Roberts against Four-Wheel Brake Service Company and others for wrongful death of driver and injuries sustained by passengers when left rear wheel of automobile fell off eight days after it had been removed and replaced by named defendant's employees in the course of relining brakes. The cases were consolidated. The Superior Court in and for the City and County of San Francisco, John J. McMahon, J., entered judgments on verdicts in favor of plaintiffs and orders denying motions for judgments notwithstanding the verdicts and defendants appealed. The District Court of Appeal, Dooling, J., held that the evidence warranted inference that wheel had been negligently replaced by named defendant's employees, thus proximately causing it to come off, that whether such inference had been rebutted was a question for jury and that any error in admitting evidence was not prejudicial.

Judgments and orders affirmed.

1. Automobiles ⇐368

In actions for death of driver and injuries sustained by passengers when wheel of automobile fell off, evidence warranted inference that wheel which had been removed and replaced by defendant's employees in course of relining brakes eight days before accident had been negligently

replaced by such employees thus proximately causing it to come off after being driven only approximately 300 miles.

2. Evidence ⇐596(1)

In civil cases reasonable probability is sufficient to support jury's finding and absolute demonstration is not required.

3. Trial ⇐142

If conflicting inferences may reasonably be drawn from the evidence, even though it is uncontradicted, which inference shall be drawn is entirely a jury question.

4. Evidence ⇐587

In civil cases, plaintiff need not exclude the possibility of every other reasonable inference from the proved facts in order to support an inference based on circumstantial evidence.

5. Trial ⇐311

Where circumstantial evidence is relied upon, jurors may draw upon their own experience to determine the proper inferences to be deduced therefrom in so far as matters within the realm of common experience are concerned.

6. Evidence ⇐587

Where circumstantial evidence does not go directly to the fact in issue, but to the facts from which the fact in issue is to be inferred, jury must first ascertain the truth of the fact to which the evidence goes, and then infer the truth of the fact in issue.

7. Evidence ⇐474½, 587

Jury must draw inference from circumstantial evidence and opinion evidence is inadmissible where drawing such inference depends upon experience of such a nature that it may be presumed to be within the common experience of all men of common education moving in the ordinary walks of life.

8. Evidence ⇐588
Trial ⇐139(1), 140(1)

In an action tried to jury, the credibility of witnesses and the weight to be accorded their testimony are questions for jury which under proper circumstances may accept all or such part of the testimony of any witness as it believes to be true and reject all or any part which it believes to be untrue.

9. Trial ⇐142

The trier of the facts may infer from circumstantial evidence the existence of a fact, even though the evidence contrary thereto is uncontradicted, unless the inference is rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men, but any reasonable doubt as to whether the inference, as a matter of law, has been rebutted should be resolved in favor of submitting the question to trier of the facts.

10. Automobiles ⇐368

In actions for death of driver and injuries sustained by passengers when left rear wheel of automobile fell off, whether inference that wheel had been negligently replaced by defendant's employees after being removed in the course of relining brakes eight days before accident was rebutted by testimony of defense witnesses that other tires had been on left rear wheel after brakes were relined was a question for jury and jury was warranted in disbelieving inconsistent testimony of such witnesses.

11. Appeal and error ⇐1050(1)

Any error in admitting testimony that witness knew of no new tires being purchased by her husband during specified month for the purpose of establishing that there had been no such purchase was not prejudicial.

12. Evidence ⇐586(3)

Testimony that it was custom of witness' husband, since deceased, to pay for all purchases by check and that no check to tire dealer had been drawn by husband during specified period, supported by introduction in evidence of husband's checks, had some probative value to establish that husband purchased no tires during such period and was admissible in actions to recover on basis of circumstantial evidence for death of husband and injuries sustained by passengers when wheel fell off husband's automobile.

13. Evidence ⇐587

Where the evidence is entirely circumstantial a party should not be deprived of competent, relevant evidence merely because it is not of great strength.

14. Evidence ⇐99

Any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy or have any weight in determining the issue is generally admitted, leaving the strength of such testimony or the amount of such weight to be determined by jury.

15. Evidence ⇐99

In determining the relevancy of evidence, much depends upon the nature of the issue and a wide discretion is left to trial judge in determining whether the evidence is admissible.

Cooley, Crowley & Gaither, San Francisco, for appellants.

Hallinan, MacInnis & Zamloch, James Martin MacInnis, and P. Paul Vlautin, Jr., all of San Francisco, for respondents Spolter.

Michael L. Haun, James A. Toner, for respondents Truncale & McNeill.

Maurice A. Harband, San Francisco, William F. Cleary, San Francisco, of counsel, for respondent Roberts.

DOOLING, Justice.

Ralph T. Spolter died on July 30, 1946 from injuries received in an accident which occurred July 28, 1946. Deceased was the owner and driver of the automobile at the time of the accident. Ethel Truncale, Helen J. McNeill and Morris Roberts, who, with a Mr. Wilkie, were guest passengers of Spolter at the time of the accident were injured in the same accident. Spolter's wife and two minor children, suing for the wrongful death of Spolter, are plaintiffs in one of the combined cases, and the injured passengers, suing for their personal injuries, are plaintiffs in the others.

The accident on July 28, 1946 occurred about 7 p. m. when the left rear wheel fell off the left rear axle of the 1942 Buick convertible owned and being driven along the highway by Spolter at a speed of approximately 45 miles per hour. Upon losing the wheel the automobile overturned resulting in the injuries outlined above. On July 20, 1946 the car had been in defendant's shop where its wheels were removed and replaced by defendant's employee in the course of relining the brakes.

The car had been driven between 314 and 320 miles from July 20, 1946, the date defendant's employee replaced the wheels, and July 28, 1946, the date of the accident. The tire on the left rear wheel of Spolter's car when the accident occurred was a Fisk Airflight deluxe, size 700 x 16, in new condition.

The jury returned verdicts for the plaintiffs. Defendant assails the verdicts on three grounds. One, that there was insufficient evidence from which the jury could draw the inferences of negligence necessary to support the verdicts; two, that even if the jury could draw the necessary inferences from the evidence to support the verdicts, as a matter of law these inferences should be held to be rebutted by the "clear, positive, uncontradicted testimony of eyewitnesses who are unimpeached"; and three, that the necessary inferences are founded upon incompetent hearsay testimony admitted over proper objection, which error is prejudicial.

Expert witnesses testified that loose insertion of the lugs into the axle could cause the wheel on the Buick to come off. Witness Greer testified that the *only* cause could be improperly tightened lug bolts. The wheel which came off the axle and the axle itself were introduced in evidence. These were examined by the jury. The testimony indicated that at least three, and possibly four, of the five lug holes were distorted indicating that one or two lugs had never been inserted or that they had been loosely inserted and had worked out of the lug holes quickly without distorting the holes in the wheel or stripping the threads of the lug holes in the axle. All of the experts were of the opinion that if all of the lugs were properly and tightly inserted that they should not have worked loose within 300 miles of driving.

[1] The witness Steine, who was produced by appellant, testified that in 1946 he had a service station in Sonoma, that he sold a new Fisk tire to Spolter from one to three weeks prior to the accident and mounted it on the left rear wheel. The witness Lynch, who introduced Spolter to Steine, also produced by appellant, fixed the time of this sale from two to three weeks before the accident. We are satisfied that from these facts the jury could conclude that it was reasonably probable that the Fisk tire remained on the left rear wheel from the time Steine put it there and that appellant's employees negligently replaced this wheel on July 20 thus proximately causing the wheel to come off on July 28.

[2] It must not be forgotten that in civil cases the law does not require absolute demonstration but only reasonable probability to support the finding of the jury. Juries in civil cases are so instructed every day. See Calif. Jury Instructions, Civil, 3d Rev.Ed., Nos. 21, 21–A, 21–B. This court recently had occasion to point out that "moral certainty is not required in civil cases; there 'reasonable probability' * * * is normally sufficient and is used as a counterpart to 'preponderance of the evidence.'" Wirz v. Wirz, 96 Cal.App.2d 171, 175, 214 P.2d 839, 842. "In civil cases which are decided in favor of the litigant upon a mere preponderance of evidence, the rule of decision is, after all, but a rule of probability, and this is well recognized. Says Greenleaf: 'In civil cases * * * it is not necessary that the minds of the jurors be freed from all doubt. It is their duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth.'" Liverpool, etc., Ins. Co. v. Southern Pac. Co., 125 Cal. 434, 440–441, 58 P. 55, 58; and see 10 Cal.Jur., Evidence, sec. 94, pp. 791, 793; Travelers Ins. Co. v. Ind. Acc. Comm., 33 Cal.2d 685, 203 P.2d 747; Fireman's Fund etc., Co. v. Ind. Acc. Comm., 93 Cal.App.2d 244, 208 P.2d 1033.

[3] It is equally well settled that if conflicting inferences may reasonably be drawn from the evidence, even though it is uncontradicted, which of such inferences shall be drawn is entirely a jury question. Said the court in Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 44, 26 A.L.R. 123:

"This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury * * *, and that the verdict of the jury * * * thereon cannot be set aside by this court on the ground that it is not sustained by the evidence." See to the same effect Webster v. Board of Dental Examiners, 17 Cal.2d 534, 539–540, 110 P.2d 992; Hamilton v. Pacific Elec. Ry. Co., 12 Cal.2d 598, 602–603, 86 P.2d 829; Tobola v. Wholey, 75 Cal.App.2d 351, 355, 170 P.2d 952; Gute v. Halstead, 75 Cal.App.2d 369, 370, 170 P.2d 1016.

[4] It is corollary of the last stated rule that in order to support an inference based on circumstantial evidence it is not incumbent upon the plaintiff to exclude the possibility of every other reasonable inference from the proved facts. "It is not necessary, in order to establish a theory by circumstantial evidence, that the facts be such and so related to each other that such theory is the *only* conclusion that can fairly or reasonably be drawn therefrom, because it is now settled law that 'circumstantial evidence in civil cases, in order to be sufficient to sustain the verdict, need not rise to that degree of certainty which will exclude every reasonable conclusion other than that arrived at by the jury'." Katenkamp v. Union Realty Co., 36 Cal.App.2d 602, 617, 98 P.2d 239, 246; Vaccarezza v. Sanguinetti, 71 Cal.App.2d 687, 691, 163 P.2d 470; Hilson v. Pacific G. & E. Co., 131 Cal.App. 427, 431–432, 21 P.2d 662; Chalmers v. Hawkins, 78 Cal.App. 733, 739, 248 P. 727; opinion of Supreme Court denying a hearing in Estate of Wallace, 64 Cal.App. 107, 116, 220 P. 682; cf. Barham v. Widing, 210 Cal. 206, 214–215, 291 P. 173.

[5-7] Where, as in this case, circumstantial evidence is relied upon, the jurors

may draw upon their own experience to determine the proper inferences to be deduced insofar as matters within the realm of common experience are concerned. Our courts have more than once quoted with approval the following statement of the proper function of the jury in a case based on circumstantial evidence from New England Glass Company v. Lovell, 7 Cush., Mass., 319, 321:

"In applying circumstantial evidence which does not go directly to the fact in issue, but to the facts from which the fact in issue is to be inferred, the jury have two distinct duties to perform: First, to ascertain the truth of the fact to which the evidence goes, and thence to infer the truth of the fact in issue. This inference depends upon experience. *When this experience is of such a nature that it may be presumed to be within the common experience of all men of common education moving in the ordinary walks of life,* there is no room for the evidence of opinion; *it is for the jury to draw the inference.*" (Emphasis ours.) Shafter v. Evans, 53 Cal. 32; Redfield v. Oakland C. S. Ry. Co., 112 Cal. 220, 225–226, 43 P. 1117; Phœnix Assur. Co. v. Texas Holding Co., 81 Cal. App. 61, 69, 252 P. 1082.

In this day and place when the ownership and operation of automobiles has become an almost indispensable commonplace of our normal life the jurors from their common experience are in a position to draw the inference that a new tire mounted on a wheel from two to three weeks before the accident would in the meantime with reasonable probability not have to be replaced. Since reasonable probability is all that the law requires we cannot hold that the evidence above summarized is insufficient to support the jury's verdict.

[8] Appellant points to the fact that the witness Steine, who testified that he originally mounted the Fisk tire on the left rear wheel, also testified that a day or two before the accident Spolter returned to his service station in Sonoma at which time the Fisk tire was in the turtle-back of Spolter's car with a leaking valve which Steine repaired. The jury was entitled to disbelieve this part of Steine's testimony. The witness Roberts testified that he was with Spolter from the time that Spolter left San Francisco on July 27 for Sonoma and the Agua Caliente Hotel except when the two retired to their rooms to sleep, and that Spolter's automobile was not taken to any service station or garage for any kind of work on that trip. Mrs. Spolter testified that Spolter on July 26 returned home early from work at about 2:30 in the afternoon. Since his normal business was in and about San Francisco, he reported at the Call-Bulletin office every day and on that day, and had a radio program on K.S.F.O. in San Francisco on that day, the unlikelihood of Spolter's driving approximately 90 miles round trip to Sonoma from San Francisco on Friday, July 26 may well have impressed the jury. If they concluded that Spolter did not visit Steine's service station in Sonoma "a day or two before his accident" they could not credit that portion of his testimony, but they were still entitled to believe that he had earlier sold the Fisk tire to Spolter and mounted it on the left rear wheel of his automobile, particularly in view of the witness Lynch's corroboration of that circumstance. In "this state the credibility of a witness and the weight to be accorded to his testimony are questions directed to the trial judge, who under proper circumstances may accept all or such part of the testimony of any witness as he believes to be true, or may reject all or any part which he believes to be untrue." Bechtold v. Bishop & Co., Inc., 16 Cal.2d 285, 291, 105 P.2d 984, 988; Wright v. Delta Properties, Inc., 79 Cal.App.2d 470, 476, 180 P.2d 57.

Appellant's second point is that even if the evidence recited would, if uncontradicted, support the inference that the wheel was negligently attached by his employees on July 20 when the brakes were relined the inference was in fact rebutted by the clear, positive and uncontradicted testimony of eyewitnesses who are unimpeached. Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Crouch v. Gilmore Oil Co., 5 Cal.2d 330, 54 P.2d 709; Maupin v. Solomon, 41 Cal.App. 323, 183 P. 198. The rule of these cases has more recently been restated with some shift of

emphasis. Hicks v. Reis, 21 Cal.2d 654, 134 P.2d 788; Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868; Huddy v. Chronicle Publishing Co., 15 Cal.2d 554, 103 P.2d 421.

[9] The Hicks case presents an extended discussion of the rule, 21 Cal.2d at pages 659–661, 134 P.2d at page 790:

"Appellant contends that the inference was rebutted as a matter of law. Such contention is not sound. The trier of the facts is the exclusive judge of the credibility of the witnesses. § 1847, Code Civ. Proc. While this same section declares that a witness is presumed to speak the truth, it also declares that 'This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony * * * or his motives, or by contradictory evidence.' In addition, in passing on credibility, the trier of the facts is entitled to take into consideration the interest of the witness in the result of the case. See cases collected 27 Cal.Jur. 180, § 154. Provided the trier of the facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontradicted. Blank v. Coffin, supra; Hinkle v. Southern Pacific Co., 12 Cal.2d 691, 87 P.2d 349; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371; Burke v. Bank of America, etc., Ass'n, 34 Cal.App.2d 594, 94 P.2d 58; People v. La Fleur, 42 Cal.App.2d 50, 108 P.2d 99; see cases collected in 27 Cal.Jur. 182, § 156; Kelly v. Jones, 290 Ill. 375, 125 N.E. 334, 8 A.L.R. 796. As a general rule, therefore, the trier of the facts is free to disbelieve the evidence as to the nonexistence of the fact of permission, and to find that it does exist solely on the basis of the inference. Blank v. Coffin, supra; Bushnell v. Yoshika Tashiro, supra [115 Cal.App. 563, 2 P.2d 550]; Day v. General Petroleum Corp., 32 Cal.App.2d 220, 89 P.2d 718. In discussing the rule that the trier of the facts may find the fact of permission to exist based on the inference even where the evidence contrary thereto is uncontradicted, the court, in Market Street Ry. Co. v. George, 116 Cal.App. 572, 576, 3 P.2d 41, 43, stated: 'It has always been the rule that courts and juries are not bound by mere swearing no matter how positive, unless it be credible swearing. It may bear within itself the seeds of its own destruction, as where it is inherently improbable, or its destruction may be wrought from without, as where the person swearing is in some manner impeached. In either case court and jury are entitled to disbelieve the testimony if they choose, and, if they do refuse it credence, it is of no more effect than if it had not been given. It disappears from the case and the inference opposed to it is no longer contradicted.'

"To these well settled rules there is a common sense limited exception which is aimed at preventing the trier of the facts from running away with the case. This limited exception is that the trier of the facts may not indulge in the inference when that inference is rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men. The trier of the facts may not believe impossibilities. When the rebutting testimony is of such a nature that the minds of reasonable men cannot differ on the subject, then the trier of the facts cannot, and should not be permitted to, indulge in the inference. If there is any reasonable doubt as to whether the inference, as a matter of law, has been rebutted, that doubt should be resolved in favor of submitting the question to the trier of the facts. This limited exception was expressed as follows in Blank v. Coffin, supra, 20 Cal.2d at page 461, 126 P.2d at page [868] 870: 'If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law;' citing Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Crouch v. Gilmore Oil Co., Ltd., 5 Cal.2d 330, 54 P.2d 709; Maupin v. Solomon, 41 Cal.App. 323, 183 P. 198. In the same case, after pointing out that the jury is the sole judge of the credibility of the witnesses and may disbelieve an uncontradicted witness if there is any rational ground for doing so, the court stated, page 461 of 20 Cal.2d,

page [868] 870 of 126 P.2d: 'In most cases, therefore, the jury is free to disbelieve the evidence as to the nonexistence of the fact and to find that it does exist on the basis of the inference.' "

[10] An examination of the testimony of the three witnesses relied on by appellant to destroy the inferences of the jury, in the light of the other testimony in the case, satisfies us that the jury had a rational basis for disbelieving their testimony. The witness Maria O'Mea testified that she met Spolter at the Agua Caliente Hotel on July 21, that he complained to her that he had been having a great deal of trouble with tires and told her: "At this point I have an undersized tire on the car. I will have to get a new one as soon as I get back to San Francisco;" and that he walked over to the car and showed her the tire on the left rear wheel. The witnesses Igel and Fulger sold Spolter a new Atlas tire on July 23. They mounted it on the right rear wheel. They both testified that at that time the tire on the left rear wheel was also badly worn and that they tried to sell Spolter a new tire for that wheel but that Spolter said that he could not afford to buy it.

Set out thus badly against one another the inconsistency in the two stories speaks for itself. Miss O'Mea remembers that Spolter showed her an undersized tire on the left rear wheel of his automobile because he pointed it out to her and said: "I will have to get a new one as soon as I get back to San Francisco." Fulger and Igel remember that Spolter had a worn tire on his left rear wheel two days later because they tried to sell him a new one to replace it and he refused to buy it. It would require no particular acuteness on the part of the jurors to view such inconsistent testimony with distrust.

Add the facts that as early as May Spolter ran a story in his column in the Call-Bulletin about his own difficulty in getting new tires, that he had an income of from $1,000 to $1,200 per month and that the witnesses were testifying to what, to them, must have been rather casual incidents which had occurred over two years before their testimony was given and the jurors as reasonable men and women were not bound to give credence to their stories.

Finally appellant complains of the admission of Mrs. Spolter's testimony that she knew of no new tires being purchased by her husband in July and from an examination of his checks for that period found no check for any such purchase. She supported this by testimony that it was her husband's custom to pay for all purchases by check and to draw checks to cash for pocket money. The checks were produced and introduced into evidence.

[11] As to Mrs. Spolter's lack of knowledge of any purchase of new tires, if the admission of that evidence was error, we cannot hold it prejudicial. The court stated: "It is just so far as her knowledge goes * * *. That is limited to her knowledge." We cannot find how the jury could be misled since it was made clear that all that Mrs. Spolter was testifying to was in effect that no such purchase had been brought to her attention and it clearly appeared that she had not been with Mr. Spolter in the car during most of that period when any such purchase might have been made. We must ascribe ordinary common-sense to the members of the jury and we can find no prejudice in the admission of this answer.

[12, 13] Insofar as the checks and the supporting testimony of Spolter's habit of paying by check are concerned we think that the evidence had probative value in what was necessarily a case based upon circumstantial evidence. "Where the evidence is entirely circumstantial a party should not be deprived of competent, relevant evidence because it is not of great strength. Many threads may make a rope." Whittemore v. Lockheed Aircraft Corp., 65 Cal.App.2d 737, 753, 151 P.2d 670, 678.

[14, 15] The absence of any check to a dealer in tires drawn by Spolter during that period supported by Mrs. Spolter's testimony of his habit of paying for all purchases by check had some probative value. "The tendency of modern decisions is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or any

weight in determining the issue, leaving the strength of such tendency, or the amount of such weight, to be determined by the jury; and, in determining the relevancy of evidence that may be offered upon an issue of fact, much depends upon the nature of the issue * * * and a wide discretion is left to the trial judge in determining whether it is admissible or not." Moody v. Peirano, 4 Cal.App. 411, 418, 88 P. 380, 382; Firlotte v. Jessee, 76 Cal.App.2d 207, 210–211, 172 P.2d 710; In re Estate of Ades, 81 Cal.App.2d 334, 342, 184 P.2d 1; Schomaker v. Provoo, 96 Cal.App.2d 738, 216 P.2d 562.

The judgments and orders denying motions for judgments notwithstanding the verdicts are affirmed.

NOURSE, P. J., concurs.



99 Cal.App.2d 572

HARDY v. SAN FERNANDO VALLEY CHAMBER OF COMMERCE et al.

Civ. 17569.

District Court of Appeal, Second District, Division 3, California.

Sept. 22, 1950.

Lester E. Hardy brought action against the San Fernando Valley Chamber of Commerce and others to recover attorney's fees. The Superior Court of Los Angeles County, Arnold Praeger, J., rendered an order expunging a lis pendens from record, orders sustaining a demurrer to each of the counts of the complaint, and a judgment for certain of the defendants, and the plaintiffs appealed. The District Court of Appeal, Vallée, J., held that first count which sought to recover for legal services performed by plaintiff's assignor at a time when he was no longer licensed to practice law within the state failed to state a cause of action, but that second cause of action alleging that plaintiff himself as an attorney performed services for certain of the defendants pursuant to contract sufficiently stated a cause of action.

Order expunging lis pendens affirmed, appeals from minute orders sustaining demurrers dismissed, and part of judgment dismissing action on first count of complaint affirmed, and part of judgment dismissing action on second count reversed.

1. Lis pendens ⇐3(1)

A lis pendens may or must be recorded in actions affecting the title to or the right of possession of realty, or to determine adverse claims to and clouds on title to realty, for partition, and in proceedings in eminent domain. Code Civ.Proc. §§ 409, 749, 755, 1243.

2. Lis pendens ⇐20

In action to recover attorney's fees for services rendered by plaintiff and his assignor in defending an action against defendants for specific performance of contract for sale of realty under alleged contracts whereby plaintiff and his assignor were to receive certain percentages of profits from sale of realty, order expunging lis pendens was proper. Code Civ.Proc. §§ 409, 749, 755, 1243.

3. Appeal and error ⇐102, 782

Appeal from orders sustaining demurrers to both counts of complaint would be dismissed, since an appeal does not lie from an order sustaining a demurrer.

4. Attorney and client ⇐11

The practice of law by one not an active member of the state bar is unlawful. Business and Professions Code, §§ 6125, 6126.

5. Attorney and client ⇐136

One may not recover compensation for services as an attorney at law unless at the time the services were rendered he was a member of the state bar.

6. Attorney and client ⇐165

Where assignor of plaintiff was not licensed to practice law after December 15, 1947, and, though suit was filed August 1, 1947, it was not tried until October 4, 1948, and no segregation was made in first count of complaint in suit to recover attorney's fees between services performed by assignor before Dec. 15, 1947, and those performed after that, first count did not state

facts sufficient to constitute a cause of action. Business and Professions Code, §§ 6125, 6126.

7. Attorney and client ⇐165

The second count in complaint alleging an express agreement of employment by defendants of plaintiff as an attorney, separate and apart from employment of third person who at time suit was tried was no longer licensed to practice law, and that the plaintiff assumed sole control of defense of suit against defendants, and that there was an agreement to pay a fixed measure of compensation, performance of services, success, demand, and refusal by defendants to pay was sufficient to allege a cause of action.

8. Attorney and client ⇐159

Where measure of compensation of an attorney is fixed by express agreement, he may have his action for amount agreed on.

9. Appeal and error ⇐917(1)

On appeal from judgment sustaining a demurrer to a complaint, allegations of the complaint must be regarded as true.

10. Pleading ⇐34(1)

Pleadings must be reasonably interpreted and must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears. Code Civ.Proc. § 475.

11. Pleading ⇐205(1)

All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief.

12. Pleading ⇐204(2)

In determining whether a complaint is sufficient, as against demurrer, on ground that it does not state facts sufficient to constitute a cause of action, the rule is that if, on a consideration of all facts stated, it appears that plaintiff is entitled to any relief at hands of court against defendants, complaint will be held good, though facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under facts alleged.

13. Pleading ⇐34(1)

In passing on the sufficiency of a pleading, its allegations must be liberally construed with a view to substantial justice between the parties.

Lester E. Hardy, Los Angeles, for appellant.

George M. Pierson, Los Angeles, for respondents.

VALLÉE, Justice.

Plaintiff commenced this action against defendants to recover attorney's fees. He recorded a lis pendens. His fourth amended complaint contained two counts. Defendants' demurrer to the first count was sustained without leave to amend. Their demurrer to the second count was sustained with leave to amend. Plaintiff declined to amend. He appeals from an order expunging the lis pendens from the record, from the minute orders sustaining the demurrer to each count, and from the judgment which followed.

We briefly summarize the allegations of the complaint.

First Count

Plaintiff at all times mentioned was and now is an attorney at law, admitted to the bar and licensed to practice in California. At all times prior to December 15, 1947, defendant Stillwell was an attorney at law, admitted to the bar and licensed to practice in California. On January 2, 1947, defendants Courtney owned a parcel of realty. On that date they entered into a written contract in which they agreed that defendant San Fernando Valley Chamber of Commerce, referred to as the corporation, which they and Stillwell controlled, would sell the realty to the Canfields. On March 24, 1947, the Courtneys deeded the realty to the corporation. The corporation has since been the record owner of the property.

On August 1, 1947, the Canfields sued the corporation, the Courtneys and Stillwell for specific performance of the contract.

No relief was sought against Stillwell other than a determination of his interest in the property and its subjection to the claim of the Canfields. Prior to September 25, 1947, William R. Courtney, for himself and his wife, entered into a verbal agreement with Stillwell in which it was agreed that Stillwell would file an answer for the defendants in said action and if he deemed it advisable, would secure the services of some other attorney to defend, and if the defense was successful, the corporation would reconvey the realty to the Courtneys who would then remove restrictions and place the property on the market for sale and pay to Stillwell for his services 50% of the sales price over and above the amount which the Canfields would have had to pay for the property should their action be successful. It was further agreed that Stillwell might sell the property to a purchaser secured by him for not less than $12,000 in the event the property was not sold by Courtney, in which event the fee of Stillwell would be paid out of escrow. Stillwell fully performed his part of the agreement.

On October 10, 1947, Stillwell, with the knowledge and consent of the Courtneys, asked plaintiff to take complete charge of the defense of the action. Plaintiff agreed to do so provided that if he won the case, the Courtneys would remove all restrictions on the property, sell it immediately and from the escrow pay him as his fee 25% of the amount received over what the Canfields would have had to pay for it if they were successful. Stillwell relinquished to plaintiff all the papers and files in the action. On October 16, 1947, Courtney signed a substitution of attorneys, substituting Stillwell and plaintiff as attorneys of record. At all times since, the Courtneys have been fully informed and had full knowledge of each and every step taken in the action. The action between the Canfields and the others was tried October 4, 1948. Plaintiff acted as attorney for the defendants therein. Judgment was for the corporation and the Courtneys on a cross-complaint and in favor of all defendants. The Courtneys were present at the trial. The judgment became final December 5, 1948. Thereafter the Courtneys refused to sell the realty.

The amount due Stillwell under the terms of his agreement with the Courtneys had the property been sold would have been 50% of $6,566.50, less $3,283.25 to be paid to plaintiff. Stillwell has been damaged in the sum of $3,283.25. On March 24, 1949, Stillwell, in writing, assigned his claim against the corporation and the Courtneys to plaintiff.

Second Count

The second count realleges all of the facts alleged in the first count except the allegation that Stillwell was prior to December 15, 1947, an attorney at law, admitted to the bar and licensed to practice in California, and the allegations as to what occurred after the judgment in the action between the Canfields and the corporation, et al., became final. The second count also alleged:

On October 10, 1947, Stillwell asked plaintiff to represent the corporation, the Courtneys and Stillwell in the Canfield action and told him that he was authorized in their behalf to secure plaintiff's services to conduct the defense. The Courtneys told plaintiff that Stillwell had authority to employ him and that he, plaintiff, had full authority to act for them. Plaintiff told the Courtneys and Stillwell that he would represent them and the corporation if, in the event he was successful, they would remove the restrictions from the realty, sell it, and pay him from escrow 25% of the amount realized from the sale over and above the amount due the Courtneys from Canfield in the event Canfield was successful. Stillwell told plaintiff they would do so. On October 16, 1947, the Courtneys signed a substitution of attorneys in the Canfield action, substituting Stillwell and plaintiff as attorneys of record. From that time on plaintiff assumed sole control of the defense of the action. After the judgment in the Canfield action became final the Courtneys refused to sell the property.

The defendants have failed and refused to fulfill any part of their agreement with plaintiff. Plaintiff has been damaged in

the amount of $3,283.25 by reason of defendants' refusal to fulfill their agreement with him. Plaintiff has made demand on defendants for the sum of $3,283.25 as assignee of Stillwell and for $3,283.25 as attorney's fees agreed to be paid to him. Defendants have not paid.

[1, 2] The order expunging the lis pendens was proper. A lis pendens may or must be recorded in actions affecting the title to or the right of possession of real property, or to determine adverse claims to and clouds upon title to real property, for partition, and in proceedings in eminent domain. Code Civ.Proc., secs. 409, 749, 755, 1243; 16 Cal.Jur. 652, sec. 9. Neither count of the complaint pleads facts bringing it within either of these actions.

[3] An appeal does not lie from an order sustaining a demurrer. The appeals from those orders must be dismissed. Weiss v. Garofalo, 89 Cal.App.2d 811, 201 P.2d 845.

The first count, as we construe it, is for compensation for services performed by Stillwell as an attorney at law in the Canfield suit from its inception to its conclusion. It is not for the reasonable value of services performed by him prior to December 15, 1947. The suit was filed August 1, 1947. Stillwell was not licensed to practice law after December 15, 1947. The suit was not tried until October 4, 1948. No segregation is made between services performed before December 15, 1947, and those performed after that date.

[4–6] It is unlawful for a person not an active member of the State Bar to practice law in this State. Bus. & Prof.Code, sec. 6125. Practicing without being a member is a misdemeanor. Bus. & Prof.Code, sec. 6126. No one may recover compensation for services as an attorney at law in this State unless he was at the time the services were performed a member of the State Bar. See 7 C.J.S., Attorney and Client, sec. 165, p. 1022, and cases cited; 5 Am.Jur. 353, sec. 156 and cases cited; Annotation, 118 A.L.R. 652. Plaintiff, as assignee, stands in Stillwell's boots. As Stillwell cannot recover for services performed by him as an attorney at law after December 15, 1947, neither can plaintiff recover for those services. We think it clear that the first count does not state facts sufficient to constitute a cause of action. The demurrer to the first count was properly sustained.

[7] The second count appears to be for compensation for services performed by plaintiff. While not a model of pleading, it states all facts necessary for recovery: an express agreement of employment of plaintiff separate and apart from the employment of Stillwell, agreement to pay a fixed measure of compensation, performance of the services, success, demand and refusal to pay. Respondent argues that because it is alleged that the substitution of attorneys dated October 10, 1947, substituted plaintiff and Stillwell for Stillwell "he [plaintiff] is still tied in with Stillwell." We do not so construe the second count as a whole. It alleged that from the time of substitution plaintiff assumed sole control of the defense of the Canfield suit. It does not appear from plaintiff's allegations that his employment was conditional upon the continued performance of services by Stillwell or that plaintiff was to receive the agreed compensation only in case Stillwell performed his agreement. An entirely different situation would be presented if plaintiff rendered his services with the understanding that he was to receive one-half of Stillwell's compensation. But the complaint shows that in any event plaintiff rendered some services for which he should be paid on the basis of their reasonable value.

[8–13] It is the rule that where the measure of compensation of an attorney is fixed by express agreement, he may have his action for the amount agreed upon. 3 Cal.Jur. 683, sec. 84. The second count of the complaint is independent of the first count and is a complete cause of action in itself. Cookson v. Fitch, 116 Cal.App. 544, 549, 3 P.2d 27. On appeal from a judgment sustaining a demurrer to a complaint the allegations of the complaint must be regarded as true. The court must, in every stage of an action, disregard any defect in the pleadings which does not affect the substantial rights of the parties. Code Civ.

Proc., sec. 475. "Pleadings must be reasonably interpreted; they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears." Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 42, 172 P.2d 867, 872. All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief. Tristam v. Marques, 117 Cal.App. 393, 397, 3 P.2d 947. "In determining whether or not the complaint is sufficient, as against the demurrer upon the ground that it does not state facts sufficient to constitute a cause of action, the rule is that if, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good, although the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged." Matteson v. Wagoner, 147 Cal. 739, 742, 82 P. 436, 438. In passing upon the sufficiency of a pleading, its allegations must be liberally construed with a view to substantial justice between the parties. Buxbom v. Smith, 23 Cal.2d 535, 542, 145 P.2d 305; Gerritt v. Fullerton U. H. School Dist., 24 Cal.App.2d 482, 486, 75 P. 2d 627. "While orderly procedure demands a reasonable enforcement of the rules of pleading, the basic principle of the code system in this state is that the administration of justice shall not be embarrassed by technicalities, strict rules of construction, or useless forms." Buxbom v. Smith, 23 Cal. 2d 535, 542, 145 P.2d 305, 308.

Applying these rules to the second count of the complaint, we are of the opinion that a triable cause of action was pleaded and that the demurrer thereto should have been overruled.

The order expunging the lis pendens is affirmed. The appeals from the minute orders sustaining the demurrers are dismissed. That part of the judgment dismissing the action on the first count of the complaint is affirmed. That part of the judgment dismissing the action on the second count of the complaint is reversed, with directions to overrule the demurrer thereto. Each party is to bear his own costs on this appeal.

SHINN, P. J., and WOOD, J., concur.



99 Cal.App.2d 738

EPSTEIN et al. v. ZAHLOUTE.
Civ. 17702.

District Court of Appeal, Second District, Division 2, California.
Oct. 2, 1950.

Jacob Epstein and others sued Lamia Zahloute to quiet title to a residential apartment and to cancel a lease executed to defendant as tenant whereunder defendant was granted option of renewal for each succeeding year following two-year term of lease. The Superior Court of Los Angeles County, Charles P. Johnson, J., rendered a judgment adverse to plaintiffs, and plaintiffs appealed. The District Court of Appeal, Wilson, J., held that the lease was invalid as providing for a perpetuity.

Judgment reversed with instructions.

1. Landlord and tenant ⇐83(1)
Perpetuities ⇐6(17)

A lease of an apartment to an individual for two-year term with option of renewal by tenant each succeeding year thereafter created a perpetuity contrary to statute and was invalid. Civ. Code, § 718.

2. Landlord and tenant ⇐72
Perpetuities ⇐6(17)

A lease which covers a city lot or a portion thereof is invalid if for a period in excess of 99 years regardless of whether tenant is a corporation or an individual. Civ. Code, § 718.

Bloom & Bloom, Hollywood, for appellants.

No appearance for respondent.

WILSON, Justice.

Plaintiffs' predecessor in interest executed a lease to defendant of an apartment for the term of two years "with option for renewal each succeeding year thereafter, * * *." Subsequently to the expiration of the two-year term plaintiffs brought this action to quiet title to the property and to cancel the lease. They have appealed from the judgment rendered in favor of defendant.

[1] The effect of the quoted provision of the lease amounts to the creation of a perpetuity. "A covenant for a lease to be renewed indefinitely at the option of the lessee, is, in effect, the creation of a perpetuity; it puts it in the power of one party to renew forever, and is therefore against the policy of the law." Morrison v. Rossignol, 5 Cal. 64, 65, 66. In Becker v. Submarine Oil Co., 55 Cal.App. 698, 700, 204 P. 245, it is said that a clause in a lease providing for perpetual renewals at the option of the lessee is enforceable when it is clear that the parties intended the lessee to have that right. However, the lease in question in the Becker case was an oil and gas lease and what the court there said must be considered in the light of the fact that such a lease creates a profit *a prendre* and vests in the lessee an estate in real property. Gavina v. Smith, 25 Cal.2d 501, 505, 154 P.2d 681; Callahan v. Martin, 3 Cal.2d 110, 122 ff., 43 P.2d 788, 101 A.L.R. 871. An assignment by the landowner of an interest in his oil rights without limitation as to time does not violate the rule against perpetuities. Callahan v. Martin, supra, 3 Cal.2d at page 124, 43 P.2d 788.

[2] The Becker case is distinguishable for the further reason that the lease was not for a city lot while the lease in the instant case covers a city lot or a portion thereof and such a lease is invalid if for a period in excess of 99 years. Civil Code, sec. 718. A lease of a city lot, with the right of perpetual renewal, to a corporation whose term of existence is without limitation as to time would manifestly be equivalent to a lease in perpetuity and contrary to the inhibition of section 718. A similar lease to a natural person would be of like effect since the length of the lessee's life would be indeterminable. The court cannot conclude that the lessee in the instant case will not survive for a period exceeding 99 years hence the right to an annual renewal for an unlimited number of years purportedly granted to her by the lease is in violation of section 718. In Hart v. Hart, N.Y., 22 Barb. 606, a lease for 12 years with a covenant for renewal for 12 years if the lessor should live and for continued renewals for every 12 years during lessor's life, was held valid for the original 12 year term but void as to the covenant for renewals for the reason that it was in contravention of the constitutional inhibition of leases of agricultural land for a period longer than 12 years.

Reversed with instructions to enter judgment in favor of plaintiffs quieting their title and canceling the lease.

MOORE, P. J., and McCOMB, J., concur.



99 Cal.App.2d 654

GRAY et al. v. JONES.

Civ. 4210.

District Court of Appeal, Fourth District, California.

Sept. 26, 1950.

Action by Fred I. Gray and another against Alice B. C. Jones to quiet title to realty. The Superior Court of San Diego County, C. M. Monroe, J., entered judgment for plaintiffs and defendant appealed. The District Court of Appeal, Mussell, J., held that an omission of property from the tax rolls, in absence of any reason therefor, was not a jurisdictional error so as to render tax levy invalid and omission would be corrected by the curative statute.

Affirmed.

1. Constitutional law ⇐193

The legislature may cure irregularities or omissions to comply with provisions of a

statute which could have been omitted in first instance, and legislature cannot cure defects which are sometimes termed jurisdictional, but after jurisdiction is acquired and mandate of due process is complied with, manner or procedure is a matter within legislative discretion and may be subject to exercise of healing power, as long as further constitutional inhibitions are observed.

2. Taxation ⇐437, 439

An omission of property from tax rolls, in absence of any reason therefor, was not of a jurisdictional character and did not render tax levy invalid, and omission would be corrected by curative statute. Gen. Laws Act, 8443b, §§ 3, 4(a).

3. Appeal and error ⇐173(10)

In quiet title action, statutes of limitation which were not pleaded or referred to at trial could not be invoked for first time on appeal. Revenue and Taxation Code, §§ 175, 3522.

Solon S. Kipp and W. E. Starke, San Diego, for appellant.

Wilmer Breeden, San Diego, for respondents.

MUSSELL, Justice.

Action to quiet title to real property.

This is an action to quiet title to lot 76, Highdale Addition to Encanto Heights in the city of San Diego. The plaintiffs claim under deed issued by the tax collector of San Diego county based upon a tax deed to the state on August 1, 1935, for a delinquency of 1929. The defendant is successor in interest to the record owner.

The complaint is in the usual form and, among other things, it is alleged therein that the plaintiffs are the owners of the real property described therein and that the defendant asserts or claims some right, title, interest, estate or lien therein adverse to the rights of the plaintiffs.

The answer denies ownership in plaintiffs, admits that the defendant claims some right, title or interest in the property, and contains a prayer for an order quieting title in the defendant.

The evidence is that the lot in question is situated in what is known as Zone K, in Acquisition and Improvement District No. 13, and was sold to the state on August 1st, 1935, for 1929 delinquent taxes and assessments; that it was deeded by the county tax collector of San Diego county to plaintiffs on February 4, 1947, and that the deed was duly recorded. The defendant produced no evidence with respect to her own title but introduced various tax records in an attempt to show that the deed to the state on August 1, 1935, was invalid.

The court found that the plaintiffs were and are the owners in fee and entitled to the possession of the lot; that the defendant has no right, title or interest therein; that assessments for certain property in the acquisition and improvement district, embracing the property herein involved, were omitted from the tax roll, thereby increasing the tax burden on the lot in question and the court concluded that any defects or irregularities occasioned by the omission of such property from the tax rolls were cured by the validating act of 1947. 1947 Statutes, Chapter 605, Act 8443b, Deering's General Laws, Supplement. Judgment was entered accordingly and defendant appeals.

The sole question presented on this appeal is whether the trial court was correct in its conclusion that the omission of property from the tax rolls, under the circumstances here presented, was cured by the said validating act.

The statute in question, as far as applicable here, provides as follows:

"Sec. 3. Every act and proceeding heretofore taken by any taxing agency or revenue district or the officers thereof relative to the preparation, transmitting, computing, determining or fixing the budget or the tax rate or rates of any taxing agency or revenue district, or to the assessment or equalization of property or to the levy of taxes thereon or to tax sales or certificates of tax sales, tax deeds or other conveyances, are hereby confirmed, validated and declared legally effective.

"Sec. 4. (a) This act is limited to the correction of defects, irregularities and ministerial errors which the Legislature originally could have omitted from the statutory requirements of law under which the acts hereby confirmed, validated and declared legally effective were taken. (b) This act is limited to the validation of acts and proceedings to the extent to which the same can be effectuated under the State and Federal Constitutions."

The record before us does not disclose the reason for the omission of the property from the tax rolls. The suggestion in the briefs is that the omitted property had been sold for taxes. If it was sold to the state for delinquent taxes, and state owned, it was properly omitted from subsequent assessments.

The Acquisition and Improvement Act, 1925 Statutes, Chapter 419, page 849, applicable here, provides in part as follows: "The lands upon which said special assessment taxes shall be levied shall be all those lying within the assessment district, including any lands which are the operative property of any public utility; *provided,* said lands shall not include any lands belonging to the United States government or the State of California, but they shall include all lands belonging to any county, municipality, district, public agency, mandatory of the government, school board, educational, penal or reformatory institution, or institution for the feeble-minded or insane, included within the assessment district, whether being in use in the performance of any public function or otherwise; * * *." Section 5.

The act further provides for the omission of certain property from the levy and collection of special assessment taxes. State owned lands are also exempt under the provisions of Article XIII, Section 1 of the State Constitution.

It may be presumed that official duty has been regularly performed, Code Civ.Proc. sec. 1963, subd. 15, and that the lands were thus excluded in accordance with the law.

[1] The rule concerning the applicability of curative statutes, such as the one here involved, is stated in Miller v. McKenna, 23 Cal.2d 774, 782, 147 P.2d 531. Generally, it is there held that the legislature may cure irregularities or omissions to comply with provisions of a statute which could have been omitted in the first instance; that the legislature cannot cure defects which are sometimes termed jurisdictional but that the manner or procedure, after jurisdiction is acquired and the mandate of due process are complied with, is a matter within the legislative discretion and may be subject to the exercise of the healing power as long as further constitutional inhibitions are observed.

In Union Title Ins. & Trust Co. v. Thorp, 94 Cal.App.2d 421, 423, 424, 210 P.2d 905, 907, this court had before it for consideration the contention that a tax assessment was defective because of omission from the assessment roll of various pieces of property. The contention was disposed of in the following language:

"It is next contended that the tax assessment for 1929 was defective because the assessor omitted from the assessment roll for that year various parcels of land in Districts No. 17 and No. 8, which had the effect of increasing the assessments on the portions of the half lot in question which were in the various zones, these portions being charged with a percentage of whatever delinquencies had occurred with respect to other property. This is the objection which has frequently been raised to the "pyramiding" of assessments in the so-called Mattoon districts. By section 41 of the 1925 act, St.1925, p. 890, and as provided for in the Resolutions of Intention of these districts, any land belonging to the state of California was excluded. Such state-owned lands are within the exemption provided for in the Constitution. Sutter-Yuba Inv. Co. v. Waste, 21 Cal.2d 781, 136 P.2d 11. The exclusion of such lands under these circumstances has frequently been upheld. Any injustice resulting therefrom is a matter for legislative and not judicial correction. American Securities Co. v. Forward, 220 Cal. 566, 32 P. 343, 96 A.L.R. 1268. The appellant admits that this point was unsuccessfully raised in Davault v. Essig, 80 Cal. App.2d 970, 183 P.2d 39, but argues that in

the later decisions of Hall v. Chamberlain, 31 Cal.2d 673, 192 P.2d 759 and Tannhauser v. Adams, 31 Cal.2d 169, 187 P.2d 716, 5 A.L.R.2d 1015, 'a different theory seems to have been presented.' We are unable to see that any different theory was followed in those cases, with respect to the point now under consideration."

[2] The record before us does not disclose an omission of "jurisdictional requisites" and under such circumstances the curative statute is applicable. City of Compton v. Boland, 26 Cal.2d 310, 316, 158 P.2d 397.

[3] The effect of the statutes of limitation, Secs. 175 and 3522 of the Revenue and Taxation Code, is not here decided as the statutes were not pleaded or referred to at the trial and cannot be invoked for the first time on appeal. Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 745, 47 P.2d 273.

Judgment affirmed.

GRIFFIN, Acting P. J., concurs.



96 Cal.App.2d 632

JORDAN v. O'CONNOR et al.

Civ. 14412.

District Court of Appeal, First District, Division 1, California.

Sept. 26, 1950.

Action by Evelyn T. Jordan against Jane O'Connor and Massachusetts Bonding & Insurance Company, a corporation, for damages for alleged negligence of notary in taking and certifying acknowledgment of a signature of a maker of a deed of trust. The notary died after commencement of the action which proceeded to trial against second named defendant only. The Superior Court in and for the City and County of San Francisco, Samuel F. Finley, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that act of the notary in taking and certifying acknowledgment of the signature of the maker of a deed of trust which was a forgery, was not the cause of plaintiff's loss of alleged loans made in reliance on deed of trust.

Judgment affirmed.

1. Evidence ⇐594

As general rule, testimony of witness which is not contradicted by that of any other witness may not be disregarded, but should be accepted by court or jury as proof of facts adduced by that witness.

2. Appeal and error ⇐994(3)

Conflicts in testimony of a witness must be resolved by trier of facts.

3. Evidence ⇐588

Manner of witness in testifying may impress court with doubt as to accuracy of his statement and influence it to disregard witness' positive testimony as to a particular fact.

4. Appeal and error ⇐1012(1)

It is province of trial court to determine what weight shall be given to testimony of any witness, and appellate court cannot control finding or conclusion of trial court denying testimony credence, unless it appears that there are no matters or circumstances which impair its accuracy.

5. Notaries ⇐11

In action against notary public's surety for damages for alleged negligence of notary in taking and certifying acknowledgment and signature of a maker of a deed of trust, evidence supported finding that plaintiff did not rely on notary's acknowledgment in making any of alleged loans, did not alter her position to her detriment based on actions of notary, and did not suffer loss or damages as result of actions of notary.

6. Appeal and error ⇐1071(6)

In action against notary public's surety for damages for alleged negligence of notary in taking and certifying acknowledgment of signature of maker of deed of trust, alleged failure of court to make certain findings relating to notary's negligence, was immaterial in view of

findings to effect that act of notary was not causative factor in effecting plaintiff's loss.

7. Notaries ⇐10, 11

Notary public and surety on his official bond are liable in damages to persons injured by official misconduct or negligence of notary.

8. Notaries ⇐10, 11

Where notary certified acknowledgment of signature of maker of deed of trust and such signature was in fact a forgery, but plaintiff had not relied on notary's acknowledgement in making any alleged loans in reliance on security of deed of trust, act of notary was not efficient cause of plaintiff's loss, if any, sustained, and neither notary nor surety was liable.

Phil F. Garvey, Francis C. Starr, San Francisco, James A. Himmel, San Francisco, of counsel, for appellant.

Worthington, Park & Worthington and Leonard A. Worthington, all of San Francisco, for respondent.

FRED B. WOOD, Justice.

This is an appeal by plaintiff from a judgment for defendant in an action against a notary public and her surety for damages for alleged negligence of the notary in taking and certifying the acknowledgment of the signature of the maker of a deed of trust. The notary died after commencement of the action, which proceeded to trial against the surety only, before the court without a jury.

The deed of trust, according to its terms, was executed by one Marie Russell as trustor to secure payment to appellant of indebtedness evidenced by a promissory note for $1,200 executed by trustor, and to secure any additional sums which appellant might thereafter lend the trustor. It was dated July 6, 1946.

The certificate of acknowledgment, executed by defendant Jane O'Connor as notary public, read as follows: "On July 10th 1946, before me, Jane O'Connor, a Notary Public, in and for said City and County and State, personally appeared Marie Russell, a married woman, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same."

The promissory note bore date July 6, 1946, was purportedly signed by Marie Russell as maker, in favor of appellant as payee; was in the principal sum of $1,200, payable one year after date; bore interest at the rate of 6 per cent per annum, payable monthly, and recited that if any of the interest were not paid within 10 days after it became due, the whole of the principal sum would forthwith become due and payable at the election of the holder, without notice.

A second promissory note, dated October 9, 1946, likewise was purportedly signed by Marie Russell in favor of appellant as payee; was in the principal sum of $700, payable 90 days after date; and bore interest at the rate of 8 per cent per annum, payable at maturity.

The signature to each of these three instruments was a forgery. Marie Russell, the owner of the property described in the deed of trust, had no knowledge of the transaction. She neither signed nor did she authorize anyone to sign her name to any of these instruments; nor did she ever appear before the notary or acknowledge the signature to the deed of trust as her signature. It is not known who signed any of the documents; nor who, if anyone, appeared before the notary and acknowledged the signature to the deed of trust.

Appellant claimed that she made these loans in reliance upon the security of the deed of trust and the notary's certificate of acknowledgment of the trustor's signature, that the notary was negligent in taking and certifying the acknowledgment, and that such negligence was the proximate cause of her loss of the money loaned and certain costs incurred in unsuccessfully attempting to enforce the security given for the loan.

The court found that it is not true that appellant loaned the signer of said notes and deed of trust $1,900 in reliance upon the security mentioned in the deed of trust and the signatures and acknowledgment on said instruments; that appellant did not rely

on the notary's acknowledgment in making any of the alleged loans; that appellant did not alter her position to her detriment based on the actions of the notary; that appellant did not suffer loss or damage as the result of the actions of the notary nor did she place any trust or reliance on the notary's acknowledgment to the deed of trust; that appellant suffered no damage as a result of negligence of the notary; that the deed of trust was not made as security for the $1,200 note; and that the alleged loan was made, if at all, four days prior to the notary's acknowledgment on the deed of trust, therefore no reliance was placed by appellant on the notary's acknowledgment.

Appellant claims that these findings are not supported by the evidence; also, that the court erroneously failed to make findings on certain material issues.

The alleged loans were made at the request of one Lyman Russell. Marie Russell, his wife, was the purported grantor of the deed of trust and maker of the promissory notes. Lyman Russell was a real estate broker who handled loans and mortgages for clients. Appellant testified that he had been her broker for over 10 years and had invested considerable sums of money for her. The usual procedure in making a loan was for Russell to make the contact, collect the data and give it to appellant. She or her mother would inspect the property, get Russell's advice and then decide whether to make the loan. Payments on these loans were made to Russell and he would send them to appellant. Sometimes he would let the payments "bank up three or four months" before remitting to her. Appellant claimed that the money purportedly loaned to Marie Russell came from collections which Russell had made and held for appellant's credit in his office.

The only written statements or reports from Russell to appellant prior to July 1946, as to which appellant testified, were statements made in August 1945 and in February, March and May 1946, in which he reported and remitted collections of $146.28, $250.29, $134.37, and $185.35, respectively. No earlier statements of his were offered in evidence. No later written accounting was made by him except one in October 1946, reporting and remitting a collection of $25.

When Russell made no payment to her in July of 1946, she called it to his attention and he said he would get everything in order and take care of everything the first of the year. She was "anxious to get everything all fixed up," "wanted to get out of this," and he assured her he would have his accounts in order the first of 1947. He stated he was not in good health and was going to curtail his activities in this field after the first of the year. From May 1946 until his death in January 1947, he gave her no statements or accounts, except that of October 1946, relying on the fact that his wife, as appellant understood it, was to inherit some money and he was counting on this money to clear up all his accounts and get them all in order and have a general accounting on the first of the year. He asked her to lend his wife, Marie Russell, $1,200 out of the money he had on deposit, and appellant did that. The $700 loan made in October 1946 was likewise made at Russell's request and from the same source.

As to the amount of her money that Russell actually had on deposit when the $1,200 loan was made, appellant did not know how much more than $1,200 it was; that up until May 1946 he rendered reports to her. In that month the report showed, she stated, he had about $1,400 on hand for her credit; and then, she said, it was not in cash, it was $1,400 outstanding, due on other accounts, she did not have a statement on that now but she could make it up. Later, she testified that over $1,400 had been there for two years, which he had not invested for her, was holding for a two-year period. From papers in her possession, she testified that the money he had on hand to her credit was $3,150, in May and also on July 7, 1946, made up of various sums which he had collected and not paid over to her. These included collections of $350, $193, and $314, made in 1942, 1943, and 1944, which he never reported to her, one of which he effected through the medium of a forged substitution of trustees which she learned about after his death; another collection of $350 in 1942; one of $407 in 1944, in connection

with which she stated he forged a substitution of trustee; and collections of $1,320, $214, $106, and $232, the dates of which do not clearly appear.

When asked what money, on any of those accounts, Russell actually collected in June of 1946, appellant replied that all of this came to light after he passed away; in January (1947) he was supposed to clear all of this up, and get it all cleared, so she could not have any more business like this; when he passed away she had to go into it very thoroughly; she contacted all these people and found they had paid him different amounts of money that he made no record to her of, and altogether her loss on all those properties stands well over $3,000.

Yet, in another part of her testimony appellant said that just prior to the making of this $1,200 loan she had a conversation with Russell as to the amount of her money he had on hand in his possession at that time; that he said he had over $3,150. In response to a question whether she then discussed with him the source of those funds, from whom he collected them, and as to the various accounts, she replied: "The accounts that I have listed, that he gave the itemized list of moneys due of the amount he had on credit in his office"; that she discussed those accounts with him and the various payments he had received. These are the very accounts substantial items of which she had earlier testified were unknown to her until after his death.

Although appellant several times stated positively, as if of her own knowledge, that Russell had more than sufficient money of hers to make these loans of $1,200 and $700 (using such expressions as "I know the money was in the office," "he had the money," "It was on deposit"), she admitted, when pressed by respondent's counsel for an answer, that all she knew was that there was a credit in her favor on her account for that money, she did not know whether he actually used that money himself or not. The following questions by the court, and her responses, are significant:

"Q. Let me ask you this: Isn't it true that all you had, all you knew about it was that as far as the accounts were concerned and considering the date on which payments should have been made, that Mr. Russell should have had in his possession $3,150 that belonged to you? A. Yes.

"Q. You don't know whether he actually had it or not? A. I know he had some of it, your Honor, because different accounts had been settled.

"Q. I mean, now, you know that he should have had, but whether he actually did have it— A. He told me had it.

"Q. But you don't know? A. That was the reason, your Honor—

"Q. Disregarding what he told you, now, for a minute, you really know nothing about it excepting that those accounts should have been paid and he should have had the money upon the dates when the payments should have been made, that he should have had the money in his possession, is that right? A. Yes."

It was after he told appellant how much he had on deposit for her account that Russell mentioned this particular loan to Marie Russell, and the San Bruno property to secure it, telling her that Marie Russell was his wife and the owner of that property. Concerning the $1,200 loan, appellant upon cross-examination said that she was not at the time familiar with the signature of Marie Russell; that she relied on Mr. Russell's statements to her that it was Marie Russell's signature. When the $1,200 note was given her on July 6, appellant took his word that that was Marie Russell's signature. The same condition existed with reference to the second note. Appellant was not familiar with the signature of Mrs. Russell and merely took Mr. Russell's word. Later, upon redirect examination she said that in making the $1,200 loan she relied on the security of the deed of trust, would not have made that loan without the security of the deed of trust.

Upon cross-examination, she stated she did not recall having any conversation with Mr. Russell, prior to accepting either of those two notes, regarding the existence of a mortgage on the San Bruno property. Later, upon redirect examination she stated

that the $1,200 note was to be secured by a second deed of trust against the San Bruno property. It was to be secured by a deed of trust subject to a first mortgage of the Hibernia Bank, which was already on the property.

As to the time and sequence of delivery of the notes and deed of trust, appellant testified that she received the deed of trust after it was recorded, and received those two promissory notes at the same time. Later, she did not remember when she first saw the deed of trust, nor if she saw it before the first note was executed; imagined it was given to her at the time the note was given; did not know whether she received the deed of trust and the note at the same time, but was quite sure she did; the deed of trust was delivered to her after recordation July 16, whether by the title company or Mr. Russell she did not remember; did not remember whether the notes and deed of trust were delivered to her at the same time or different times; all eventually came into her possession after July 16; did not remember whether she herself recorded the deed of trust; did not know whether the first note was handed her by Mr. Russell or if it was mailed to her; she imagined it was handed to her.

Despite appellant's claim that Russell held $3,150 of her money from May 1946 on, he made no loans for her after that, outside of the two loans to Marie Russell. Also, after May 1946 she received no money from him, except the $25 collection in October 1946; and no money from his wife or any other person on his behalf. Yet, she let him hold the difference between $3,150 and $1,200 in July, and the difference between $3,150 and $1,900 in October and subsequently. Russell did not tell her what he was doing with that money of hers which he was holding.

Although the $1,200 note called for interest payments monthly, with acceleration of the principal if any interest payment became delinquent for 10 days, appellant never made any demand upon either Mr. or Mrs. Russell for payment of principal or interest on either note until after Mr. Russell's death, at a meeting of appellant and Mrs. Russell with their attorneys in February 1947.

The unusual character of this lending transaction, the circumstances attending it, and the uncertainties and conflicts in appellant's testimony, it would seem, prompted the trial court to ask the following questions of appellant: "Just tell me this, Mrs. Jordan, how did this transaction come about? How did you happen to loan him this $1200 and this $700? Was it at his request? A. Yes.

Q. Did you feel you [he?] might not have had the money for it? A. No, we had no idea, your Honor.

"Q. What did he say he wanted it for? A. He wanted us to lend the money on property owned by his wife and, as I said before, we were going to close all dealings on the first of the year and he had this money on deposit.

"Q. Is that what he told you? A. Yes, he told us definitely.

"Q. Did he tell you that he had $3,150? A. He had $3,150.

"Q. He said, 'If you will loan me $1200—'

"Mr. Garvey [counsel for appellant]: Not him, your Honor; Marie Russell.

"The Witness: Yes, Marie Russell, not to lend him the money out of the money he had on deposit, and we did that.

"The Court: Q. Then when he paid no interest on this $1200 between then and the time you made the loan of $700, did that raise any question in your mind? A. No, because his health was so poor and he was so anxious himself to close up all his dealings and he was going to make a general accounting on the first of the year.

"Q. Didn't you say, 'Well, all right, I will loan you this money and you turn the balance over to us now, there is no use to have it in your office'? A. No, we didn't go into that at all, because we had trusted him, your Honor, we had dealt with him over a period of ten years."

These further questions and comments by the court are of similar significance:

"Q. Didn't you question it at all when these checks failed to come in? A. No, because we had known that he was in poor health and that he had told Mother that he was going to get out, because his health was so bad and so we just—due to his past record of good judgment and handling money over a period of ten years, we had no occasion to question any dealings at all. Q. Let me ask you this: When you took this note for $1200, why didn't you take a note at that time for all that was remaining due, instead of just part of it—all that, according to your figures, that he owed you?" This question was not answered by appellant. Her attorney interrupted to say and did say: "May I explain to your Honor, that wasn't the transaction at all. I think your Honor has misconceived all this transaction here. This was not a transaction whereby he was giving her a note and security for any balance that she may have had on deposit with him there. The transaction was this—". Thereupon the court made this comment: "According to the testimony that is in the record—we are getting down to the truth of this thing—I would like to find out why all of a sudden this transaction came up in this way. In other words, here this lady had $3,150 that was supposed to be in his hands and all at once he comes and wants to borrow $1200," and asked this question: "Was that his suggestion or yours?" to which appellant responded, "It was his."

Concerning Russell's statements of account to appellant, the court asked appellant: "Well, Mrs. Jordan, let me ask you this question: Q. Were these statements by Mr. Russell—they were made each month, were they, over a period of time? A. Over a period of time, they were rendered about every other month, they were given.

"Q. Were they to bring you up to date, were they statements—wasn't in effect Mr. Russell saying, 'I have collected this much money; this is what belongs to you and this is what I am turning over to you'? A. No, we understood he was holding other money in his possession for deposit to our account."

The court continued with the following inquiries: "Let me ask you this question: Was there any account rendered by Mr. Russell to you which gave you information how much he was holding for you, or were you, as you might say, in the dark as to how much he was holding for you? A. We knew pretty well what he had on deposit.

"Q. But he didn't render you any regular accounts to show you? A. No.

"Mr. Garvey: Your Honor will recall the testimony of the witness that he did acknowledge he had on hand a certain amount.

"The Court: I recall that. I am talking about these statements, I am just asking her if he rendered regular statements which indicated to her how much he was holding for her, from time to time. A. At the time—if I may go on to help you a little bit—at the time these loans were made, he told us that he had a definite amount of money on deposit for us, and for that reason asked if he could use $1200 of the money he had on deposit on this new loan and again, in October, the additional $700.

"The Court: I understand that was your testimony. It was his proposal. A. Yes."

It is apparent that appellant's testimony did not convince the court that the transaction was as claimed by her. Proof was lacking that Russell actually had on hand sufficient money, or any money, of hers to make the purported loans to Marie Russell. Appellant's conduct and testimony support the conclusion that appellant relied upon her own agent in entertaining and consummating this transaction, upon him to make out the necessary papers, and upon his assurance, not the notary's certificate of acknowledgment on the deed of trust, that trustor's signature and the signatures on the notes were genuine. The evidence further supports the conclusion that appellant's loss, if any, occurred prior to and independently of this transaction, as a result of the conduct of her agent, Russell.

[1–4] Appellant directs attention to the fact that appellant's testimony is not contradicted by that of any other witness and invokes the general rule that the testimony

of such a witness may not be disregarded but should be accepted by the court or jury as proof of the facts adduced by that witness. This rules has its exceptions. Conflicts in the testimony of a witness must be resolved by the trier of the facts. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statements. There may be circumstances in evidence in connection with the matter which satisfy the court of the inaccuracy or falsity of that testimony. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard the witness' positive testimony as to a particular fact. It is the province of the trial court to determine what weight shall be given to the testimony of any witness. An appellate court cannot control the finding or conclusion of the trial court denying the testimony credence, unless it appears that there are no matters or circumstances which impair its accuracy. Young v. Tassop, 47 Cal.App. 2d 557, 561, 118 P.2d 371, and cases therein cited.

[5] We conclude that the findings challenged by appellant are supported by the evidence, except the finding which seems to predicate appellant's nonreliance upon the notary's acknowledgment upon the fact that the loan was made, if at all, four days prior to the acknowledgment. This exception does not affect the other findings, which are amply supported by the evidence.

Appellant claims error for asserted failure of the court to find that Marie Russell did not sign the deed of trust and that her purported signature thereto was forged. This was fully covered by a finding which, by declaring true the allegations of paragraph IX of the complaint, found that the signatures of Marie Russell on the trust deed and the promissory notes were forged and were not genuine signatures.

[6] Appellant also asserts error of the court in declining to find that at the time the notary took the acknowledgment she did not know whether the person making the acknowledgment was the person described in the trust deed and did not know whether or not the person named therein executed the same and that the notary did not procure satisfactory or any evidence or information to show that the same was named therein as trustor. The court predicated this declination upon the fact that no evidence was presented covering these allegations. This failure to find, whether correct or not, is immaterial in view of the findings to the effect that the act of the notary was not a causative factor in effecting appellant's loss.

Appellant suggests that the court erroneously found "That the notary was not guilty of official misconduct and negligence." The record does not disclose any such finding.

[7, 8] The authorities upon which appellant relies correctly hold that for the official misconduct or negligence of a notary public he and the surety on his official bond are liable to the persons injured thereby for all the damages sustained. But those authorities are not applicable here for in each it appeared that the plaintiff had parted with his money in reliance upon the notarial certificate and that the notary's negligence or official misconduct was the proximate cause of his loss. While the notary's act, if relied upon, need not be the sole cause, Homan v. Wayer, 9 Cal.App. 123, 98 P. 80; Inglewood Park M. Co. v. Ferguson, 9 Cal. App.2d 217, 49 P.2d 305, it must be an efficient cause of the loss. Overacre v. Blake, 82 Cal. 77, 22 P. 979; McAllister v. Clement, 75 Cal. 182, 16 P. 775; Burck v. Buchen, 46 Cal.App.2d 741, 746, 116 P.2d 958, and cases cited; White v. Rosenstein, 8 Cal. App.2d 217, 47 P.2d 358; Riverside P. C. Co. v. Maryland C. Co., 46 Cal.App. 87, 189 P. 808. Where, as here, the act of the notary was not an efficient cause of the loss, if any, sustained, there can be no recovery from the notary or her surety.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

99 Cal.App.2d 700

GRADDON et al. v. KNIGHT et al.

ANGLO SAFE DEPOSIT CO. et al. v. GRADDON et al.

Civ. 14257.

District Court of Appeal, First District, Division 2, California.

Sept. 28, 1950.

Rehearing Denied Oct. 28, 1950.

Peyton S. Graddon and others, sued Ralph C. Knight and others, to recover damages suffered by plaintiffs when a largely completed residence being constructed by defendant Knight for plaintiffs was destroyed by fire, and defendant Knight filed a cross-complaint and the Anglo Safe Deposit Company intervened, and plaintiffs and defendant Knight filed cross-complaints against intervenors and the intervenors cross-complained against plaintiffs. The Superior Court in and for the County of Santa Clara, M. G. Del Mutolo, J., entered a judgment in favor of the Graddons and Knight on the cross-complaints against the bank, and entered a judgment in favor of defendants Knight and his employees and the plaintiffs Graddon on the Graddons' complaint, and entered a judgment in favor of cross-defendant Graddon on Knight's cross-complaint against them, and entered a judgment in favor of Knight and the Graddons on the cross-complaint of the bank against them, and the Graddons appealed from the judgment against them and in favor of Knight and his employees on the Graddons' complaint, and the intervenors appealed generally from all judgments. The District Court of Appeal, Dooling, J., held that under deed of trust executed by plaintiffs, plaintiffs and not the bank were required to procure fire insurance.

Order in accordance with opinion.

1. Mortgages ⇐201

Under deed of trust executed by veteran who borrowed money from bank to construct a residence, providing for borrower to keep buildings insured against loss by fire, and containing provision that deed of trust was subject to Servicemen's Readjustment Act, and regulations issued pursuant thereto, one of which regulations provided that lender should require insurance to be procured and maintained, veteran and not bank had duty to procure fire insurance, the word "require" being satisfied by provision for borrower to procure insurance. Servicemen's Readjustment Act of 1944, as amended in 1945, 38 U.S.C.A. § 693 et seq.

2. Evidence ⇐397(2), 448

A fully integrated, unambiguous and certain written agreement may not be varied by parol evidence.

3. Appeal and error ⇐173(9)

Where no estoppel was pleaded by plaintiffs and question of estoppel was not presented by instructions, plaintiff could not on appeal attempt to invoke an estoppel against defendant in attempting to support judgment.

4. Appeal and error ⇐882(3)

A party cannot try his case on one theory and on appeal shift to another theory which was neither presented to jury nor considered by jury in deciding case.

5. Appeal and error ⇐1001(1)

Where evidence will reasonably support inferences of jury an appellate court cannot interfere.

6. Negligence ⇐136(17, 25)

In action for damages resulting when a largely completed residence being constructed by defendant for plaintiff was destroyed by fire, whether defendant's employees left a fire burning inside of residence when they left work for day, which proximately caused burning of residence, and whether a fire left burning in yard 72 feet from apparent origin of fire caused fire in residence, was for jury.

7. Costs ⇐233, 236

Where judgment for defendants in action on complaint for negligence was affirmed on appeal, defendants were entitled to costs on appeal, and where money judgments in favor of plaintiff and defendants on their cross-complaint against intervenors were reversed, intervenors were entitled to costs.

Chickering & Gregory, and Frederick M. Fisk, all of San Francisco, Howe & Finch, and Nathan C. Finch, all of Palo

Alto, for appellants, Anglo-Safe Deposit Co. and others.

Crist & Stafford, and John M. Donegan, all of Palo Alto, for respondents and cross-appellants, Ralph C. Knight and others.

Henry C. Clausen, San Francisco, John H. Machado, San Jose, for appellants and cross-respondents, Graddon and others.

DOOLING, Justice.

In June 1949 the plaintiffs Graddon, husband and wife, desiring to construct a residence procured for that purpose a so-called G.I. loan from the intervener, the Anglo California National Bank, hereinafter called the Bank. To secure the loan the plaintiffs executed a deed of trust with intervener, Anglo Safe Deposit Company, named as trustee. The Graddons entered into a contract with defendant Knight for the construction of such residence. When the residence was largely completed it was destroyed by fire.

The Graddons filed a complaint against Knight and certain of his employees charging that the fire was caused by the negligence of, and violation of a county ordinance by, Knight's employees. Knight filed a cross-complaint against the Graddons charging a breach of the Graddons' contract with Knight to keep the building insured against loss by fire during construction payable to Knight as his interest might appear.

The Bank and its trustee filed a complaint in intervention in which they sought a recovery against Knight and his employees for the damages suffered by them, based on similar allegations of negligence and violation of ordinance to those in the Graddons' complaint. The Graddons and Knight each filed cross-complaints against the interveners counting on their alleged duty under the deed of trust to procure and maintain fire insurance on the uncompleted building for the protection of the interests of the Graddons as parties to the deed of trust and of Knight as a third party beneficiary. Finally the interveners cross-complained against the Graddons alleging their substitution of a cost plus contract with Knight without the knowledge or consent of the interveners for the flat price contract upon which the loan was based.

Upon this complicated set of pleadings the case was tried before a jury resulting in verdicts and judgments in favor of the Graddons and Knight on their cross-complaints against the Bank for money judgments based on the Bank's failure to procure and maintain fire insurance; a verdict and judgment in favor of defendants Knight and his employees against the plaintiffs Graddon on the Graddons' complaint; a verdict and judgment in favor of cross-defendants Graddon on Knight's cross-complaint against them; and a verdict and judgment in favor of Knight and the Graddons on the Bank's cross-complaint against them. No verdict or judgment was returned or entered expressly adjudicating the Bank's original complaint in intervention.

The Graddons appeal from the judgment against them and in favor of Knight and his employees on the Graddons' complaint, and the interveners appeal generally from all of the judgments.

We shall first consider the

Money Judgments Against The Bank.

The deed of trust was executed on a printed form in use by the Bank. Paragraph Third of the printed deed of trust provides: "The Trustor (the Graddons) agrees at all times during the continuation of these trusts to keep the buildings and improvements * * * on said property, insured against loss or damage by fire * * * to the amount of their full insurable value (or less in the discretion of Beneficiary) * * * with loss made payable to Beneficiary * * *."

A Paragraph Twenty-third was added in typewriting reading in part: "This deed of trust * * * is made in accordance with and subject to the provisions of the Servicemen's Readjustment Act of 1944, as amended in 1945 [38 U.S.C.A. § 693 et seq.], and the Rules and Regulations of the Administrator of Veterans' Affairs issued pursuant thereto * * *."

Section 36.4326 of Regulations, Administrator (of Veterans' Affairs), Feb. 27, 1946 (5 Code of Fed.Reg. 5953 (Supp.

1946)) provides: "*Hazard Insurance.* The holder shall require insurance policies to be procured and maintained in an amount sufficient to protect the security against the risks or hazards to which it may be subjected to the extent customary in the locality. All monies received under such policies covering payment of insured losses shall be applied to restoration of the security or to the loan balance."

Pursuant to, and in explanation of, this regulation the Veterans Administration issued a bulletin or notice reading: "The obligation upon the lender * * * to see that insurance in sufficient amount and types to protect the security against risks and hazards to the extent customary in the locality is procured and maintained, is clearly set forth in Section 36.4326."

It was proved that it was customary in the locality to procure and maintain fire insurance on a building under construction, and it was the claim of the Graddons and Knight that by Paragraph Twenty-third read in connection with Section 36.4326 of the Regulations above quoted the contract duty was assumed by the Bank to procure and maintain such insurance.

The court, on the theory that Paragraph Third under which the Graddons agreed to keep the buildings insured against fire was inconsistent with Paragraph Twenty-third which incorporated Section 36.4326 of the Regulations thereby creating an ambiguity, allowed oral testimony to aid in the construction of those provisions. It is the theory of the Graddons and Knight that, at least in the light of this oral testimony, the jury was entitled to find that the Bank had assumed the obligation itself to procure and maintain fire insurance on the building. At the request of Knight the jury was instructed: "If you find that the bank and Graddon executed a deed of trust and that this deed of trust provided that the bank was to procure insurance against loss by fire * * * and that the bank and Graddon expressly intended and agreed in the deed of trust that the insurance * * * was to be for the benefit of Graddon and the contractor Knight, and that the bank and Graddon did not rescind the deed of trust * * * and if you find that the bank did not procure or maintain insurance against loss by fire * * * then cross-complainant Knight is entitled to recover against the bank * * *."

Thus the Graddons and Knight both relied on the theory that under the deed of trust the Bank had bound itself to the Graddons that the Bank would procure and maintain such insurance and that the failure to do so was a breach of its contract with the Graddons.

We agree with the Bank that under the plain and unambiguous terms of the deed of trust the Graddons assumed the duty to procure and maintain such insurance and the Bank did not promise the Graddons that the Bank would itself procure or maintain it.

Under Paragraph Third the Graddons clearly and unequivocally agreed that the Graddons were "to keep the buildings and improvements * * * insured against loss or damage by fire * * *." Under section 36.4326: "The holder shall *require* insurance policies to be procured and maintained * * *." "Require" is a transitive verb meaning "To demand; to claim as by right and authority; to exact" and its synonyms are "claim, necessitate, ask, enjoin, compel, force." Webster's New International Dictionary, 2d Ed., Unabridged.

[1] If the regulation had provided that "the holder shall procure and maintain insurance" the plain duty of the Bank would be to secure the insurance itself, but the regulation does not so provide. The verb "require" is satisfied by action directed to another and clearly permits the Bank to "require" the Graddons to carry the insurance. This is exactly what the deed of trust in plain, direct and unambiguous language does.

[2] A fully integrated, unambiguous and certain written agreement may not be varied by parol evidence. Civ.Code secs. 1625, 1638, 1639; Code Civ. Proc. sec. 1856; Pendleton v. Ferguson, 15 Cal. 2d 319, 323, 101 P.2d 81, 688; In re Estate of Gaines, 15 Cal.2d 255, 264–265, 100 P.2d 1055; Brant v. California Dairies, Inc., 4 Cal.2d 128, 133–134, 48 P.2d 13.

It may be that the deed of trust could be reformed if it did not truly express the intention of the parties, but here there were no allegations of fact to support a decree of reformation nor any attempt to invoke the equity powers of the court to reform the instrument. The parties saw fit to stand on the deed of trust as written and as written the deed of trust does not support the recovery by the Graddons and Knight against the Bank.

[3, 4] The Graddons attempt in support of the judgment to invoke an estoppel against the Bank. No estoppel was pleaded nor was the question of estoppel presented to the jury by any instruction. The claim that the Bank might be held liable on the theory of negligence was also neither pleaded nor presented to the jury. It is axiomatic that a party cannot try his case on one theory and on appeal shift to another theory which was neither presented to the jury nor considered by it in deciding the case. Ernst v. Searle, 218 Cal. 233, 240–241, 22 P.2d 715; Mathews v. Pacific Mut. Life Ins. Co., 47 Cal.App.2d 424, 428, 118 P.2d 10; 2 Cal.Jur. 237.

The Judgment In Favor Of Knight And His Employees Absolving Them Of Responsibility For The Fire.

The jury verdict was in favor of Knight and his employees on the Graddons' complaint. The Graddons for a reversal argue: 1. that Knight and his employees violated a fire ordinance of Santa Clara County and sections 13000 and 13001 of the Health and Safety Code which proximately caused the fire; 2. that the circumstances of the fire made a case of res ipsa loquitur which imposed upon defendants the burden of showing their freedom from fault which they failed to do.

Both arguments are subject to the same vice and so may be considered together. Appellants Graddon assume that the jury was bound as a matter of law to find that fire started and left burning by Knight's employees proximately caused the burning of the building. Under the evidence we are satisfied that the question of proximate cause was one of fact for the jury.

The fire occurred in December. Knight's employees, who were working inside the house, lighted a fire in the living room fireplace for warmth. They also had a fire outside the house for burning rubbish. About 4:15 or 4:20 p. m., according to the testimony of one of Knight's employees, he took all of the ashes and live coals out of the fireplace and dumped them on the fire outside. The fire outside was not completely extinguished. There may have been "very few, a little" live coals in the outside fire. A witness who lived across the street testified that after the workmen left she saw through the living room window "quite a small blaze" in the living room fireplace. Another witness testified that at about 6 p. m. she looked into the living room window and saw no sign of any fire. There was also evidence that the fire probably originated in the den and not in the living room. The outside fire was from 18 to 22 feet from the carport, which was not burned, and 72 feet from the den where the fire apparently originated. The weather was wet and foggy and there were puddles between the site of the outside fire and the house. A wind up to 8 miles per hour was blowing in a northwesterly direction, not from the site of the outside fire toward the house.

[5, 6] Under these facts the jury were entitled to find: 1. that no fire was left burning inside the house, and 2 that the few live coals left in the yard 72 feet from the apparent point of origin of the fire did not cause the fire in the house. Where the evidence will reasonably support the inferences of the jury an appellate court cannot interfere. Powell v. Pacific Electric Railway Co., 35 Cal.2d 40, 216 P.2d 448; Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; 2 Cal.Jur. 934. It follows that the judgment in favor of Knight and his employees on the complaint of the Graddons must be affirmed.

There was no express verdict finding on the issue between the interveners and Knight and his employees on the interveners' complaint in intervention against

Knight and employees charging their tort liability for the burning of the building. The interveners argue that this issue has not been adjudicated and that they are accordingly entitled to have it retried. Irelan-Yuba, etc., Min. Co. v. Pacific G. & E., 18 Cal.2d 557, 570–571, 116 P.2d 611; Portman v. Keegan, 31 Cal.App.2d 30, 34, 87 P.2d 400.

On the oral argument and by letter dated July 13, 1950 counsel for Knight and his employees have (quoting from the letter) "conceded the Bank to be entitled to a new trial of those particular issues." On this point we need therefore say nothing further.

[7] The money judgments in favor of the Graddons and Knight against the Bank are reversed. The parties should be allowed to amend their pleadings if they see fit in the light of this opinion. The issues presented by the complaint in intervention against Knight and his employees should be retried. In all other respects the judgments are affirmed. Interveners are entitled to costs on their appeal against the Graddons and Knight. Knight and employees are entitled to costs against the Graddons on the Graddons' appeal. See Baldie v. Bank of America, 97 Cal.App.2d 614, 217 P.2d 1011.

NOURSE, P. J., and GOODELL, J., concur.



99 Cal.App.2d 599

TRAVERS v. SIME et al.
Civ. 17928.

District Court of Appeal, Second District, Division 3, California.

Sept. 25, 1950.

Rehearing Denied Oct. 11, 1950.

Hearing Denied Nov. 20, 1950.

Tad Travers brought action against Harry R. Sime and others, claiming a half interest in a judgment obtained by defendant Sime. Plaintiff obtained temporary injunction restraining defendants from collecting or attempting to collect more than one-half of the proceeds of the judgment obtained by defendant Sime and defendants appealed from the order of the Superior Court, Los Angeles County, Alfred E. Paonessa, J., granting the injunction. The District Court of Appeal, Shinn, P. J., held that a temporary injunction restraining the use of any sum in excess of that which plaintiff would probably recover if successful in the main action was erroneous.

Order reversed with directions.

1. Injunction ⇐136(2)
Joint adventures ⇐5(2)

Complaint stating that plaintiff and defendant were joint adventurers in transactions culminating in defendant's obtaining judgment in another action, that cause of action was prosecuted by defendant for joint benefit of plaintiff and defendant, stated cause of action, and granting of temporary injunctive relief to prevent defendant from disposing of plaintiff's alleged share of proceeds was proper.

2. Appeal and error ⇐1024(3)

On appeal from order granting temporary injunction in action to establish one-half interest in judgment, where complaint stated cause of action, appellate court would not weigh conflicting evidence before trial court.

3. Injunction ⇐137(1)

Complaint alleging one-half interest in proceeds of judgment obtained by defendant as joint adventurer, but not attacking contingent fee arrangement with attorneys who prosecuted action, stated no ground for temporary injunctive relief against attorneys.

4. Injunction ⇐157

In action to establish one-half interest in proceeds of judgment obtained by alleged joint adventurer, temporary injunction restraining use of any sum in excess of that which plaintiff would probably recover if successful, was erroneous.

George Acret, Los Angeles, for appellants.

Ralph W. Swagler, Burbank, for respondent.

SHINN, Presiding Justice.

Harry R. Sime recovered judgment against certain individuals which was affirmed on appeal. Sime v. Malouf, 95 Cal. App.2d 82, 212 P.2d 946. When the judgment debtors were ready to pay the judgment it amounted to about $88,000. The present action was filed by Tad Travers, claiming a half interest in the judgment, and an order was issued against Sime and the other defendants herein restraining them temporarily from collecting more than one-half of the judgment. The judgment debtors paid one-half of the judgment to defendant Pyle, as assignee of Sime, and under order of the superior court in Sime v. Malouf, supra, pursuant to a written agreement with the present defendants, deposited the remainder, amounting to $44,315.15 with the county clerk, to be held subject to further order of the court in said action. The judgment was thereupon satisfied in full and the sum deposited still remains in the custody of the court. Thereafter upon the hearing of the order to show cause a temporary injunction was issued restraining the defendants from collecting or attempting to collect any of the money on deposit with the county clerk until the final determination of the present action. Defendants appeal from this order.

The complaint of Travers alleges that he and Sime were joint adventurers in the transactions which culminated in Sime's obtaining the judgment above mentioned, and that the cause of action was prosecuted by Sime for the joint benefit of himself and Travers. A history of the factual background of that litigation will be found in our opinion above cited, to which reference is hereby made.

The Travers' complaint alleges, and defendants admit, that the judgment was assigned by Harry S. Sime to E. C. Pyle, who assigned one-half thereof to Sime's wife, Iona H. Sime, and one-fourth to George Acret. Plaintiff also alleges that the assignment to Mrs. Sime was without consideration and in fraud of creditors, which the defendants deny. It is not disputed that E. C. Pyle and George Acret each acquired one-fourth interest in the judgment in consideration of legal services rendered in the case of Sime v. Malouf. Of the sum of $44,315.15 that was paid to Pyle, $1,584.57 was paid to Sime as one-half of his costs in the former case, $21,365.24 was paid to Acret and $21,365.24 was retained by Pyle.

[1,2] Upon the hearing of the order to show cause defenses to Travers' action and his application for an injunction were presented by means of answers and affidavits. It was denied that any joint venture was ever undertaken by Travers and Sime. The affidavits of defendants furnished evidence as to the relationship of the parties and the conduct of Sime which the defendants contended in the trial court, and contend here, is sufficient to disprove and dissipate the claims of Travers to any interest in the judgment or the money on deposit. It is insisted on this appeal that the court should have decided on the evidence before it that Travers' claims are groundless and that the defendants alone are entitled to receive the money in question. This contention cannot prevail. Travers' complaint states a cause of action, and although his allegations were denied, it will require a trial of the action to determine the factual issues raised by the pleadings. Upon the record before us it does not appear as a matter of law that the action is without merit and we cannot, of course, undertake to weigh the conflicting evidence that was before the trial court. We may add, however, that both plaintiff and defendants are in error in their attempts to find something in our opinion in Sime v. Malouf which would have a bearing upon the merits of the present action. There is nothing in that opinion which remotely suggests that Travers has or has not a meritorious claim to an interest in the recovery.

[3] Upon the uncontroverted evidence produced at the hearing, no ground existed for an injunction against defendants Pyle and Acret. Defendants' affidavits stated that Pyle and Acret conducted the former litigation pursuant to an agreement that they would be paid 50 per cent of the net recovery. It appeared without question that each of them had been paid the sum of

$21,365.24 and these sums with the sum of $1,584.67 paid to Sime in partial reimbursement of expenses amount to the one-half of the judgment that has heretofore been paid. Although these facts were known to plaintiff before he filed his amended complaint no cause of action was stated therein against defendants Pyle and Acret for the recovery of a judgment against them for any part of the sums they have received. Nor was any attack made upon the validity of the contingent fee agreement or its effectiveness to bind Travers as a joint adventurer, if he was such.

[4] The injunction, as we have seen, has the effect of impounding the entire sum of $44,315.15, and this in view of the undisputed fact that Travers' interest in the fund, if it should be established, would be chargeable with his proportionate share of the costs and expenses, including reasonable attorneys' fees, paid or incurred in the prosecution of the case of Sime v. Malouf. It was shown in defendants' affidavits, and not denied, that Sime's court expenses amounted to $3,169.35, that the trial of the action in the superior court extended over a period of eight months, that it was held upon 151 trial days, and that the services of the attorneys extended over a period of approximately five years in which they devoted some 12 months' service to the Malouf litigation. The good faith of the parties in entering into the contingent fee arrangement was not questioned in the complaint or affidavits of Travers. It would be manifestly unjust, in any event, to deprive defendants Sime in the present action, even temporarily, of the use of any sum in excess of that which Travers would probably recover if he should be successful. This sum would not exceed what might be found to be Travers' interest in the net recovery, that is to say, the sum remaining after deducting from that share of the money a proportionate share of the costs, expenses and attorneys' fees of the litigation in which the judgment was recovered.

The order was erroneous for the reasons stated, and should be reversed for further proceedings in the trial court.

There was no showing that any of the defendants is insolvent. The question will arise in the course of further proceedings whether there is necessity for an injunction on the ground of insolvency, or upon the ground that the identity of the fund should be preserved as the property of a joint venture. Another question will be whether the court would be authorized to treat the amount on deposit as a trust fund for the purpose of retaining control of a sufficient amount to satisfy any judgment in favor of plaintiff, if he should prevail. See Code Civ.Proc. sec. 572. The briefs do not discuss these questions and we express no opinion on them.

The order is reversed for further proceedings not inconsistent with the views we have expressed.

WOOD and VALLÉE, JJ., concur.



99 Cal.App.2d 717

PEOPLE v. JOHNSON.

Cr. 822.

District Court of Appeal, Fourth District. California.

Sept. 29, 1950.

Ted Johnson was convicted in the Superior Court of Tulare County, Glenn L. Moran, J., of grand theft on two counts, and from the judgment and from an order denying a motion for new trial, he appealed. The District Court of Appeal, Griffin, Acting P. J., held that evidence sustained conviction, that charge was not reversibly erroneous, that allegedly improper arguments of district attorney were not prejudicially erroneous, and that prosecution sufficiently established that theft occurred in the County of Tulare.

Judgment and order affirmed.

1. Criminal law ⇐1144(13)

District Court of Appeal was required to assume in favor of verdict of guilty the existence of every fact which the jury could reasonably have deduced from the evidence

and then to determine whether such facts were sufficient to support the verdict.

2. Criminal law ⇐742(1)

In prosecution for grand theft, it was for jury to determine question of veracity of testimony of defendant and his witnesses.

3. Larceny ⇐65

Evidence, which was mainly circumstantial, was sufficient to sustain grand theft convictions of one charged with taking a trailer load of cotton and with taking a cotton trailer.

4. Criminal law ⇐792(2)

In grand theft prosecution, evidence justified giving of instruction pertaining to aiding and abetting. Pen. Code, §§ 31, 32.

5. Criminal law ⇐772(6)

Where evidence in grand theft prosecution was undisputed that some one stole personalty of the complaining witness, instruction that the fact that others have violated the law with impunity is no defense, was not erroneous.

6. Criminal law ⇐822(1)

An instruction in a criminal prosecution must be viewed as a whole.

7. Larceny ⇐77(2)

Where there was sufficient circumstantial evidence in grand theft prosecution to show that stolen cotton was on ranch of defendant and was apparently under his dominion and control, and that the cotton was subsequently loaded by defendant and taken by another to gin mill by authority of defendant to be ginned for him, it was proper to instruct that possession of stolen property is a circumstance to be considered in connection with other evidence in determining question of innocence or guilt.

8. Criminal law ⇐810

In grand theft prosecution, instruction that it was not necessary that there should exist an intent to violate the law or to do a wrong because criminal intent exists whenever a person does that which the law declares to be a crime, was not in conflict with instruction that in every crime there must exist a union of act and intent.

9. Criminal law ⇐1038(3)

In absence of a request for an instruction to a certain effect, defendant was in no position on appeal to complain for the first time because of the failure to give such an instruction.

10. Criminal law ⇐814(1, 19)

Where defendant in grand theft prosecution was not charged with being an accessory after the fact nor with crime of receiving stolen property, trial court had no duty to submit to the jury forms of verdict as to such offenses. Pen. Code, §§ 971, 972.

11. Criminal law ⇐1171(3)

Statement of district attorney in argument that the sheriff's office and the district attorney's office seemed to think that defendant was guilty, was not prejudicial error, where such particular statement was not objected to or assigned as error, and where such statement, when examined in relation to entire argument, showed that district attorney was basing his remarks on an analysis of the evidence in the case.

12. Criminal law ⇐1037(1)

Statement of district attorney in argument that a number of character witnesses had testified for defendant, but that government official, who had recently been much in the news, had prominent character witnesses but was nevertheless convicted, and that certain labor leader who had been much in the news, had brought in a priest as a character witness, but that he had still been found guilty, was not prejudicial error, in absence of an objection to the argument.

13. Criminal law ⇐1037(1, 2)

Where court in grand theft prosecution instructed jury that neither prosecution nor defense was required to call as witnesses all persons shown to be present at any of the events involved in the evidence or who might appear to have some knowledge of the matters in question in the trial, and counsel for defendant explained to jury that reason for his failure

to call defendant's father as a witness was because he did not wish to embarrass defendant's father or jury by reason of some facial impediment which the defendant's father possessed, and defendant's counsel made no assignment of misconduct in relation to argument of district attorney with reference to failure to call defendant's father as a witness and did not ask the court to admonish the jury in respect thereto, such argument of the district attorney was not reversible error.

14. Criminal law ⇐792(3)

Where court in grand theft prosecution instructed jury to effect that if jury was convinced, beyond a reasonable doubt, that defendant, either actively and personally committed offense charged or aided "and" abetted any other person or persons to commit the offense, then it must find defendant guilty, and that all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid "and" abet in its commission, though not present, shall be tried as principals, jury was sufficiently informed that before it could convict defendant as one who aided and abetted another in commission of offense charged, it was necessary to prove that he not only aided in its commission but that he did so with a guilty knowledge of the wrongful purpose of the perpetrator with an unlawful intent. Pen. Code, §§ 31, 32, 971, 972.

15. Criminal law ⇐564(5)

In grand theft prosecution in the County of Tulare, evidence that stolen property was located at the Village of Yettem was sufficient to establish that the theft occurred in the county of Tulare, since court would take judicial knowledge of the fact that Yettem is in the county of Tulare.

Morris B. Chain, Bakersfield, Bradley & Bradley, Visalia, for appellant.

Fred N. Howser, Attorney General, Dan Kaufmann, Deputy Attorney General, for respondent.

GRIFFIN, Acting Presiding Justice.

It is charged in an information containing four counts, first, that on December 12, 1949, defendant unlawfully committed the crime of grand theft by voluntarily taking a trailer load of cotton belonging to one W. H. Richards; second, that he unlawfully took a four-wheel cotton trailer belonging to Kenneth Richards, without his consent; and the third and fourth counts charged respectively that on November 8, 1949, defendant unlawfully took a trailer load of cotton and also a trailer from one Robert Hamilton.

A trial by jury resulted in a conviction on the first two counts and a verdict of not guilty on a third and fourth count. Defendant appealed from the judgment pronounced. He first challenges the sufficiency of the evidence to support the verdict.

On December 12, the prosecuting witness, Richards, a cotton raiser who resided in Dinuba, was picking cotton by machine at a ranch which was located about a mile south and a little west of the ranch owned by defendant at Yettem. He left his field about 6 o'clock in the evening, after dark, and at the time of his departure there were three trailer loads of cotton in his field. When he returned the next morning about 9 o'clock, he discovered that one of the trailers was gone. It had contained a normal load of cotton (about 7,600 pounds or about 7 bales, approximately, valued at $900). The cotton was owned by Richards, and the missing trailer was owned by a cousin of his. Richards summoned the sheriff. At the location where the trailer had been left the previous evening they found tire tracks with 7 grooves in a saw-tooth pattern. Similar tracks were noted the same day at the same place by others. One rear tire of the missing trailer had a diamond-type tread with a smooth place in the center. The other rear tire had a "W" type of tread with a smooth place in the center. The tread marks of these rear tires appeared at the scene where the trailer had been loaded the previous evening. These tire tracks indicated that the vehicle, bear-

ing the 7-groove saw-tooth tread tires, had backed up to the trailer. It was hitched onto it and then hauled from the Richards property to the near-by county oiled road. Defendant's ranch adjoined that of Richards. To the east of defendant's home was a road running in a north and south direction and parallel to defendant's fields, which fields were divided into parcels by a ditch. Eighty acres of the defendant's land was denominated the "south 80 acres". The north 15 acres adjoined defendant's house. A witness Hamilton, who had previously lost a trailer load of cotton, testified that when he learned of the loss by the witness Richards, he chartered an airplane and flew over the area looking for the abandoned trailer and a new cotton stock pile, because he knew stock-piling was not necessary at that time of the year because the gin was "ginned up" within 24 hours. He testified that he was unable to locate the type of trailer described by Richards but he criss-crossed over the Yettem area to cover the Johnson families' ranches; that he located what he thought was an abandoned trailer and what looked like an old stock pile near it; that after further search he noticed, on the ranch of defendant Ted Johnson, a full cotton trailer in front of his house and an empty trailer on the road in front of it; that particularly in the 80-acre field, he noticed in a cleared area, evidence of recent stock piling; that it stood out very plainly from the air as though it was painted white because the other stock piles were a dull grey due to rains which occurred about December 7; that he landed at the airport and reported his findings to the deputy sheriff. The following day he accompanied the deputy sheriffs, constable, and other interested parties to the ranch operated by defendant. The Richards trailer was found abandoned about 10 miles north of Yettem on the paved highway. It had mud on the tires and under the bed of the trailer. The racks were laid on top and tied down. One of them appeared to have been pried off with a bar or an automobile jack, which cut into the timbers and caused them to splinter and shatter and break off some of the wood. The tires from this trailer were offered in evidence. Sketches, photographs and plaster casts of tire tracks found not only upon the Richards property but upon the property owned by defendant, were made and received in evidence. One inverted "W" track was found between the defendant's house and the canal where the tire had passed through soft mud. In another place was found the indentation of the "diamond" marked tread similar to one of the tires received in evidence. A similar mark was found in the cleared area on the south 80 acres. Tractor tire marks apparently had pretty well obliterated all tracks surrounding that area. This cleared area gave evidence of the fact that a short time previous to the officers' visit to defendant's ranch a trailer load of cotton had been dumped from the Richards trailer onto the ground and had been re-loaded onto another trailer and hauled to the gin. A fresh tire mark, similar to those received in evidence, was found under the remains of the cotton stack left upon the ground. One of the officers discovered pieces of wood missing from the sideboards of the Richards trailer at that spot. Samples of the wood particles were sent to the State Division of Criminal Identification and Investigation for examination. Soil samples were also taken from the mud on the tires and body of the trailer as well as those of Tom Johnson's truck. This truck was owned by defendant's father, and tire marks similar to the tires on that truck were found on the Richards' ranch as well as on defendant's ranch, particularly at the cleared spot indicated on the south 80 acres. The result of this examination showed that the wood particles found on defendant's ranch and those on the Richards trailer were identical and that these parts fitted together perfectly. The result of the soil analysis indicated that the mud on the trailer and the Johnson truck were similar and that the soil samples taken from the Richards ranch and that taken from the mud on the truck and trailer were dissimilar.

Defendant's brother, who testified on behalf of the people, stated that on December 13, he worked for his brother on his broth-

er's ranch; that he helped him load the cotton off the ground into a trailer from the cleared area; that his other brother Unica, and Paskell January also helped; that they started to load it with hay forks but later defendant went home and brought back the picking machine and loaded it with that; that one trailer and a part of another were thus loaded; that the trailer was then hauled out of the field with a tractor and left in front of defendant's house; that in the evening of the day previous to the loading, defendant Johnson told him that he wanted him to help him load cotton the next day. The loaded trailer, containing about 6,006 pounds, was hauled to the gin by defendant's father, Tom Johnson. The other trailer contained about 3½ bales of cotton, which defendant took to the gin. An investigation of the 80 acres on defendant's south field showed that only 27 rows had been picked between the time of the rain and the time when the examination was made. Estimates of the yield from these 27 rows varied from a bale and a half suggested by one witness, to 3½ bales suggested by a defense witness, and all cotton picked in that area had been previously taken to the gin. Records of the gin were received in evidence and showed that defendant delivered 4,570 pounds or 3 bales on December 12, *9,580* pounds or 7 bales on *December 13,* and on the 27th of December 4 bales; January 5, 1950, 4 bales; January 7, 3 bales; and January 9, 3 bales. The manager of the gin where the defendant took his cotton testified that he had previously estimated defendant's total yield as 80 bales and that he had, up to that time, received 97 bales. However, he did testify that his estimate was only an estimate and there could possibly be this much variance. There was evidence that about December 11, defendant returned a cotton loader, of which he was a part owner, to his neighbor, stating that he was through with it. Defendant also admitted that he was working in this field in the late evening of December 12 and that he dug holes in the ground for the purpose of setting a trailer in them to make it easier to load. Defendant also admitted having a conversation with Richards on the evening of December 13. Although he told Richards nothing about it, he stated he had previously heard of the theft of the cotton.

There is evidence that the officers made search of the automobiles and trucks in the vicinity of Yettem for tires similar to those which were on the Johnson truck and were unable to find any of that particular type and marking. One of the officers at the gin, after hearing of the theft, also made investigation of trucks, over a period of time, coming into the gin for unloading purposes, and found no trucks having tires of this particular design.

Defendant's answer to the charge was that after working late in the field that evening, he went home, had dinner, went to a near-by grocery store with his wife, and then visited a neighbor until about 11 p. m.; that at that time he and his wife returned home and retired. He denied leaving the house that night. He also denied taking the trailer or the cotton or having any part in such taking. He produced several corroborating alibi witnesses as well as a group of character witnesses who testified as to his general reputation in the community. He also produced the testimony of his brothers endeavoring to corroborate his story in reference to his cotton picking activities for the previous week, which varied somewhat from the testimony produced by the people's witnesses. There was evidence that automobile tire tracks similar to the tires on Tom Johnson's truck, were found on the property of *Mr. Hamilton* at the time he lost his cotton trailer and load of cotton.

The force of defendant's argument is that since the prosecution did not produce any direct evidence to connect him with the commission of the alleged offenses; that since no one saw him at or in the vicinity of the cotton that was supposedly stolen; and that since no one saw him in possession of the trailer that was taken, the prosecution failed to produce sufficient evidence upon which to convict him; that since defendant established that he did not deliver cotton to the gin in any unusual

quantity, that since he showed that he was picking cotton on his own premises at the time the theft occurred, and that he had nothing whatever to do with the cotton or trailer of the complaining witnesses, and since all of the people's testimony was "buttressed" by the testimony of numerous character witnesses who testified to the good character of defendant, and since the prosecution failed to rebut their testimony, the defendant more than overcame any indication of guilt on his part that may have been established by the circumstances presented, citing People v. Flores, 58 Cal.App. 2d 764, 137 P.2d 767; and State v. Henry, 66 Idaho 60, 154 P.2d 184.

[1] The evidence is mainly circumstantial and must be examined in the light of the well established rules on appeal. We must assume in favor of the verdict the existence of every fact which the jury could reasonably have deduced from the evidence and then determine whether such facts are sufficient to support the verdict. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

[2, 3] The evidence clearly establishes that the complaining witness's trailer and load of cotton were stolen some time after dark on the evening of December 12, or the morning of December 13. Counsel for defendant concedes this fact. The evidence sufficiently establishes that it was Tom Johnson's truck that hauled the trailer and cotton onto the defendant's premises, and that the same trailer was unloaded there. Whether defendant Ted Johnson was actually driving the truck is not clearly determinable. There is evidence that defendant was, in fact, late that evening, working in the south 80 acres near the complaining witness's ranch and that he was the guiding hand in supervising the employment of persons for the purpose of loading stock piled cotton into a different trailer the following morning. The cotton so loaded was taken by defendant's father by means of the same truck, the following day, to the cotton gin, and the proceeds were credited to defendant. The jury was justified in believing that if defendant did not actually drive the truck from the complaining witness's premises that he did in fact aid and abet another or others in the commission of that offense. The finding of the several pieces of sideboard of the complaining witness's truck on defendant's property at the place indicated was strong evidence that the contents of the complaining witness's truck were removed to defendant's premises, and the circumstances surrounding the disposition of the cotton and the trailer thereafter point directly to the defendant Ted Johnson as having committed the offenses charged or aided and abetted in their commission. The jury was the one to determine the question of the veracity of the testimony of defendant and his witnesses, as opposed to the circumstances related and as to whether or not defendant had sufficiently established an alibi. People v. Ash, 88 Cal.App.2d 819, 826, 199 P.2d 711; People v. Egan, 77 Cal. App. 279, 281, 246 P. 337. The jury might well have believed that the defendant committed or aided and abetted in the commission of the crimes notwithstanding the testimony of the character witnesses. People v. French, 137 Cal. 218, 69 P. 1063.

[4] The next complaint pertains to the giving of certain claimed erroneous instructions pertaining to aiding and abetting. Instructions were given embodying Penal Code sections 31 and 32, as to who are principals and who are accessories, together with a general instruction to the effect that the fact that others "have violated the law with impunity is no defense and if you believe beyond a reasonable doubt that Ted Johnson and others who are not before the court took and carried away the personal property of * * *" W. H. Richards, or that they "drove and moved the trailer of Kenneth Richards, without the consent of the owner thereof, and with intent to deprive the owner thereof of the said vehicle, you must find the defendant, Ted Johnson, guilty as alleged * * *"

It is defendant's contention that the trial court should not have instructed the jury on aiding and abetting because there was no evidence to show he aided or abetted any one. There is no merit to this contention for the reasons heretofore expressed. People v. Latona, 2 Cal.2d 714, 726, 43 P.2d

260; People v. Burke, 18 Cal.App. 72, 104, 122 P. 435. The jury was fully instructed as to the quantum of evidence necessary to be established before defendant could be convicted.

[5, 6] It is claimed that one of the instructions which states that "The fact that others have violated the law" with impunity is no defense, is in effect a statement by the trial judge to the jury "as a fact, that someone has violated the law and has told the jury that as an undisputed fact there has been a theft of cotton and that someone other than defendant participated in that theft". The evidence is undisputed that some one did violate the law and did take and carry away the personal property of the complaining witness. Counsel for defendant, not only in his brief but in his argument before the jury, conceded this fact but denied that defendant Ted Johnson had any part in it. The remaining portion of that instruction clarifies the former portion of it. Under the facts established no error was committed. The instruction must be viewed as a whole. People v. Garnier, 95 Cal.App.2d 489, 213 P.2d 111; People v. Weatherford, 87 Cal.App.2d 275, 278, 196 P.2d 832.

[7] It is next claimed that the trial court committed error in instructing the jury in the language of Instruction No. 235 CALJIC, pp. 192-193, on the law pertaining to the possession of stolen property. The instruction told the jury that the mere possession of stolen property unexplained by the person having possession, is not sufficient to justify a conviction. However, it may be a circumstance to be considered in connection with other evidence in determining the question of innocence or guilt. Defendant's complaint of this instruction is that there is no evidence showing that the defendant ever had possession of the stolen property and therefore such an instruction should not have been given. Since it has been determined that there is sufficient circumstantial evidence to show that the stolen property was on defendant's ranch and was apparently under his dominion and control, and that the cotton was subsequently loaded by him and taken to the gin mill by his authority to be ginned for him, soon after the theft, this instruction was proper. People v. Taylor, 4 Cal.App.2d 214, 40 P.2d 870. This conclusion is not contrary to the holding in People v. Hurley, 60 Cal. 74, 44 Am.Rep. 55, cited by defendant.

[8] The next complaint is that since the standard instruction was given to the effect that it was not necessary that there should exist an intent to violate the law or to do a wrong because criminal intent exists whenever a person does that which the law declares to be a crime, such instruction is contrary to an instruction given to the effect that in every crime there must exist a union of act and intent, citing People v. Gherna, 80 Cal.App.2d 519, 524, 182 P.2d 331. We see no merit to this complaint. Defendant does not deny that the jury was instructed on the necessity of finding a specific intent in order to convict. This requirement was covered by several of the given instructions. Comparable instructions were given in People v. Raffington, 98 Cal.App.2d 455, 220 P.2d 967. A similar contention was there made. The court held that the instructions were proper.

[9] Defendant argues that a violation of section 499b of the Penal Code was an included offense under a charge of violation of Vehicle Code section 503, and that it was the duty of the trial judge, on his own motion, to have instructed the jury of this fact. No authority is cited in support of this argument. The issue before the jury was whether or not the defendant committed the offenses charged or participated therein, and on this issue the jury was fully instructed. In the absence of a request for an instruction to this effect, the defendant is not in any position to complain for the first time on appeal. People v. Ross, 89 Cal.App. 132, 139, 264 P. 314; People v. Owens, 79 Cal.App.2d 290, 300, 179 P.2d 401. Furthermore, under the evidence, it can scarcely be contended that the defendant took the trailer within the meaning of the so-called "joy-ride statute", Sec. 499b, Penal Code. See People v. Orona, 72 Cal.App.2d 478, 164 P.2d 769.

[10] Then follows the statement that prejudicial error was committed by the court in failing and refusing to submit to the jury verdicts on the offense of being an accessory after the fact, and on the offense of receiving stolen property, after having been instructed as to those offenses. The defendant was not charged with the crime of being an accessory after the fact nor was he charged with the crime of receiving stolen property and accordingly, not being an included offense within the charge, there was no duty upon the trial court to submit to the jury forms of verdict as to these offenses. Secs. 971 and 972, Penal Code; 7 Cal.Jur. p. 891, sec. 40; People v. Stakem, 40 Cal. 599; People v. Hawkins, 34 Cal. 181; Sec. 496, Penal Code. Furthermore, the instruction on the subject of accessory after the fact was given in connection with section 31, as well as sections 971 and 972 of the Penal Code, in defining who are the principals concerned in the commission of a crime and whether or not they directly committed the act constituting the offense or aided or abetted in its commission or, not being present, have advised or encouraged its commission. We find no instruction given by the court, and counsel for defendant has not called our attention to any instruction, in which the court defined the offense of receiving stolen property as denounced by Penal Code sec. 496, or which would in any wise indicate that the jury could find the defendant guilty of such an offense.

Prejudicial error is claimed by reason of the alleged misconduct of the district attorney in his argument to the jury. During the course of the argument the prosecutor stated that the mere filing of an information did not make the defendant guilty and that he is presumed to be innocent "but on the other hand, both the sheriff's office and the district attorney's office seem to have spent a lot of time on this case and they seem to think that they have a guilty man; and they seem to think the guilty man is Ted Johnson." Defendant cites 8 Cal.Jur. 268, sec. 329; People v. Edgar, 34 Cal.App. 459, 467, 167 P. 891; and People v. Cooper, 36 Cal.App.2d 6, 12, 96 P.2d 1012, wherein it is stated that the prosecutor should not attempt to argue to the jury as an individual rather than in his official capacity, and that he should not add the weight of his personal opinion to the evidence in support of his cause. The record shows that Tom Johnson, defendant's father, and owner of the truck here involved, was not called as a witness on behalf of the defendant to testify as to either his whereabouts or the whereabouts of the truck on this particular evening. In summing up the case, the district attorney remarked: "Incidentally, where is this Tom Johnson? We hear about Tom Johnson all during the trial, but Tom Johnson never took the stand in favor of his son. I wonder why not? * * * I wonder if it could be that Tom Johnson fears the very fate, Paskell January, impeachment * * *. Do you suppose Mr. Smee, in the investigating of this case, along with the deputy sheriffs, would not have taken a statement from Tom Johnson? * * * He is the owner of those tires. He has been in and out of this thing all the time * * *. Maybe Tom Johnson is so afraid of making a statement that he would incriminate himself * * *." It is claimed that the inflammatory and prejudicial nature of the above arguments is self-evident; that they are unfounded upon any testimony, and are remarks that are not based on any evidence in the case; that a comment on the failure of any certain witness to appear is prejudicial error, particularly where such witness was equally available to either party, citing People v. Frank, 129 Cal.App. 119, 125, 18 P.2d 719; and People v. Piazza, 84 Cal.App. 58, 83, 257 P. 592.

In discussing the production by the defendant of a goodly number of character witnesses, the prosecutor stated: "Alger Hiss had some character witnesses * * I think that the character witnesses that Alger Hiss put on were of considerable more prominence than those this defendant put on. Yes, sir, Hiss brought two United States Supreme Court Justices in to testify to his character, and as to his truth, * * * and that in itself didn't stop Alger Hiss from being convicted * * *. As a matter of fact, Harry Bridges was

convicted by a jury recently. He brought in some character witnesses and I think he brought in a Catholic Priest as a character witness and that didn't stop the jury one bit. They still found him guilty. The mere fact that a number of people—and I certainly am not casting any aspersions on them at all, I am sure they are telling Ted Johnson's reputation up until now has been good. Neither am I saying that the Supreme Court Justices that appeared for Alger Hiss were in any way misstating the truth, because apparently in the past Alger Hiss did have a good reputation."

It is claimed that it was prejudicial misconduct on the part of the prosecuting attorney to refer to the Alger Hiss trial and the Harry Bridges trial in a repeated attempt to depreciate the force of the testimony of the defendant's character witnesses; that it was debatable whether the facts of these cases might have been matters of common knowledge and that the average layman might not even be aware that character witnesses were put on the stand in either of these cases. Counsel for defendant concedes that he did not object to nor did he move to strike the argument of Counsel to the jury pertaining to the matters set forth and did not ask the court to admonish the district attorney in reference thereto. He claims that this failure to object was not vital because the misconduct was apparent and sufficient to cause a possible miscarriage of justice, citing People v. Hadley, 84 Cal.App.2d 687, 692, 191 P.2d 517; People v. De Vries, 52 Cal.App. 705, 710, 199 P. 867; and People v. Gilliland, 39 Cal.App.2d 250, 264, 103 P.2d 179.

[11] As to the first claimed error regarding the expression of opinion that the sheriff's office and district attorney's office *seemed* to think that Ted Johnson was the guilty man, the defendant is segregating a small portion of the record from its context. When that portion is examined in relation to the entire argument it is clear that he was basing his remarks upon an analysis of the evidence in the case. It did not therefore constitute prejudicial error, particularly where such statement was not objected to nor assigned as error. People v. Owens, 11 Cal.App.2d 724, 54 P.2d 728. It does not appear from the statement that the jury could have been misled into accepting any substitute for evidence. In the Cooper case, relied upon by defendant, no objection was made to the argument, and the court affirmed the judgment of conviction. In the Edgar case, supra, strenuous objection was made and the judgment of conviction was reversed but the court pointed out that the misconduct of the district attorney in that case was objected to and the prosecutor continued such misconduct in spite of the warnings of the trial court. This charge cannot be laid at the door of the district attorney in the instant case.

[12] As to the prosecutor's reference to the Alger Hiss and Harry Bridges trials and as to the character witnesses appearing therein, it might be properly questioned whether all of the facts of those cases were of such notoriety that they became commonplace and within the wide range of discussion, illustration and augmentation of counsel, but it can hardly be said that the trials, some of the claimed facts and the results were not generally known or of common knowledge. The gist of this portion of the prosecution's argument was to illustrate that persons who are of good character, as shown by the best intention character witnesses, may still be found guilty if the evidence is present to show the commission by them of the crime charged. No objection was made to this illustration or discussion at the time and the court was not asked to admonish the jury or the prosecuting attorney in respect thereto. It is the general rule that in the argument of the district attorney before the jury, the range of discussion, illustration and argument is properly very wide, and matters of common knowledge and historical facts may be referred to and interwoven in such argument. People v. Burke, 18 Cal.App. 72, 122 P. 435. Under the circumstances related and in the absence of an objection to the argument, we conclude that the statement did not constitute prejudicial error. People v. Stembridge, 99 Cal.App. 2d 15, 221 P.2d 212; People v. Agnew,

16 Cal.2d 655, 107 P.2d 601; People v. DuBois, 16 Cal.App.2d 81, 87, 60 P.2d 190, and cases there cited.

[13] These same authorities would be cited and the same conclusion must be reached in reference to the prosecutor's statement in reference to the failure of Tom Johnson, father of defendant, to testify in defendant's behalf. It must be remembered that throughout the trial the prosecution was insisting that either defendant himself or some one other than defendant drove the truck and hauled away the trailer and its contents onto the defendant's premises and that defendant and his father later conveyed them to the cotton gin. It is quite apparent that neither the prosecution nor the defense was obliged to call Tom Johnson as his own witness. The court instructed the jury that neither the prosecution nor the defense was required to call as witnesses all persons who were shown to be present at any of the events involved in the evidence or who might appear to have some knowledge of the matters in question in the trial. It does appear unusual that the defendant, under the circumstances related, preferred not to call him as his witness. It might have been error for the district attorney to discuss unfavorably the failure of the accused to produce witnesses, and to make other insinuations resulting from such failure, when the witness was equally available to the state. People v. Harris, 80 Cal.App. 328, 251 P. 823; People v. Piazza, 84 Cal.App. 58, 257 P. 592. We do not conclude that it was prejudicial misconduct, particularly where counsel for defendant endeavored to explain to the jury the reason for his failure to call that witness and predicated it upon the fact that he did not care to embarrass the witness or the jury by reason of some facial impediment which the witness possessed, and where counsel made no assignment of misconduct in relation to the prosecutor's argument and did not ask the court to admonish the jury in respect thereto. Counsel for defendant actually undertook to answer the prosecutor's argument, indicating thereby that at the time, there was no thought in his mind that the prosecutor's remarks were not proper.

The reason for the rule requiring assignment of misconduct and a request that the jury be instructed to disregard it is that the trial court must be given the opportunity to obviate the harmful results, if any, by appropriate instructions to the jury. Furthermore, the trial judge had an opportunity to consider the alleged misconduct on the motion for new trial and his rejection of the contention indicates the lack of prejudice to the defendant. People v. Macias, 77 Cal.App.2d 71, 89, 174 P.2d 895; People v. Sarazzawaski, 27 Cal.2d 7, 15, 161 P.2d 934.

Defendant cites the case of People v. Ponce, 96 Cal.App.2d 327, 215 P.2d 75, for the proposition that it was error for the trial judge to fail to define the words "aid and abet" to a greater extent than defined by the proffered instructions.

The court instructed the jury in the exact language of sections 31 and 32 of the Penal Code to the effect that if it was convinced, beyond a reasonable doubt, that defendant, either actively and personally committed the offense charged or aided *and abetted* any other person or persons to commit that offense, then it must find the defendant guilty. In another instruction embodying the provisions of sections 971 and 972 of the Penal Code, the jury was told that all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or *aid and abet* in its commission, though not present, shall be tried as principals. This was followed with an instruction that in every crime there must exist a union of act and intent, and that criminal intent exists wherever a person intentionally does that which the law declares to be a crime.

Under the instructions given then, the jury was, in effect, told that if defendant *aided and abetted* in the commission of the crime, before he could be found guilty of such crime, there must exist a union of act and intent to commit such crime.

[14] People v. Ponce, 96 Cal.App.2d 327, 215 P.2d 75, 77, relied upon by defendant, was a case construing secs. 209 and 210 of the Penal Code, which use the term "aids *or* abets". It properly held that the in-

struction should have been "aid *and* abet", notwithstanding the language of the sections. Defendant's counsel seeks some comfort in the dicta set out in the opinion pertaining to the necessity of giving a further instruction, on the court's own motion, defining the term "aid and abet". The case there cited as authority for this statement is People v. Dole, 122 Cal. 486, 55 P. 581, 68 Am.St.Rep. 50. That case does not support the dicta. It clearly holds that it would be error to use the term "aids *or* abets" for the reasons stated but if the court had used the term "aid *and* abet", the use of these words in the conjunctive included not only aiding in the commission of the crime but doing it with the "knowledge of the wrongful purpose of the perpetrator". To the same effect is People v. Wong Hing, 176 Cal. 699, 169 P. 357, 359, criticized in People v. Ponce, supra. There the Supreme Court again held that "The term 'aiding and abetting' are commonplace words, the meaning of which the jurors must be deemed to have understood; hence, and especially in the absence of a request therefor, the court was not called upon of its own motion to define them." See, also, 7 Cal. Jur. 889, sec. 39. Webster's New International Dictionary, 1929, defines "abet" "* * * 2. To instigate, encourage, support, or uphold, as by aid or countenance; —now chiefly in a bad sense, and distinguished from *aid* as implying a guilty knowledge and wrong intent; as, to *abet* a crime; to *abet* an insurrection." See, also, Vol. 1 Words & Phrases Permanent Edition, Perm. Ed., p. 70. We conclude that the jury was sufficiently informed by the instructions given that before it could convict the defendant as one who aided and abetted another in the commission of the offense charged, it was necessary to prove that he not only aided in its commission but did so with a guilty knowledge of the wrongful purpose of the perpetrator with an unlawful intent.

[15] Next, counsel for appellant contends that the prosecution failed to show that the theft occurred in the County of Tulare. The charge is that it occurred in that county and the evidence shows that the complaining witness' property was at the village of Yettem. No contention was made of this point during the trial. The court will take judicial knowledge of the fact that Yettem is in Tulare County. All of the evidence clearly indicates that the offense occurred in that county.

Finally, it is claimed that the trial court abused its discretion in refusing to grant a new trial. The arguments made under this contention are but restatements of the arguments made on the appeal from the judgment. The jury's verdict was supported by the evidence. The verdict was reached under proper instructions. Defendant was accorded a full and fair trial, and no prejudicial error resulted.

Judgment and order affirmed.

MUSSELL, J., concurs.



99 Cal.App.2d Supp. 887

FINLEY et al. v. WINKLER.

Civ. A. 7417.

Superior Court, Appellate Department, Los Angeles County, California.

Sept. 15, 1950.

Action by Lyle V. Finley and another against Walter Lee Winkler, for damages arising out of an automobile collision, wherein defendant filed a cross-complaint. The Municipal Court of City of Pasadena, William E. Fox, J., entered a judgment that neither plaintiffs nor defendant recover judgment for damages and plaintiffs appealed. Some time after the accident in question and after filing of the complaint but before trial, plaintiffs Finley and Ruth Hershey were married. The Appellate Department of the Superior Court, County of Los Angeles, Stephens, J., held that the negligence of a husband is not imputable to the wife as to a cause of action existing in favor of wife prior to marriage.

Judgment affirmed in part and reversed in part with directions.

1. Appeal and error ⇐717

The Appellate Department of the Superior Court could consider the written opinion of trial judge to determine process by which judgment was reached or basis upon which trial court acted.

2. Property ⇐5½

The right to recover damages for personal injuries, as well as money recovered as damages, is property, and may be regarded as a chose in action. Civ. Code, §§ 14, subds. 1, 3, 654, 655, 953, 1427, 1458.

3. Husband and wife ⇐248½

A chose in action accruing to a wife before her marriage is wife's separate property. Civ.Code, §§ 157, 162.

4. Negligence ⇐89(2)

Negligence of a husband is not imputable to the wife as to a cause of action existing in favor of wife prior to marriage.

5. Automobiles ⇐244(2, 41)

Evidence sustained finding of trial court that both plaintiff driver and defendant motorist were guilty of negligence in an automobile collision.

Forgy, Reinhaus & Forgy, and Mark A. Soden, all of Santa Ana, for appellants.

John H. Poole, Pasadena, for respondent.

STEPHENS, Judge.

Plaintiff Lyle Finley was the driver and plaintiff Ruth Hershey was a passenger in an automobile which collided with another car driven by defendant. Plaintiffs brought this action alleging negligence on the part of defendant, and the latter answered alleging contributory negligence on the part of driver Finley, and also filed a cross-complaint. The case was tried by the court without a jury, findings were waived, and judgment was that neither plaintiffs nor defendant recover judgment for damages. Plaintiffs appeal. Sometime after the accident and after filing of the complaint, but before trial, plaintiffs Finley and Hershey intermarried.

It appears from the settled statement that after trial and submission, the following "opinion" was rendered by the trial judge on November 22, 1949:

"The Court finds from all the circumstances and from the evidence given at the trial of this case, that the operators of both vehicles were each guilty of negligence which contributed to the happening of the accident in question.

"The plaintiff Ruth Hershey, now being the wife of the plaintiff Lyle V. Finley, his negligence is imputed to her, which also bars her recovery.

"The judgment will therefore be: That the plaintiffs will take nothing by reason of their complaint on file herein and that defendant will take nothing by reason of his cross-complaint on file herein. Neither party to recover their costs of Court. See 2 Cal.Jur.Supp. 610."

Two problems are presented upon this appeal: (1) may this "opinion" of the trial court be considered by us for the purpose of discovering the process by which the trial judge arrived at his conclusions and, (2) the cause of action having accrued in favor of Ruth Hershey, a single woman, would any award of damages therefor made to her after her marriage be community property and consequently be defeated by reason of the contributory negligence of her then husband?

[1] Upon the first point, we have concluded that in such a situation as that herein presented the rule that it will be presumed by a reviewing court that the trier of facts made all determinations of fact and that all findings should be implied which are necessary to support the judgment or order and which would find support in the evidence has now been relaxed at least to the extent that we may now consider the written opinion of the trial judge to determine the process by which judgment was reached or the basis upon which the court acted. This was clearly decided by the Supreme Court in Union Sugar Co. v. Hollister Estate Co.,

1935, 3 Cal.2d 740, at page 750, 47 P.2d 273; and, as said in Guardianship of Gestner's Estate, 1949, 90 Cal.App.2d 680, at page 686, 204 P.2d 77, at page 81, now "is well established." In Satchell v. Ind. Acc. Comm., 1949, 94 Cal.App.2d 473, 475, 210 P.2d 867, 868, the court, speaking through Mr. Presiding Justice Shinn, stated the principle broadly, as follows: "The rule that it will be presumed by a reviewing court that the trier of facts made all determinations of fact, and that all findings should be implied which are necessary to support the judgment or order, and which would find support in the evidence, has limitations which a reviewing court cannot conscientiously ignore. If the record clearly shows that the trier of facts declared that a state of facts entering into his decision had or had not been established by the evidence, it would be an absurd reliance upon a fiction, and a grave injustice, for a reviewing court to imply a finding in support of the judgment or order contrary to such oral declaration." See also Fields v. Michael, 1949, 91 Cal.App.2d 443, 446, 205 P.2d 402; Trans-Oceanic Oil Corp. v. Santa Barbara, 1948, 85 Cal.App.2d 776, 790, 194 P.2d 148; Noble v. Kertz & Sons, 1945, 72 Cal.App.2d 153, 158, 164 P.2d 257.

As the opinion of the trial judge states that "The Court finds from all the circumstances and from the evidence given at the trial of this case, that the operators of both vehicles were each guilty of negligence which contributed to the happening of the accident in question"; and "The plaintiff Ruth Hershey, now being the wife of the plaintiff Lyle V. Finley, his negligence is imputed to her, which also bars her recovery," we are now brought to the second problem.

[2] A reading of the following several Civil Code sections bearing upon the subject discloses beyond question that the cause of action in favor of plaintiff Ruth Hershey was property: Section 14, Civil Code, provides that "1. The word 'property' includes property real and personal. * * * 3. The words 'personal property' include money, goods, chattels, things in action, and evidences of debt"; section 953, "A thing in action is a right to recover money or other personal property by a judicial proceeding"; section 654, "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may be ownership is called property"; section 655, "There may be ownership of * * * all obligations * * *"; section 1427, "An obligation is a legal duty, by which a person is bound to do or not to do a certain thing"; and section 1458, "A right arising out of an obligation is the property of the person to whom it is due * * *." In Scott v. McPheeters, 1939, 33 Cal.App.2d 629, 632, 92 P.2d 678, 680, 93 P.2d 562, the court quotes this broad definition of property from 50 Corpus Juris, page 736, section 7, " 'Generally, the subjects of property comprise all valuable rights or interest protected by law. * * * In the broad sense of the term, 'property' includes * * * choses in action. * * * In modern legal systems, property includes practically all valuable rights. The term is indicative and descriptive of every possible interest which a person can have, extends to every species of valuable right or interest, and comprises a vast variety of rights. The right to be protected in a person's privileges belonging to him as an individual or secured to him as a member of the commonwealth is property, as is any valuable interest in or to any object of value that a person may lawfully acquire or hold.' " To this the Court adds: "That definition certainly includes the right to compensation for personal injuries wrongfully inflicted by the wilful or negligent acts of another person." See also Hunt v. Authier, 1946, 28 Cal.2d 288, at page 296, 169 P.2d 913, 171 A.L.R. 1379, where the above case is quoted for the same definition, and Ponsonby v. Sacramento Suburban Fruit Lands Co., 1930, 210 Cal. 229, 232, 291 P. 167, for a similarly broad definition. See also Mortimer v. Young, 1942, 53 Cal.App.2d 317, at page 321, 127 P.2d 950, 952, where it is said that, "A cause of action for tort is, as held in the case last cited, [Everts v. Will S. Fawcett Co., 1937, 24 Cal.App.2d 213,

74 P.2d 815] a 'thing in action.' It is therefore within the provision of section 691 of the Code of Civil Procedure for 'selling the things in action' of the judgment debtor on execution." In the early case of McFadden v. Santa Ana etc., 1891, 87 Cal. 464, at page 467, 25 P. 681, 682, 11 L.R.A. 252, it is said: "The right to recover damages for a personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose in action".

[3] It is equally clear from the following sections of the Civil Code that it was her *separate* property: section 162, "All property of the wife, owned by her before marriage * * * is her separate property"; section 157, "Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling."

As the cause of action was her property before she was married, it continued to be her separate property after marriage. The fact that any recovery of damages to which she may be entitled upon such cause of action occurs after the marriage does not in any way affect her property right therein any more than would the recovery after marriage upon a promissory note (a chose in action) which she owned before; or the changing of previously owned real property into money after marriage. We might well rest our decision upon the case of Morrissey v. Kirkelie, 1935, 5 Cal.App.2d 183, 42 P.2d 361, which is on all fours with ours; in that case an engaged couple, while returning from the courthouse where they filed their notice of intention to wed, met with the accident which resulted in that action, and the same contention now presented was made upon the trial. The court disposed of the contention as follows, 5 Cal.App.2d at page 184, 42 P.2d at page 361: "The further point is urged that the negligence of the driver is imputable to plaintiff because they were husband and wife at the time of trial. Plaintiff's recovery is not community property, since her rights thereto accrued before marriage. The rule that the negligence of a husband is imputable to his wife does not apply here."

There would be no occasion for further prolonging this opinion were it not for the discussion in the more recent case of Franklin v. Franklin, 1945, 67 Cal.App.2d 717, 155 P.2d 637. In that case an interlocutory decree of divorce had been entered, awarding certain property to the wife, and before the final decree was granted the defendant husband suffered injuries for which he brought suit for damages. Upon motion of the wife, the court, in the final decree, awarded her a half interest in defendant's cause of action for damages. In reversing this portion of the decree, the District Court discussed the awkward and impractical situation which would result from such undivided interests in a cause of action and said, 67 Cal.App.2d at page 727, 155 P.2d at page 642: "The limitations upon the right to transfer such a cause of action, or an interest in it, are well illustrated by the rule, which is supported by the great weight of authority, that it is not capable of transfer for the benefit of creditors." The decision then goes on to say, 67 Cal. App.2d at page 727, 155 P.2d at page 642: "The powers of the court were limited to making a division of the community property, and the cause of action was something that could not be partitioned, directly or indirectly, before it had been reduced to judgment. Only then or in the event of a settlement could it be said that defendant had acquired 'property' which was subject to the community property laws." In view of the preceding statement, 67 Cal.App.2d at pages 722, 723, 155 P.2d at page 640, that "It is the ownership of the recovery, and not the mere right to sue, that is controlling", the decision seems to imply that in some manner the ownership of the recovery ceases to be the same as the ownership of the right of action. If this is its purport, we most respectfully disagree; and we are strengthened in this view by the following comment of the Supreme Court in Zaragosa v. Craven, 1949, 33 Cal.2d 315, at page 320, 202 P.2d 73, at page 76, 6 A.L.R.2d

461: "Hence, it must be considered as the present law of this state that the cause of action for personal injuries *suffered by either spouse during marriage,* to whatever extent such cause of action may constitute property (see 67 Cal.App.2d page 725, 155 P.2d 637, Franklin v. Franklin, supra), as well as any recovery therefore, constitutes community property—at least in the absence of agreement otherwise between the spouses. Any contrary implications which may be derived from the language of the Franklin case are disapproved." (Emphasis added.)

[4] By a coincidence, the distinguished author of the Franklin decision is also the author of the decision in Morrissey v. Kirkelie, 5 Cal.App.2d 183, 42 P.2d 361, supra. As the latter holds directly that the negligence of the husband is not imputable to the wife as to a cause of action existing in favor of the latter prior to marriage and this decision is not mentioned in the Franklin case involving a different situation, we do not consider that the discussion in the Franklin case, hereinabove referred to, in any way weakens the effect of Morrissey v. Kirkelie.

[5] The appeal is by both plaintiffs. We have examined the record as disclosed by the settled statement and find that there is sufficient evidence to support the conclusion of the trial judge that both plaintiff Lyle V. Finley and defendant Winkler were guilty of negligence, and therefore we do not find it necessary to order a new trial upon the question of negligence.

The judgment is affirmed as to plaintiff Lyle V. Finley. The judgment that plaintiff Ruth Hershey take nothing is reversed and it is ordered that a new trial be had as to the amount of damages to be awarded, and thereafter that judgment be entered in favor of plaintiff Ruth Hershey (Finley) in the amount awarded.

SHAW, P. J., and BISHOP, J., concur.

36 Cal.2d 116

JACKSON v. UNIVERSAL INTERNATIONAL PICTURES, Inc. et al.

L. A. 21388.

Supreme Court of California, In Bank.

Sept. 28, 1950.

Frederick Jackson brought action against Universal International Pictures, Inc., and others for damages because of the use of the title of plaintiff's play for the title of a moving picture. The Superior Court of Los Angeles County, Henry M. Willis, J., rendered a judgment for the plaintiff, and certain of the defendants appealed. The Supreme Court, Edmonds, J., held that whether title of the play had acquired a secondary meaning, so as to be entitled to protection, was for jury, that question whether secondary meaning of title had been abandoned was for jury, that certain instruction was correct, that damages were not excessive, and that cross examination of an expert witness of the named defendant was not reversible error.

Judgment affirmed.

Prior opinion, 212 P.2d 574.

1. Trade-marks and trade-names and unfair competition ⇐71

An author of a play has no inherent right in the title to his production, and only when the title has acquired a secondary meaning identifying it in the public mind with the play is he entitled to its exclusive use.

2. Trade-marks and trade-names and unfair competition ⇐71

Regardless of any deliberate use by moving picture company of title of play with knowledge of prior use of the title by the author of the play, he was not entitled to damages unless the title had acquired a secondary meaning.

3. Trade-marks and trade-names and unfair competition ⇐71

If words have been used by an author or a manufacturer in such a manner that public has learned to associate the words with the product, book, or play, the words acquire a secondary meaning, so that they are entitled to protection.

4. Trade-marks and trade-names and unfair competition ⇐71

A play may become known to the public by its title, so that it thereby acquires a secondary meaning and attains a protectible status.

5. Trade-marks and trade-names and unfair competition ⇐71

The question whether a title of a literary production has acquired a secondary meaning, so that it will be protected, is one of fact.

6. Trade-marks and trade-names and unfair competition ⇐71

No particular period of use of the title of a literary production is required in order to give the title a secondary meaning which will be protected.

7. Trade-marks and trade-names and unfair competition ⇐71

Where play entitled "Slightly Scandalous" was publicized in three of the largest cities in the country, and rehearsal and production of the play were announced in dramatic and motion picture journals in Hollywood and New York, and the play was advertised in Philadelphia and New York City where it was produced, it could not be said as a matter of law that the title had not acquired a secondary meaning so as to entitle author to recover damages for use of the title by moving picture company for a moving picture, though the play received adverse notices from critics, only about 3,750 persons attended performances of the play, and about two years elapsed before moving picture was released and distributed.

8. Trade-marks and trade-names and unfair competition ⇐71

The title of a play produced only in New York City may acquire a secondary meaning which entitles it to protection throughout the United States.

9. Trade-marks and trade-names and unfair competition ⇐71

A literary product need not be popular before its title acquires a secondary meaning, so that the title will be protected, since notoriety and adverse discussion may bring about widespread identification of the play by its title and may pique the public interest.

10. Trade-marks and trade-names and unfair competition ⇐71

The title of a literary production is not required to be associated specifically with the author in order to give the title a secondary meaning which will be protected.

11. Trade-marks and trade-names and unfair competition ⇐71

Question whether the author of a literary production has abandoned the secondary meaning of its title, so that it is no longer entitled to protection is a fact question to be determined by a jury on substantial evidence.

12. Trade-marks and trade-names and unfair competition ⇐71

Fact that author of play had not produced the play for two years after it had closed in New York, did not compel a holding, as a matter of law, that he had abandoned his rights with respect to secondary meaning which the title to the play had acquired.

13. Trade-marks and trade-names and unfair competition ⇐99

In action by author of play against moving picture company to recover damages because of the unauthorized use by the company of the author's title, instruction given at request of author, that referred to exhibits showing cost of the advertising of the play in certain cities, and that directed jury to limit its consideration to value of title in question and whether it had acquired a secondary meaning as a result of advertising, was proper.

14. Trade-marks and trade-names and unfair competition ⇐98

A verdict of $17,500 to author of unsuccessful play, the title of which had acquired a secondary meaning, for unauthorized use of the title by moving picture company as the title of a moving picture, was not excessive.

15. Appeal and error ⇐1048(6)

In action by author of play against moving picture company to recover damages because of the unauthorized use by the company of the author's title, conduct of counsel of author in asking expert witness of company on cross examination whether he was prejudiced because company had been held for $25,000 damages in another action of the same kind, was not prejudicial, where objection of company was sustained, and jury was directed to disregard the whole incident.

Loeb & Loeb, Adrian A. Kragen, Harry B. Swerdlow and Herman F. Selvin, all of Los Angeles, for appellants.

Wright & Garrett and Harold F. Collins, all of Los Angeles, as amicus curiae on behalf of appellants.

Harold A. Fendler, Beverly Hills, for respondent.

Morris Cohn, Richard L. Rykoff and Aubrey I. Finn, all of Hollywood, Arthur Garfield Hays, New York City, and Morris Lavine, Los Angeles, as amicus curiae on behalf of respondent.

EDMONDS, Justice.

Frederick Jackson, the author of a play which was not a theatrical success, sued to recover damages assertedly resulting from the unauthorized use of its title. The principal ground relied upon as requiring a reversal of the judgment in his favor is that the evidence shows no acquisition by the title of a secondary meaning.

The first count of the complaint alleged that Jackson is the author of a play which he entitled "Slightly Scandalous." The play was rehearsed in Los Angeles and produced in Philadelphia and New York with publicity announcing the times of performance. The title thereby acquired a secondary meaning. Later, Universal produced a motion picture under the same title. Universal's distribution, advertising and showing of its picture misled the public and infringed upon Jackson's right in the title of his play. The second count of the complaint alleged that Universal had made a "deliberate, wrongful and unfair misappropriation and use of plaintiff's name and title" in connection with the motion picture. Universal denied these allegations generally.

The evidence presented upon trial may be summarized as follows:

Jackson is a writer with about 40 years of experience. He has written plays which were produced in New York and London and sold the motion picture rights to several of them. In 1943, he wrote "Slightly Scandalous." In the following year, while the play was being rehearsed in Los Angeles prior to production, a press agent was employed to publicize it. During the next two months about 40 stories concerning it were prepared and distributed to 550 metropolitan and suburban newspapers.

Only a small percentage of this material was published. A one-inch item appeared in the Hollywood Reporter, a trade journal. It stated that the play would open in Philadelphia and be presented in New York two weeks later with Janet Beecher in the leading role. The Los Angeles Evening Herald-Express, with a daily circulation of 325,000, reported that the author was adding final directorial touches to "Slightly Scandalous" before its initial production in Philadelphia.

Variety, a theatrical magazine having a circulation of 600,000 and sold at newstands in the principal cities, included reference to the play in a section entitled "Shows in Rehearsal." The Los Angeles Times, which has a daily circulation in excess of 280,000, mentioned in a story concerning another play that the title of the one in which Janet Beecher was to be starred had been changed to "Slightly Scandalous." Rehearsal would commence in Hollywood immediately, it was said, preparatory to a New York appearance.

The play opened in Philadelphia as scheduled. It was advertised in newspapers there prior to and during its two weeks run, in space ranging from 10 to 60 lines. The producer also placed 20,000 "heralds" in hotels and restaurants and used outdoor advertising with "24-sheets" on 50 poster boards.

The play ran for almost two weeks in Philadelphia. The drama critics were uncomplimentary, and although the theater was nearly filled to its capacity of 1,500 persons at one performance, attendance at all of the others averaged about 200. The total of the audiences at the 15 performances did not exceed 3,000.

The New York opening followed, but the play closed after seven performances. Advertising was carried by 10 newspapers there in space varying from 12 to 50 lines. But, as in Philadelphia, the newspaper comments were critical and the public showed little interest. In a theater which seated 1,000 there was an average attendance of about 100 at each performance. The play has not since been presented.

A witness for Jackson, after qualifying as an expert, testified that "Some of the most successful pictures have been made of plays that have been flops." Examples were cited. This testimony was corroborated by other witnesses.

To establish a secondary meaning to the title of his play, Jackson presented the testimony of five witnesses. Three of them told the jury that they had seen reviews or advertisements of the play and thought that the picture was based upon it. The testimony of the other two was substantially to the same effect.

Other testimony showed that Jackson's agent requested Universal Pictures to "cover" the eastern production of the play after it had been submitted to that company's West Coast story editor during the period of rehearsal in Los Angeles. A report concerning the play and its reception on Broadway was sent to the company's executive offices.

About two years later, Universal released and distributed throughout the country a motion picture by the same name. It was stipulated that three months before this picture was released, Universal knew of Jackson's play and referred to their attorneys the question as to whether the title "Slightly Scandalous" should be selected for their production. The picture originally carried the title, "Oh Say Can You Sing." The attorneys for Universal were notified by Jackson's attorney that his client would sue for damages if the title to his play were used.

Jackson does not claim that there is any similarity whatever between the picture and the play. He bases his cause of action entirely upon the use of the title.

The evidence offered by Universal generally is to the effect that the public did not

connect the motion picture with Jackson's play and only a handful of people had previously heard of the title. In the company's defense, its witnesses stressed the unsuccessful presentations in Philadelphia and New York.

As grounds for the reversal of the judgment, Universal asserts that the evidence is not sufficient to justify the conclusion that "Slightly Scandalous" had acquired and retained a secondary meaning with relation to Jackson's play. The company also challenges an instruction as incorrect and prejudicially erroneous. Instructions offered by it were erroneously refused, it is asserted, and Jackson's damages in the amount of $17,500 are excessive. It is also claimed that the title was abandoned by Jackson's two year non-use of it. Finally, the appellant charges, Jackson's attorney was guilty of prejudicial conduct.

The position of Jackson is that the question as to whether a secondary meaning has attached to a literary or dramatic title is a question of fact. As substantial evidence sufficient to justify the jury's verdict, he refers to the testimony concerning prior use, advertising, and the general impression of the public in New York, Philadelphia and Los Angeles. He also relies upon the statements of his five witnesses that because of the title they associated the play with the motion picture. Nation-wide knowledge of a title is not essential to the acquisition of a secondary meaning, he declares, nor is success of the play a requirement. The correct test, as he analyzes the question, is whether an effect or reaction is created upon the public mind. He also contends that deliberate and unauthorized appropriation of a prior user's name, title or trademark is actionable.

As to the claimed procedural errors, the conduct of counsel was not prejudicial, he asserts, because it was promptly cured by an instruction to the jury. Moreover, the denial of the motion for a new trial was a determination that it did not influence the jury.

The points presented by *amici curiae* for Jackson are broader in scope. It is claimed that secondary meaning is established when the title is identified by the general public and it does not depend upon popularity. Although a play is unpopular or "panned" by the critics, unfavorable comments, or any discussion of the play, fixes the title in the mind of the general public as the product of a particular playwright. Moreover, widespread publicity and advertising renders a title valuable and subject to protection entirely apart from rights derived from secondary meaning. The "general public," they say, need only be a substantial number of people not necessarily residing throughout the nation.

[1, 2] An author of a play has no inherent right in the title to his production. Paramore v. Mack Sennett, Inc., D.C. 9 F.2d 66, 67; Martenet v. United Artists Corp., D.C., 56 F.Supp. 639, 640. Only when the title has acquired a secondary meaning identifying it in the public mind with the play is he entitled to its exclusive use. Warner Bros. Pictures v. Majestic Pictures Corp., 2 Cir., 70 F.2d 310, 311; Amusement S. Corp. v. Academy Pictures D. Corp., 162 Misc. 608, 294 N.Y.S. 279; see Nims, Unfair Competition and Trade Marks [4th Ed.1947], sec. 274-a. Therefore, regardless of any deliberate use by Universal of "Slightly Scandalous" with knowledge of Jackson's prior use, he is not entitled to damages unless his literary product had acquired a secondary meaning.

[3, 4] There is no initial property right in household semantics or words which are merely descriptive, fanciful or geographic in nature. G. & C. Merriam Co. v. Saalfield, 6 Cir., 198 F. 369, 373. However, if words have been used by an author or manufacturer in such a manner that the public has learned to associate them with the product, book or play, they acquire a "secondary meaning". This principle, which was first applied in trademark cases, renders the words or symbols protectible and transferable because of that association. A play may become known to the public by its title, which thereby acquires a secondary meaning and attains a protectible status. Manners v. Triangle Film Corp., 2 Cir., 247

F. 301; Hemingway v. Film Alliance of the United States, Inc., 174 Misc. 725, 21 N.Y.S.2d 827.

[5, 6] In Johnston v. Twentieth Century-Fox Film Corp., 82 Cal.App.2d 796, 813, 187 P.2d 474, 484, the court stated, "The question whether a title has acquired a secondary meaning is one of fact." Other decisions to the same effect are International Film Service Co., Inc. v. Associated Producers, Inc., D.C., 273 F. 585; Bayer Co. v. United Drug Co., D.C., 272 F. 505, 509; Saland v. Monogram Pictures Corp., Sup., 67 N.Y.S.2d 436; Hemingway v. Film Alliance of the United States, Inc., 174 Misc. 725, 21 N.Y.S.2d 827. The Restatement of the Law of Torts, in stating this rule, adds: "No particular period of use is required." (Sec. 716b.)

[7] There is substantial evidence in the record to support the implied finding of the jury that "Slightly Scandalous" had acquired a secondary meaning. Jackson's play was publicized in three of the largest cities in this country. The rehearsal and production of the play were announced in dramatic and motion picture journals in Hollywood and New York. Although only about 3,750 persons attended performances of the play, there is no basis for a holding, as a matter of law, that they and the undetermined number who saw the advertising are not sufficient in number to provide a basis for secondary meaning. The precise size of this segment of the public is important in connection with the amount of damages which should be awarded, but it does not determine whether the title has acquired a secondary meaning.

[8] This court, in speaking of the word "public", has said that it "'* * * does not mean all the people, nor most of the people, nor very many of the people of a place, but so many of them as contradistinguishes them for a few'." Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal.2d 501, 514, 86 P.2d 102, 108. The title of a play produced only in New York may acquire a secondary meaning which entitles it to protection throughout the United States. Aronson v. Fleckenstein, C.C., 28 F. 75; Hemingway v. Film Alliance of the United States, Inc., 174 Misc. 725, 21 N.Y.S.2d 827; Frohman v. Payton, 34 Misc. 275, 68 N.Y.S. 849. And the writer of a play recovered damages for the unauthorized use of its title although it was never produced in any city in the United States but had run for some weeks in Paris, France. Frohman v. Wm. Morris, 68 Misc. 461, 123 N.Y.S. 1090.

[9] Popularity is not a requirement for secondary meaning because notoriety and adverse discussion may bring about widespread identification of the play by its title and may pique the public interest. Likewise, advertising, even of an unpopular play, may cause the public to identify it as one which has been a "Broadway production".

Although some decisions indicate that the word or phrase constituting the title must have been used "* * * long and * * * exclusively by one producer with reference to his article * * *", G. & C. Merriam Co. v. Saalfield, 6 Cir., 198 F. 369, 373, and, in some cases, the length of the use may be persuasive, the essence of the acquisition of secondary meaning is the impact upon the public mind. "The duration of user required to create a secondary meaning can be measured by no accurate test. In the Yorkshire Relish case the time was twenty-five years, * * * in the Anatolia Licorice case, six weeks. From these instances it will be seen that there is no rule as to the length of time required." Nims, Unfair Competition and Trade Marks [4th Ed.1947], vol. 1, sec. 38a, p. 162.

Judge Learned Hand has said in relation to trademarks that "* * * it is the priority of user alone that controls, even though, when the defendant comes into the field, it may not be fully established, or may not even be enough established to have become associated largely in the public mind with the plaintiff's make. * * * Were it not so, it would be of extreme difficulty to show at just what point in time the mark became associated with the maker in enough of his customers' minds to justify the inference that the defendant's use might have become confusing. Therefore, once his use begins, the rest of the public must avoid his fanciful mark." Waldes v. Internation-

al Manufacturers' Agency, Inc., D.C., 237 F. 502, 505.

[10] Universal claims that, in order to gain secondary meaning, the title must be associated specifically with the author of the play rather than with the play. The contention is unrealistic and contrary to authority. "Secondary meaning may exist between a name and the manufacturer or seller whose identity is not known to the buyer * * *. He [the buyer] does not know its [the manufacturer's] name, or its location, or whether it is a corporation or an individual." Nims, Unfair Competition and Trade Marks [4th Ed.1947], vol. 1, sec. 42, pp. 169, 170.

In all probability only a very small percentage of persons who know something about plays can remember or identify the names of the authors. Usually, advertising and publicity are concentrated upon the title and the actors rather than the name of the playwright. There is no logical basis for holding that a public well acquainted with the title and the play could not confer secondary meaning upon that title merely because of unfamiliarity with the author's name.

[11] The question of abandonment falls within the same category; it is one of fact to be determined by the jury upon substantial evidence. International Film Service, Inc. v. Associated Producers, Inc., D.C., 273 F. 585; Goldman v. R.K.O. Radio Pictures, Inc., 149 Misc. 226, 267 N.Y.S. 28. In Goldman v. R.K.O. Radio Pictures, Inc., supra, 267 N.Y.S. at page 29, the court stated: "* * * a lapse of thirteen years in the use of a title, under the circumstances of this case, raises a question of fact as to whether the title ['The Public Defender'] still retains a secondary significance * * *."

[12] In the present case, there is evidence that several plays written by Jackson had been sold to motion picture producers, from two to ten years after they were produced in New York. It is also significant that in the United States, copyrights protect literary and dramatic properties for an initial period of 28 years with the right of renewal. The evidence, that Jackson had not produced his play for two years after it had closed in New York, does not compel a holding, as a matter of law, that he had abandoned his rights.

[13] The instruction given at the request of Jackson and attacked as prejudicially erroneous refers to exhibits showing the extent of the advertising in the eastern cities at a total cost of $3,300. It is argued that although the court correctly directed the jury not to allow compensation for this expense, the cost of the advertising charges should not have been allowed in evidence. But the instruction directed the jury to limit its consideration to "* * * the value of the title in question and whether it had acquired a secondary meaning as hereinbefore defined, as a result of volume or extent of advertising." Considering the instruction as a whole, it correctly presented the applicable rule of law.

The rejected instructions concerned the principle that there is no property right implicit in the name or title of a literary work until a secondary meaning has attached to it. But in at least five different instructions, one of which was requested by Universal, the jury was told that the burden of proving a secondary meaning to the title of his play rested upon Jackson. Read together, they adequately covered the subject.

[14] Considering the issue of damages, the sum of $17,500 does not appear to be excessive. The record includes testimony to the effect that other titles to unsuccessful plays have been sold for larger amounts. The value of property wrongfully taken is a matter for the determination of the jury and the evidence as a whole supports the award in Jackson's favor.

[15] The conduct of counsel attacked as prejudicial was the cross-examination of an expert witness of Universal. He was asked whether he was prejudiced because his employer "was just held for $25,000 damages in an action [of the same kind]." The objection of Universal was sustained, and the jury directed to disregard the whole incident. Another occurrence, cited as misconduct, involved a quarrel between counsel as to which of them submitted a certain document.

There is no showing that the reference to other litigation was untrue. Considering the record as a whole and the ruling upon the motion for a new trial, it cannot be said that the misconduct was prejudicial.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



36 Cal.2d 95

CLEMONS v. CITY OF LOS ANGELES et al.

L. A. 20873.

Supreme Court of California, In Bank.

Sept. 28, 1950.

Action by Charles L. Clemons against the City of Los Angeles, a municipal corporation, wherein certain other defendants intervened, for declaratory and injunctive relief to test the validity of an ordinance of the City of Los Angeles limiting the subdivision of property to certain minimum lot requirements. The Superior Court, Los Angeles County, W. Turney Fox, J., rendered a judgment for defendants and plaintiff appealed. The Supreme Court, Spence, J., held that the ordinance providing that no lots in a certain area held in separate ownership and used for dwelling purposes should be reduced below a minimum width of 50 feet, and an area of 5,000 sq. feet, was constitutional and valid.

Judgment affirmed.

Carter and Schauer, JJ., dissenting.

Prior opinion, 216 P.2d 1.

1. Appeal and error ⇐110

An order denying a motion for a new trial is not appealable. Code Civ.Proc. § 963.

2. Municipal corporations ⇐601(7)

A restrictive zoning regulation pursuant to a municipality's comprehensive and systematic plan of community development, when reasonable in object and not arbitrary in operation, will be sustained as within legitimate exercise of police power. U.S.C.A.Const. Amend. 14, § 1.

3. Municipal corporations ⇐63(1), 122(2)

Zoning regulations enacted pursuant to municipality's comprehensive and systematic plan of community development is to be considered with every intendment in favor of its validity, and a court will not, except in a clear case of oppression and arbitrary limitation, interfere with legislative discretion which has been exercised in adoption of regulation, and it is presumed that measure as a whole is justified under police power, and adapted to promote public health, safety, moral and general welfare. Gen.Laws, Acts 5211b, 5211c; U.S.C.A. Const. Amend. 14, § 1.

4. Appeal and error ⇐931(1)

Where from a consideration of evidence trial court has found certain physical facts and conditions exist in relation to particular property restriction, which would justify regulation by a city through exercise of its police power, all intendments must be indulged to sustain such findings and resulting judgment.

5. Appeal and error ⇐717

A memorandum of an opinion filed by trial judge and included in record will be considered by Supreme Court, in so far as it bears on an interpretation of findings. Rules on Appeal, rule 5(a).

6. Municipal corporations ⇐601(7)

City ordinance providing that no lot in certain area held under separate ownership at effective date and used for dwelling purposes should be reduced below minimum width of 50 feet and an area of 5,000 sq. feet was a valid exercise of police power. Gen.Laws, Acts 5211b, 5211c; Const. art 11, § 6; U.S.C.A.Const. Amend. 14, § 1.

7. Constitutional law ⇐89(1), 278(1) Municipal corporations ⇐601(11)

As applied so as to prohibit an owner of a bungalow court from dividing and conveying each building to a separate owner, a city zoning ordinance providing that no lot held under separate ownership should be reduced below stated minimum size, did not

interfere with constitutional guarantees affecting property rights or right of contract. Gen.Laws, Acts 5211b, 5211c; Const. art. 1, §§ 1, 13, 14; U.S.C.A.Const. Amend. 14, § 1.

8. Municipal corporations ⇐601(4)

Police power, as evidenced in zoning ordinances, has a much wider scope than mere suppression of offensive uses of property and acts constructively and affirmatively for promotion of public welfare. U.S.C.A.Const. Amend. 14, § 1.

9. Constitutional law ⇐81

A property owner's right to unlimited and uncontrolled disposition of property may properly be subordinated to public good under police power. U.S.C.A.Const. Amend. 14, § 1.

10. Constitutional law ⇐190

City zoning ordinance providing that no lot in a certain area, held under separate ownership on effective date and used for dwelling purposes, should be reduced below a stated minimum in area, was not objectionable upon retroactive grounds as destroying vested property rights. Const. art. 1, §§ 1, 14; U.S.C.A.Const. Amend. 14, § 1.

11. Municipal corporations ⇐601(12)

Where city zoning ordinance, in furtherance of general plan of community development, provided that no lot in certain area, held under separate ownership on effective date and used as dwelling purposes, should be reduced below minimum width of 50 feet and area of 5,000 sq. feet, fact that bungalow court owner, who had built before adoption of ordinance, was deprived of realizing a greater profit from disposition of various bungalows to different individuals through subdivision, did not make ordinance arbitrary in application nor preclude regulation of his individual rights in promotion of general welfare. Gen.Laws, Acts 5211b, 5211c; Const. art. 1, § 6; U.S.C.A.Const. Amend. 14, § 1.

12. Municipal corporations ⇐589

Ordinarily a city has no power to legislate concerning validity of transfers of title to realty, for this is a matter over which state has full control.

13. Contracts ⇐136

Where municipality enacted a zoning ordinance under statute empowering a city to impose civil sanctions for violation of municipal ordinances, transactions in violation of ordinance were not void ab initio, but were voidable at option of other parties to transactions. Business and Professions Code, § 11540.

14. Appeal and error ⇐1180(3)

Where Supreme Court found that plaintiff's transaction in violation of municipal zoning ordinance were voidable at option of other parties to transactions, in absence of an appeal by other parties to transactions, trial court's declaration that transactions in question were null and void, was not error. Business and Professions Code, § 11540.

E. H. Delorey and Harold L. Newman, Los Angeles, for appellant.

O'Melveny & Myers, Louis W. Myers, W. B. Carmen, Jr., Sidney H. Wall and William W. Alsup, all of Los Angeles, amici curiae on behalf of appellant.

Ray L. Chesebro, City Attorney, Bourke Jones, Roger Arnebergh, Assistant City Attorneys, Lester L. Lev and Alan G. Campbell, Deputy City Attorneys, all of Los Angeles, for respondents.

SPENCE, Justice.

This action for declaratory and injunctive relief was brought to test the validity of an ordinance of the city of Los Angeles limiting the subdivision of property to certain minimum lot requirements. The trial court held that the ordinance was "constitutional, valid and enforceable," and that certain transactions concluded by plaintiff in violation thereof were "null and void." The propriety of such adjudication cannot be successfully assailed in the light of settled legal principles.

It appears from the agreed statement of facts that within two years prior to the commencement of this action on December 12, 1946, plaintiff purchased the property in question, a bungalow court of nine units which had been built some twenty years pre-

viously and had been used continuously for residential purposes. Located in zone C-2 on Beverly Boulevard, the property was subject to section 12.21-C of the Los Angeles Municipal Code (Ordinance No. 77,000 adopted September 28, 1936, as amended by Ordinance No. 90,500, adopted March 7, 1946) providing that no lot "held under separate ownership" at the law's effective date and "used * * * for dwelling purposes" shall be "reduced in any manner below the minimum lot area, size or dimensions" prescribed—"a minimum average width of fifty (50) feet and a minimum area of five thousand (5000) square feet."

Following his purchase, plaintiff subdivided the property into nine separate parcels, each averaging 925 square feet (25' x 37') and having a bungalow thereon. Through sale or 99-year lease arrangements plaintiff conveyed eight of these parcels to various individuals—transactions contrary to the minimum lot area and width requirements of the ordinance as a zoning regulation. Each parcel was conveyed with an easement to Beverly Boulevard over the walkways within the bungalow court. Two of the parcels had no frontage on any street or alley. The entire property was serviced by only one incinerator and two sewer connections.

[1] Threatened with arrest and prosecution for violation of the ordinance, plaintiff instituted this action for declaratory and injunctive relief from the enforcement of such municipal regulation against him as a property owner, charging that it transcended the legitimate scope of the exercise of the police power and constituted "an unwarranted and arbitrary interference with [his] constitutional rights." Several persons intervened in this action, among whom were Joseph Girofilo and Blanche M. Girofilo, who filed a "cross-complaint in intervention." The trial court upheld the validity of the ordinance both in its general aspects and in its application to plaintiff's property, and declared that certain transactions made contrary thereto were "null and void." Plaintiff has appealed from the adverse judgment accordingly entered and also from the court's order denying his motion for a new trial. Since said order is not appealable, Code Civ.Proc. § 963; Pipoly v. Benson, 20 Cal.2d 366, 368, 125 P.2d 482, 147 A.L.R. 515, plaintiff's purported appeal therefrom must be dismissed and only the appeal from the judgment remains for consideration.

[2, 3] The constitutionality of the principle of zoning is no longer an open question, and a restrictive regulation in this field pursuant to a municipality's comprehensive and systematic plan of community development, when reasonable in object and not arbitrary in operation, will be sustained as within the legitimate exercise of the police power. Miller v. Board of Public Works, 195 Cal. 477, 488–490, 234 P. 381, 38 A.L.R. 1479; Zahn v. Board of Public Works, 195 Cal. 497, 503, 234 P. 388, affirmed 274 U.S. 325, 328, 47 S.Ct. 594, 71 L.Ed. 1074; Wilkins v. City of San Bernardino, 29 Cal.2d 332, 337, 175 P.2d 542. Such an enactment is considered with every intendment in favor of its validity, and a court will not, except in a clear case of oppressive and arbitrary limitation, interfere with the legislative discretion which has been exercised in the adoption of the regulation. Jardine v. City of Pasadena, 199 Cal. 64, 72, 248 P. 225, 48 A.L.R. 509. It is presumed that the measure as a whole is justified under the police power and adapted to promote the public health, safety, morals, and general welfare. Lockard v. City of Los Angeles, 33 Cal.2d 453, 460, 202 P.2d 38, 7 A.L.R.2d 990. The courts may differ with the zoning authorities as to the "necessity or propriety of an enactment", but so long as it remains a "question upon which reasonable minds might differ," there will be no judicial interference with the municipality's determination of policy. Miller v. Board of Public Works, supra, 195 Cal. at page 490, 234 P. at page 386; see, also, Acker v. Baldwin, 18 Cal.2d 341, 344, 115 P.2d 455. The mere fact that some hardship may be experienced is not material, for "[e]very exercise of the police power is apt to affect adversely the property interest of somebody." Zahn v. Board of Public Works, supra, 195 Cal. at page 512, 234 P. at page 394. Consonant with

these established principles, the zoning ordinance here involved is not vulnerable to plaintiff's attack.

Zoning is an essential part of a city's overall master plan for community development, Planning Act of 1929, Stats.1929, p. 1805, as amended, 2 Deering's Gen.Laws, Act 5211b; later superseded by Conservation and Planning Act, Stats.1947, ch. 807, p. 1909, as amended, 2 Deering's Gen.Laws, Act 5211c, and a city is vested with control of "the design and improvement of subdivisions", subject to judicial review as to reasonableness. Subdivision Map Act, Stats.1937, p. 1864, as amended, now Bus. & Prof.Code, sec. 11500 et seq.; sec. 11525. The word "design" is defined in the latter Act to include, among other things, provision for "minimum lot area and width", Bus. & Prof.Code, sec. 11510, by "local ordinance." Ibid. secs. 11506, 11526. Consistent with this state recognition of municipal functions and in line with its autonomous character, Cal.Const. art. XI, sec. 6; West Coast Advertising Co. v. San Francisco, 14 Cal.2d 516, 519–521, 95 P.2d 138, the city of Los Angeles adopted the zoning ordinance prohibiting the reduction of residential lots below the specified minimum of 5,000 square feet in area and 50–foot frontage. The city's charter expressly contemplates the adoption of regulations pursuant to the authority granted by the Subdivision Map Act, charter, sec. 95(g), and on this point the trial court found that the ordinance "* * * constitutes an essential part of the master plan for the comprehensive development of the City of Los Angeles in that it is designed to prevent the cutting up of lots into unduly small areas and into parcels of economically unusable widths; that the ordinance * * * supplements the California Subdivision Map Act in that it prevents lots sold pursuant to said Act from being further subdivided, and in so doing, the ordinance prevents or diminishes the possibility of circumvention of [said] Act." In support of its view that the "ordinance is an important factor in the orderly development of the city," the trial court found that the "attempted cutting up" of such property as plaintiff's bungalow court would "tend to create and accelerate the creation of slum conditions" and "overcrowd[ing]," thus "militating against orderly, quiet and peaceful living"; that "health and sanitary regulations and laws would be more difficult to enforce" if the bungalow units "were sold to various separate owners"; and that therefore "said ordinance has a reasonable relation to the public health, safety and general welfare, and was enacted for the public good."

[4, 5] Where from a consideration of the evidence the trial court has found certain physical facts and conditions to exist in relation to the particular property restriction involved as would justify regulation by the city through the exercise of its police power, all intendments must be indulged to sustain such findings and resulting judgment. Ayres v. City Council of Los Angeles, 34 Cal.2d 31, 39, 207 P.2d 1, 11 A.L.R.2d 503. So significant are these factors in accord with the objectives found by the trial court to be within the design of the ordinance. The benefits of the Subdivision Map Act would be of little practical value in aid of desirable community planning if following the subdivider's compliance for the terms of the initial sale, the purchasers of the lots could erect multiple dwellings thereon according to authorized specifications and then "cut up" the units for separate sale. In this regard the ordinance clearly appears to supplement the state Act and to operate in avoidance of its circumvention as the trial court found. Likewise appropriate for consideration here is the memorandum opinion filed by the trial judge and included in the record, Rules on Appeal, rule 5(a), 22 Cal.2d 1, 4, as bearing on the interpretation of the findings. Trans-Oceanic Oil Corp. v. Santa Barbara, 85 Cal.App.2d 776, 790, 194 P.2d 148. The comment is there made that according to the view of experts in the field of community development, the subdivision of "bungalow courts into separate parcels" tends "to create slum conditions" because it would be unlikely that a uniform state of repair would be maintained by the various owners and a "hodge-podge appearance" would result, with a consequent depreciation in value of the entire property; "overcrowding" develops because where it is "a common

practice for landlords to limit the number of people who may occupy a bungalow in a court," such restriction would not apply under separate ownership of the various units, and the probable increase and concentration of people within the limited area would "add to the noise and other irritations that militate against orderly, quiet and peaceful living"; "health and sanitary regulations" become "more difficult to provide for and enforce," and particularly where such "close living" in separately owned bungalow units contemplates "each person * * * constantly making use of easements over the others' property, and where there is no one to make or enforce any rules touching items of common necessity to all, such as, for example, use of incinerators or other disposal of trash, and keeping clean the common walkways," the situation could create disturbing tensions. As is further there said, the "City Council may well have had all these matters in mind in passing the ordinance here under attack and may have concluded that it was necessary in furtherance of the general welfare of the city and its orderly development."

A zoning law which prescribed a minimum area of one acre for residential lots was recently upheld in Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516, 141 A.L.R. 688, as a reasonable and valid restriction in view of the location of the district, the physical characteristics, and other circumstances present. Among the factors considered pertinent in relation to the municipality's power to so regulate the size of house lots in a district which appeared "admirably suited for one family residences" were the following, 42 N.E.2d at page 518: avoidance of "congestion in the streets"; prevention of "overcrowding of land"; facilitation in furnishing "transportation, water, light, sewer and other public necessities"; provision of recreational space for "children to play"; encouragement of the "cultivation of flowers, shrubs and vegetables." While the court recognized that there might be a "difference of opinion" as to the real advantages that would accrue from the larger lots and whether they were such as to lead one to the conclusion that the adoption of the one-acre area would result in a "real and genuine enhancement of the public interests", still a belief that such a result would be realized under the particular circumstances was "not unreasonable" and precluded "the measure" from being held "invalid." 42 N.E.2d at page 518. Similar factual considerations prevailed and a like rationale was followed in the case of Greenway Homes v. Borough of River Edge, 137 N.J. L. 453, 60 A.2d 811, with regard to a zoning regulation prescribing a minimum frontage of 75 feet in residential districts.

[6] While the validity of the respective zoning laws in these two cited cases arose in connection with the power of the municipality to disapprove map plans for proposed subdivisions and to deny permits for the erection of dwellings thereon unless the minimum lot requirements were observed, such difference in the stage of development of the land at the time of litigation as compared with the present case does not militate against the principle of decision sustaining the propriety of such type of regulation. So here the factors listed by the trial court as constituting a basis for the adoption of the ordinance in question appear to bear a reasonable relation to the public interests—the general welfare of the community—and properly bring the regulation within the purview of the police power. Thille v. Board of Public Works, 82 Cal.App. 187, 190–193, 255 P. 294.

[7] Plaintiff argues that the zoning ordinance prohibiting his conveyance of the bungalow units in separate parcels to individuals as he chooses encroaches upon constitutional guarantees attaching to the ownership of property and securing him in his right to contract concerning the use, enjoyment, and disposition of his property. U.S.Const., Fourteenth Amend., sec. 1; Cal.Const., art. I, secs. 1, 13, and 14. But the fact that the ordinance so restricts plaintiff in his right to dispose of his property is not determinative of its invalidity, for in innumerable situations the sale of various types of property has been subject to regulation by public authority: such as drugs, Gregory v. Hecke, 73 Cal.App. 268, 238 P. 787, various food products, Justesen's

Food Stores, Inc., v. City of Tulare, 43 Cal. App.2d 616, 111 P.2d 424, second-hand and pawned merchandise, In re Holmes, 187 Cal. 640, 203 P. 398; the quantity of farm produce that may be marketed, Agricultural Prorate Comm. v. Superior Court, 5 Cal.2d 550, 55 P.2d 495; and articles at auction. Hart v. City of Beverly Hills, 11 Cal.2d 343, 79 P.2d 1080. The right of free bargaining does not preclude legislation directed toward the curbing of predatory merchandizing practices which tend to injure or destroy fair and open competition. Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co., 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486. A property owner may not divide his tract of land into lots to sell before developing or improving them without complying with the Subdivision Map Act. Cowell v. Clark, 37 Cal.App. 2d 255, 99 P.2d 594. These various instances illustrate the expanding concept of the exercise of the police power consistent with "the gradual regulation of the individual in his liberty of action and ownership of property for the public good." Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 458, 55 P. 2d 177, 182; see, also, Miller v. Board of Public Works, supra, 195 Cal. 477, 484, 234 P. 381. Likewise here the zoning ordinance as above considered in relation to the city's accomplishment of a comprehensive and systematic plan of community development shows the challenged regulation to have been reasonably adopted in furtherance of the "general welfare," and plaintiff's individual liberty in the disposition of his property may be curtailed to that extent in the public interest. Moreover, it should be noted that plaintiff still has the right to sell the property as he bought it—the bungalow court as a single entity—and he has only been deprived of his right to "cut it up" into individual units for conveyance to separate individuals, to what reasonably appears would be to the public detriment and at variance with the dictates of the city's overall plan of community design.

[8] Plaintiff further argues that the zoning ordinance is unreasonable and arbitrary in its application to his property because his subdivision and separate conveyance of the bungalow units to various individuals would effect only a change in ownership, and not a change in their use for dwelling purposes. In this connection reliance is placed on these factors: that the bungalow units were constructed on plaintiff's property some twenty years before the adoption of the ordinance in question; that the city laws do not purport to require the removal of these improvements nor cessation of the present use thereof; that the property would remain exactly as it has been in the past, without a change in its improvements, its use or its existing yard areas, and the sole difference would be the circumstance of single ownership of the bungalow units through the respective conveyances; and that the city manifestly does not consider such bungalow courts a nuisance, for the very ordinance here considered permits the present construction of just such improvements on 5,000-square-foot lots held under single ownership in the C-2 zone (where plaintiff's property is situated), with a requirement of only 800 square feet of lot area per dwelling unit—while each of the parcels into which plaintiff has subdivided his property contains approximately 925 square feet. But the mere fact that the property in its existing condition is not deemed a nuisance *per se* nor objectionable as a "near-nuisance" in constituting a menace to health, safety or morals in the strict sense of the phrase does not strengthen plaintiff's position. Jones v. City of Los Angeles, 211 Cal. 304, 310, 295 P. 14. The "police power, as evidenced in zoning ordinances, has a much wider scope than the mere suppression of the offensive uses of property * * * it acts, not only negatively, but constructively and affirmatively, for the promotion of the public welfare." Miller v. Board of Public Works, supra, 195 Cal. 477, 487–488, 234 P. 384.

[9-11] The ordinance here challenged is grounded in considerations of the "general welfare" pursuant to the city's comprehensive and systematic plan of community development, and consistent with the "tendency to a more liberal construction of the police power, as applied in zoning and other regulatory laws", Thille v. Board of Public Works, supra, 82 Cal.

App. 187, 189, 255 P. 294, 295, plaintiff's right to the unlimited and uncontrolled disposition of his property may properly be subordinated to the public good. Miller v. Board of Public Works, supra; Zahn v. Board of Public Works, supra, 195 Cal. 497, 234 P. 388. The various factors above reviewed as found by the trial court to be possible motivating forces in the city's adoption of the ordinance show it to have a reasonable relation to the interests of the community as a whole in establishing a recommended residential pattern through regulation of minimum lot areas under single ownership. Moreover, it is fairly arguable that numerous other advantages might well suggest themselves when one attempts to visualize the appearance of a sizable area of a city subdivided into lots akin in dimension to those of plaintiff, upon each of which there stood an individually owned and maintained dwelling—in support of the legislative discretion exercised in the enactment of this regulation. See Simon v. Town of Needham, supra, 311 Mass, 560, 42 N.E.2d 516, 518. The zoning ordinance is not objectionable upon retroactive grounds in destroying plaintiff's vested property rights, Jones v. City of Los Angeles, supra, 211 Cal. 304, 310-311, 295 P. 14, but it only looks to the future in guiding a pattern of home development in the enhancement of the public interest. Acker v. Baldwin, supra, 18 Cal.2d 341, 346, 115 P.2d 455. While it may be that plaintiff could realize a greater profit in the aggregate from the disposition of the various bungalows in single units to different individuals, such consideration does not make the zoning ordinance arbitrary in its application to his property, Wilkins v. City of San Bernardino, supra, 29 Cal.2d 332, 338, 175 P.2d 542; Lockard v. City of Los Angeles, supra, 33 Cal.2d 453, 466-467, 202 P.2d 38, nor preclude the regulation of his individual rights in the promotion of the general welfare. Miller v. Board of Public Works, supra, 195 Cal. 477, 487-488, 234 P. 381.

There remains for discussion the further contention—a matter vigorously argued on behalf of plaintiff by amicus curiæ, the California Land Title Association—that the trial court erred in declaring void certain transactions of plaintiff in violation of the ordinance. The principal attack is directed at paragraph 2 of the judgment, which reads: "* * * the purported sales made by plaintiff and referred to in the amended complaint and in the findings of fact were made in violation of said Section 12.21C of the Los Angeles Municipal Code and are null and void." It is argued: (1) that the city had no power to enact legislation which would render void any transfer of title to real property; and (2) that even assuming the existence of such power, the ordinance should not be construed as having that effect.

[12, 13] We may assume, without deciding, that ordinarily a city has no power to legislate concerning the validity of transfers of title to real property, for it has been said: "The state has full control over the subject of the mode of transferring and establishing titles to property within its limits." Robinson v. Kerrigan, 151 Cal. 40, 46, 90 P. 129, 131, 121 Am.St. Rep. 90, 12 Ann. 829. In this connection it may be observed that the ordinary municipal zoning ordinance is concerned only with the regulation of the use of land as distinguished from the ownership thereof. But in the present case, the state legislation embraced in the Subdivision Map Act, Stats. 1937, p. 1864, as amended, now Bus. & Prof. Code, § 11500 et seq., dealt with the subject of transfers of ownership and the validity of transfers made in violation of its terms, Bus. & Prof. Code, § 11540, and it expressly empowered the cities to supplement that act in the manner provided by the section of the ordinance under attack. Bus. & Prof. Code, §§ 11510, 11525. The only reasonable conclusion to be drawn from a reading of the state act and the municipal ordinance is that the state intended by its legislation to empower the cities to impose the same civil sanctions for violations of supplementary municipal ordinances as those found in the Subdivision Map Act, and that the city here intended, by the enactment of its ordinance, to exercise the power so conferred. Under these circumstances, it is immaterial that the ordinance did not expressly

declare the title consequences of a violation of the terms of said section 12.21-C. Smith v. Bach, 183 Cal. 259, 262-264, 191 P. 14. We conclude that plaintiff's transactions in violation of the ordinance were not void ab initio but were voidable at the option of the other parties to said transactions as provided in the state act. Bus. & Prof. Code, § 11540.

This conclusion is in line with the argument of counsel for plaintiff and counsel for amicus curiæ as found in their joint petition for rehearing herein. It is there said: "Even if the city had power to affect land titles, the ordinance should be construed as attaching to a conveyance violative of its terms the same voidable character as is provided by the Subdivision Map Act for conveyances made in violation thereof. * * * We submit that such a construction would be entirely permissible in view of the apparent fact that the ordinance was enacted pursuant to the authority granted by the Subdivision Map Act and for the purpose of supplementing its provisions." In passing, it should be noted that this litigation arose prior to the addition in 1949 of section 11540.1 of the Business and Professions Code. Stats. 1949, ch. 1100, p. 2001.

Having concluded that plaintiff's transactions in violation of the ordinance were not void but were voidable as provided in the Subdivision Map Act, now Bus. & Prof. Code, § 11540, we turn to a consideration of the disposition to be made of the judgment from which the appeal is taken in the light of the record before us. The short record in the form of an agreed statement contains, among other things, the findings, judgment, notice of appeal, and written opinion of the trial judge but does not include any of the pleadings, reference to which pleadings is made in the findings. From the judgment and notice of appeal, it appears that there were numerous intervenors, who were represented by separate counsel, in addition to Joseph Girofilo and Blanche M. Girofilo, who were designated as "cross-complainants in intervention" and who appeared without counsel. The judgment is in six numbered paragraphs: Paragraph 1 adjudges the validity of said section 12.21-C of the ordinance; Paragraph 2, as set forth above, declares that the sales "referred to in the amended complaint" are "null and void"; Paragraph 3 declares that the transactions with the Girofilos are "null and void" and fixes the amount which was paid by the Girofilos in those transactions; Paragraphs 4 and 5 award costs to "defendants" and to "plaintiffs in intervention," respectively; and Paragraph 6 awards judgment for $1,862.14 and costs to the "cross-complainants in intervention," the Girofilos. Plaintiff appealed but no appeal was taken by any intervenor; and no briefs have been filed herein by any of the parties other than plaintiff and the defendant city.

[14] Upon this record we find no justification for the reversal or modification of the portion of the judgment declaring certain transactions "null and void," or for the reversal of any other portion of the judgment. This appeal, as originally developed by the briefs, was concerned only with the constitutionality of the ordinance in question. In the petition for rehearing and on rehearing, the main question presented was the propriety of the portion of the judgment declaring certain transactions in violation of the ordinance "null and void" rather than voidable. It appears, however, that this declaration in the judgment was made only with respect to those specific transactions referred to in the pleadings, which pleadings are not before us; and, in the absence of any contention to the contrary, we deem it appropriate to assume that a full transcript containing all pleadings and all proceedings on the trial would show that the validity of these particular transactions was properly challenged by the intervenors. As we have concluded that such transactions were voidable, and as we may assume that the intervenors could and did properly challenge their validity, there is no error in the trial court's declaration that such particular transactions are "null and void." Such is the legal effect of the avoidance of a voidable transaction by a party entitled to exercise that right. Depner v. Joseph Zukin Blouses, 13 Cal.App.2d 124, 127, 56

P.2d 574; see, also, Myrick v. O'Neill, 33 Cal.App.2d 644, 648, 92 P.2d 651; 6 Cal. Jur. § 12, p. 29. As we read paragraph 2 of the judgment, it does not purport to be a declaratory judgment to the effect that all transactions in violation of said section 12.21-C are "null and void" ab initio rather than voidable, but only that certain specific transactions, which had been avoided by the intervenors, are now "null and void."

The purported appeal from the order denying a new trial is dismissed. The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, and TRAYNOR, JJ., concur.

CARTER, Justice.

I dissent.

Plaintiff, in 1945, bought a piece of property on which some nine bungalows had been built some twenty years previously. He then subdivided the property into nine parcels which averaged 925 square feet in size. Eight of these parcels were sold to individual purchasers in violation of a municipal ordinance which prohibited reduction of residential lots below 5,000 square feet of area with a fifty-foot frontage. The property purchased by the plaintiff is in a C-2 Zone, and the ordinance permits the present construction of the same type of units as those owned by the plaintiff on a lot area of 800 square feet per dwelling unit. But these units must be held in single ownership.

The property here involved is situated in a C-2 Zone for which the ordinance provides in part as follows:

"C-4. Lot Area. Buildings hereafter erected and used wholly or partly for dwelling purposes shall comply with the lot area requirements of the R4 Zone—Sec. 12.11-C,4."

"Section 12.11-R4.

"C-4. Lot area. Every lot shall have a minimum average width of fifty (50) feet and a minimum area of five thousand (5000) square feet. *The minimum lot area per dwelling unit shall be eight hundred (800) square feet.*" [Emphasis added.]

In Devaney v. Board of Zoning Appeals, 132 Conn. 537, 45 A.2d 828, 829, the Supreme Court of Connecticut aptly stated that "Zoning consists of a 'general plan to control and direct the use and development of property in a municipality or a large part of it by dividing it into districts according to the present and potential use of the properties.'" It has also been said that a zoning statute or ordinance is one regulating by districts the building development and uses of property and imposing restrictions on the use of the land itself. The term "zoning" within the meaning of a constitutional provision permitting laws authorizing zoning ordinances means a separation of the municipality into districts and the regulation of buildings and structures in such districts in accordance with their construction and the nature and extent of their use and the dedication of such districts to the particular uses designed to subserve the general welfare and pertains not only to use but to structural and architectural design of the building. Yokley, Zoning Law Practice. In Goodrich v. Selligman, 298 Ky. 863, 183 S.W.2d 625, it was said that the theory of zoning is to foster improvements by confining certain classes of buildings and uses to certain localities without imposing undue hardship on property owners.

It would seem that the ordinance here involved is not the usual type of zoning ordinance, nor does it fall within the definitions given above insofar as it applies to the *ownership* of lots of a certain size. By it a restriction is placed on the ownership, *not the use,* of parcels of land below a certain specified area.

I concede that the objectives of zoning are within the police power—that the public health, safety, morals and general welfare must be safeguarded. *But* there must be a rational connection between the means used and the end result to be attained. The majority opinion sets forth the reasons why this ordinance providing for single ownership of the units, rather than individual ownership, is a rational basis for the ordinance enacted under the police power of the municipality. These reasons would have validity if, and only if, the ordinance

prohibited more than a single dwelling or two on each 5000 square foot parcel of land (which was heretofore used by the occupants of the nine bungalows). These reasons are: (1) Avoidance of congestion in the streets. The absurdity of this is apparent—because a man owns his own home, does he tend to make for greater congestion in the streets? (2) Prevention of overcrowding the land—because a man owns his land, does he tend to have more children, more guests, more relatives? (3) Facilitation in furnishing transportation, water, light, sewer and other public necessities—I may be obtuse, but it appears that this reason is less than valid. In bungalow courts, unfurnished apartments, and the like, each tenant usually pays for his own water, light, and public utilities—These facilities are furnished to him as an individual tenant, and have nothing whatsoever to do with his ownership of the property. The transportation argument seems so ridiculous as to require no answer. (4) Provision of recreational space for children to play—how can individual ownership of the various units have the slightest bearing on such space? (5) Encouragement of the cultivation of flowers, shrubs, vegetables—it has been my experience that individual ownership tends toward the encouragement of interest in the land, rather than tending to diminish it, and the same argument applies so far as the upkeep of property is concerned. Tenants are only too willing to let the landlord take care of any repairs, and if the landlord fails to do so, the tenant is not willing to expend his funds on someone else's property. (6) As another reason we are told that a "probable increase in occupancy" would add to the noise and other irritations which militate against orderly, quiet and peaceful living. As I have pointed out previously, this is a valid argument if we are to prohibit absolutely such bungalow courts, but, in the very nature of things, can have no validity when we take into consideration the fact that these units will be occupied in the same manner whether or not they are individually owned. (7) Health and Sanitary regulations—this argument is equally delusive. There is no one incinerator and two sewer connections servicing the nine units and it would seem that individual ownership would not make these services less adequate. There are common walkways which will need to be cleaned, we are told, and there are easements over other property which will need to be regulated. And on these very speculative and improbable future neighborhood squabbles, we are asked to say that the ordinance has a reasonable basis in that it will tend to promote the public health, welfare, safety and general well-being! A corollary of finding this ordinance a sound and rational exercise of the police power of the municipality is to restrain the free alienation of property.

The majority say that "The courts may differ with the zoning authorities as to the 'necessity or propriety of an enactment,' but so long as it remains a 'question upon which reasonable minds might differ,' there will be no judicial interference with the municipality's determination of policy." I am of the opinion now, as I have been in the past, that this court, when viewing a record on appeal, must sustain the findings of the trial court when there is substantial evidence in support thereof. The evidence in the instant case in support of the reasonableness of the ordinance appears to me to be sadly lacking. I fail to see that there *is* a question on which *"reasonable* minds might differ"! It seems to me that this is a clear case of arbitrary interference with the rights of an individual, and that the public gain from that interference is nonexistent.

The majority tell us that "* * * it is fairly arguable that numerous other advantages might well suggest themselves when one attempts to visualize the appearance of a sizable area of a city subdivided into lots akin in dimension to those of plaintiff, upon each of which there stood an individually owned and maintained dwelling * * *." The fact remains that plaintiff's property is in a zone in which these bungalow units (under single ownership) are permitted by this ordinance. Just how an observer would be able to say whether or not they were individually owned and what difference that would make

in one's visualization of the area in question, I am at a loss to understand. There is no reasonable relation between a reduction of the area of an improved lot, *without* change in its improvements, its use or its existing yard areas and the protection of the public health, safety, morals or welfare. The exercise of the police power, though an essential attribute of sovereignty for the public welfare and arbitrary in its nature, cannot extend beyond the necessities of the case and be made a cloak to destroy constitutional rights as to the inviolateness of private property. House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950.

I consider it a duty of this Court—a duty imposed on it by the will of the people of the State—to protect the individual against state or municipal action which deprives an individual of a right guaranteed to him not only by the Constitution of the United States, but by the Constitution of the State of California, when that action is not validly necessary for the benefit of the public at large. I have long argued against stateism and for the protection of individual rights when it is not necessary that those rights should be abridged for the benefit of the public. I consider that the people of this State and of the United States voluntarily relinquished certain of their rights that they collectively might benefit, but that they did not intend that all individual rights should be so relinquished. Our Constitutions embody that intent, and they stand as shields protecting the individual against arbitrary state action. It is the duty of this Court to hold those shields. I do not feel that the declaration in the majority opinion that this ordinance is a reasonable and valid exercise of the police power has any support in reason.

In affirming the judgment, the majority fall into the error of assuming, just because municipal legislation on zoning is involved, that every such restriction is valid and that it is beyond the power of this Court to inquire into the reasonableness thereof. Ordinances are held invalid and unconstitutional, Page v. City of Portland, 178 Or. 632, 165 P.2d 280; Lee v. City of Chicago, 390 Ill. 306, 61 N.E.2d 367; Koch v. Toledo, 6 Cir., 37 F.2d 336; American Wood Products Co. v. Minneapolis, 8 Cir., 35 F.2d 657; Van Auken v. Kimmey, 141 Misc. 105, 252 N.Y.S. 329; Lombardo v. City of Dallas, Tex.Civ.App., 47 S.W.2d 495; Johnson v. Village of Villa Park, 370 Ill. 272, 18 N.E.2d 887; Village of Terrace Park v. Errett, 6 Cir., 12 F.2d 240; Women's Kansas City St. Andrew's Soc. v. Kansas City, 8 Cir., 58 F.2d 593; Glencoe Lime & Cement Co. v. City of St. Louis, 341 Mo. 689, 108 S.W.2d 143, because unreasonable and discriminatory. "The courts usually will hold a zoning ordinance invalid when it clearly appears that the restrictions are arbitrary and unreasonable and have no substantial relation to health, safety, morals or the general welfare." State ex rel Dixie Inn, Inc., v. City of Miami, 156 Fla. 784, 24 So.2d 705, 706, 163 A.L.R. 577. Zoning restrictions must bear a *substantial relation* to the promotion of public health, safety, morals or general welfare. Ex parte Angelus, 65 Cal.App.2d 441, 150 P.2d 908; Grant v. Board of Adjustment, 133 N.J.L. 518, 45 A.2d 184; Merrill v. City of Wheaton, 379 Ill. 504, 41 N.E.2d 508; Zadworny v. City of Chicago, 380 Ill. 470, 44 N.E.2d 426; City of Louisville v. Koenig, 290 Ky 562, 162 S.W.2d 19, 140 A.L.R. 1369.

The legislation here considered is arbitrary and discriminatory. It is arbitrary and unreasonable in that it has no substantial justification based on "imperious considerations of public health, morals and safety * * *." Miller v. Seaman, 137 Pa.Super. 24, 8 A.2d 415, 417. It is discriminatory in that it prohibits *ownership* of small parcels of land in a district where *rental* of *lesser* parcels of land is permitted. As the court said in the case cited by the majority, Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516, 519, 141 A.L.R. 688: "A zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there and who are able and willing to erect homes upon lots upon which fair and reasonable restrictions have been imposed nor for the purpose of protecting the large estates that are already located in the district." This ordinance discriminates against those wishing to live

in the district in homes *owned* by them and favors those who wish only to rent property there. It definitely sets up a barrier and discriminates *against* thrifty persons of small means while favoring those who can afford to buy property and build small homes thereon for rental and income purposes.

In Harmon v. City of Peoria, 373 Ill. 594, 27 N.E.2d 525, the ordinance limited the houses in a district to one family dwellings. Nevertheless, an owner was permitted to use his house for a multiple family dwelling because there was no substantial relation between the police power and the ordinance inasmuch as under it there was no limit on the number of people that could be considered a family. Thus the test in the ordinance was really not the number of people in a house but whether they happened to consist of more than one family. The analogy to the instant case is pronounced. The ordinance here is not aimed at preventing more than one house on each 5000 feet. It only prevents separate ownership of the houses. The court in the Harmon case stated, 27 N.E.2d at page 528: "Here the validity of the ordinance as applied to the entire subdivision is not challenged. In short, it is only to the extent that the ordinance applies to plaintiffs' property that an unreasonable exercise of the police power is claimed. * * * The ordinance, it has been observed, defines a 'family' as one or more persons occupying premises and living together as a single housekeeping unit as opposed to a group occupying a boarding house, lodging house or hotel. Admittedly, a person may legally lodge and board four persons for remuneration upon premises located in an 'A' one-family district and, specifically, in the block where plaintiffs reside. Plaintiffs, it is conceded, enjoy the right under the ordinance to rent rooms to a maximum of four individual roomers and if they so desire, may serve meals to such persons. Indeed, any number of persons may occupy a house as a 'family,' within the contemplation of the ordinance, and divide the housekeeping expenses, provided only they live as a solitary housekeeping unit, using a single kitchen. Manifestly, the term 'one-family dwelling,' *bears no relation in fact to the number of persons or families living in a building.* On the other hand, the ordinance prohibits plaintiffs from renting their suits of rooms equipped with adequate kitchen facilities to two couples. The harsh reality of the distinction made by the ordinance is evidenced by the refusal of the zoning officials to permit the use last described. Tested in the light of the applicable principles set forth the distinction is unreasonable in the extreme, particularly since less than one-half of the residences in the block are actually used as single-family dwellings. The use of plaintiff's one-family residence by six persons maintaining three separate housekeeping units appears no more inimical to the public welfare than the devotion of their property to the accommodation of four roomers and boarders." [Emphasis added.]

The court states in Women's Kansas City St. Andrew Soc. v. Kansas City, 8 Cir., 58 F.2d 593, 603: "To justify such restriction the police power would have to be extended, not only to restricting certain districts to residence purposes, but to restricting such districts to *particular classes of residents,* and this has been quite universally condemned by the decisions." [Emphasis added.] The ordinance here restricts the class of persons—residents who may reside in the area involved for it permits renter residents but prohibits owner residents.

A zoning ordinance may be generally valid, but its enforcement with respect to particular property will be restrained by the courts if it is unreasonable, arbitrary and discriminatory in its application thereto. Reynolds v. Barrett, 12 Cal.2d 244, 250, 251, 83 P.2d 29; Skalko v. City of Sunnyvale, 14 Cal.2d 213, 214, 216, 93 P.2d 93; Bernstein v. Bush, 29 Cal.2d 773, 777, 177 P.2d 913; Hagenburger v. City of Los Angeles, 51 Cal.App.2d 161, 163, 164, 124 P.2d 345.

We are supposed to have a constitutional form of government where certain fundamental individual rights are guaranteed and protected. Section 1 of Article 1 of our Constitution provides that "All men are by nature free and independent, and have certain inalienable rights, among which are

those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness." While I concede that the right to acquire and possess property is subject to the police power of the state in the advancement and protection of public health, safety, morals and general welfare, I think it is time for this Court to declare that the police power of the state is so limited and that the right to own and possess property may not be impaired by the mere whim or caprice of any planning commission, city council, or board of supervisors which may have some pet notion about what use should be made by an individual of property owned by him. In other words, I do not believe that these public agencies should be permitted to interfere with the ownership or possession of property unless it can reasonably be said that such interference is necessary in the interests of public health, safety, morals or welfare. In my opinion, the determination of this issue is for the Courts who must interpret and apply the constitutional safeguards for the protection of the property owner.

I positively do not agree with the philosophy announced in the recent decisions of this Court, Wilkins v. City of San Bernardino, 29 Cal.2d 332, 175 P.2d 542; Lockard v. City of Los Angeles, 33 Cal.2d 453, 202 P.2d 38, 7 A.L.R.2d 990; and Ayres v. City Council of Los Angeles, 34 Cal.2d 31, 207 P.2d 1, 11 A.L.R.2d 503, in which it has completely abdicated its judicial function in favor of the arbitrary and unreasonable action of city councils, as shown by the record in those cases, who recognize no constitutional limitation of their power to control the use of private property.

It may be that we are going to have to stand up and be counted in order to determine whether constitutional rights in the ownership and possession of property still exist. Such rights certainly will no longer exist when the decision in this case takes its place beside the Wilkins, Lockard and Ayres cases herein cited. Under these decisions the right of ownership and possession of real property is subject to the whim and caprice of any planning commission, city council or board of supervisors and the restrictions which any one of them may place upon an individual's right to own, possess or use real property which will be upheld by a majority of this Court is any one's guess—the sky may be the limit—certainly not the Constitution which has become a dead letter—a forgotten document.

When the Constitution is disregarded we reach the perimeter of the police state. True, city councilmen are elected, but what chance has a property owner who may be in the minority to protect himself against arbitrary and unreasonable action by a city council who may see fit to zone his property for a use for which it is wholly unsuited? This Court has said it will not interfere with such action. Of what value to him is the inalienable right guaranteed by the Constitution to acquire, possess and protect property when a city council or board of supervisors tells him he can only use his property for a purpose dictated by whim or caprice and the courts refuse to grant him relief? The instant case is a shining example of such arbitrary action. The bungalow units were legally constructed and have been legally occupied, but they cannot be legally sold in separate units. Does this really make sense? Is there a scintilla of reason or logic behind such a rule? If there is, it is not apparent to me, and I doubt that it would be to any unprejudiced mind.

I am of the opinion that the ordinance is invalid and unconstitutional in its application to these facts in that the evidence discloses that it bears no reasonable relation to the legitimate objectives to be attained by an exercise of the police power, and that it is wholly arbitrary and discriminatory. I would reverse the judgment.

SCHAUER, Justice (dissenting).

I agree with the conclusion of Mr. Justice Carter that the ordinance here involved, in its application to the facts of this case, is arbitrary and discriminatory. On the face of the majority opinion it appears, I think, that the ordinance as applied bears no reasonable relation to legitimate objec-

tives of constitutional police power but, rather, effects an unwarranted curtailment of the rights of private ownership. By heretofore well established standards the judgment should be reversed.



99 Cal.App.2d 740

FOX v. ERICKSON.

Civ. 17862.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1950.

Rehearing Denied Oct. 19, 1950.

Action by Roy Fox, against C. N. Erickson to recover $2,500 which was remainder of sum of $5,000 defendant had agreed to pay plaintiff if he would remain in the employment of corporation which had purchased defendant's manufacturing business. The Superior Court, Los Angeles County, Otto J. Emme, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Wilson, J., held that plaintiff had continued in the employ of the purchasing corporation both in legal effect and in the spirit of the contract.

Affirmed.

1. Corporations ⇐30(5)

Under contract wherein defendant agreed to pay plaintiff $5,000 if he would continue employed for three years as plant superintendent and designer for manufacturing business purchased by B. corporation, where manufacturing business was later incorporated as E. & J. corporation, which was wholly owned and operated by B. corporation, and both corporations had same president and interlocking directorate, plaintiff's subsequent transfer and employment by E. & J. corporation, which took over manufacturing business, did not invalidate and terminate contract so as to prevent recovery of unpaid balance due.

2. Appeal and error ⇐758(1)

Appellate courts will not act as counsel for either party to appeal and search record to discover errors not pointed out in briefs.

3. Appeal and error ⇐760(1)

Counsel for appellant has duty to refer reviewing court to portion of record to which he objects and to show that appellant was prejudiced thereby.

4. Appeal and error ⇐758(1), 760(1)

Fact that purported errors would amount to great number of references and would be burdensome and cumbersome does not excuse appellant from pointing out errors in brief and referring to portions of record supporting alleged errors.

5. Corporations ⇐30(5)

In action on contract wherein former proprietor of manufacturing business agreed to pay plant superintendent and designer certain sum if he would remain in employment of purchasing corporation continuously for term of three years, where manufacturing business was later incorporated but remained wholly owned subsidiary of purchasing corporation, and plaintiff continued in employment of new corporation, evidence concerning incorporation of manufacturing business and its sole ownership by purchasing corporation was properly admitted.

Max Tendler and Olin N. MacKay, Los Angeles, for appellant.

Walter C. Harbert, Los Angeles, for respondent.

WILSON, Justice.

Action on a contract wherein defendant agreed to pay plaintiff the sum of $5,000 if he would remain in the employment of Don Baxter, Inc., continuously for the term of three years. The sum of $2,500 was paid and this action is for the recovery of the remainder. Judgment went for plaintiff and defendant has appealed.

For several years prior to the date of the agreement plaintiff had been employed as plant superintendent and designer in a business solely owned and operated by defendant under the name of E. & J. Manufacturing Company. The company de-

signed and manufactured life-saving resuscitators and hospital units, the majority of which were designed or developed by plaintiff while in defendant's employ. Plaintiff's knowledge, training and experience were a valuable asset to his employer.

In November, 1945, Don Baxter, Inc., a Nevada corporation, purchased the E. & J. Manufacturing Company from defendant with its assets including patents, patent rights, trade-names and trade-marks. Baxter desired to have plaintiff continue to act as its plant superintendent and designer. For the purpose of assuring that he would so continue, defendant entered into the agreement which is the subject of this action. At the same time plaintiff entered into a contract of employment with Baxter and ever since that time has continued to be plant superintendent of Baxter's E. & J. department.

Shortly after Baxter had purchased E. & J. the latter's business was incorporated as a California corporation known as E. & J. Manufacturing Company. It has always been wholly owned by Baxter, the latter being the owner of the one share of stock issued by the E. & J. corporation. The same person is president of both Baxter and E. & J. corporations, they have an interlocking directorate and maintain their operations on contiguous property.

[1] Upon the organization of E. & J. as a corporation Baxter transferred plaintiff to its E. & J. division where his employment was continued until the trial of this action. Defendant contends that his contract with plaintiff was invalidated and terminated when plaintiff ceased to be on Baxter's payroll and was transferred to that of E. & J. Such argument is without merit. Since E. & J. has at all times been solely owned by Baxter and the latter, for reasons of its own, placed plaintiff on its E. & J. payroll, he has been in the employ of Baxter both in legal effect and in the spirit of the contract between plaintiff and defendant. His services were actually rendered to and his salary paid by Baxter through an intervening instrumentality of which Baxter was sole proprietor.

[2-4] In his brief defendant has specified several alleged errors in the admission of evidence, but has failed to refer to any portion of the record where such evidence may be found or to point out why the evidence was inadmissible. Appellate courts will not act as counsel for either party to an appeal and will not assume the task of initiating and prosecuting a search of the record for the purpose of discovering errors not pointed out in the briefs. It is the duty of counsel to refer the reviewing court to the portion of the record to which he objects and to show that the appellant was prejudiced thereby. In re Estate of Randall, 194 Cal. 725, 728, 230 P. 445; Turgeon v. Barney, 70 Cal.App. 432, 435, 233 P. 394; Phillips v. Wheeler, 55 Cal. App. 236, 237, 156 P.2d 468; Frasier v. Witt, 62 Cal.App. 309, 316, 217 P. 114. In defendant's reply brief he offers as a reason for the deficiency in his opening brief that the purported errors "would amount to a very great number of references" and would be "burdensome and cumbersome." Such fact does not excuse a litigant from the performance of his duty to the court and does not impose upon a reviewing court the burden of searching through a transcript for a possible error. The fact that it would be burdensome and cumbersome to appellant's counsel who are familiar with the record is a sufficient reason for their assistance to the court.

[5] We gather from defendant's belated statement in his reply brief that the error of which he has attempted to complain has reference to evidence introduced concerning the incorporation of E. & J. and its sole ownership by Baxter. There was no error in the admission of such evidence since its purpose was to show the continuity of plaintiff's employment by Baxter through its wholly owned subsidiary.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

99 Cal.App.2d 745

PEOPLE v. ESTES.

Cr. 4467.

District Court of Appeal, Second District, Division 3, California.

Oct. 2, 1950.

Tommy Barney Estes was convicted in the Superior Court of Los Angeles County, William Turney Fox, J., of an attempt to commit an offense of sexual perversion and defendant appealed. The District Court of Appeal, Vallée, J., held that the evidence sustained conviction and was sufficient corroboration of the accomplice.

Affirmed.

1. Criminal law ⇐511(2)

Corroboration is sufficient if, considered by itself, it tends to connect defendant with offense charged in such a way as may reasonably satisfy jury that accomplice is telling the truth, and it is not necessary that independent evidence be sufficient to establish defendant's guilt.

2. Criminal law ⇐1159(2)

Whether corroborating evidence by itself is as compatible with innocence as it is with guilt is a question for trier of facts and not for reviewing court.

3. Criminal law ⇐511(1)
Sodomy ⇐6

Evidence sustained conviction of an attempt to commit a sexual perversion and was sufficient corroboration of the accomplice. Pen.Code, § 288a.

Gladys Towles Root, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Dan Kaufmann, Deputy Attorney General, for respondent.

VALLÉE, Justice.

Defendant was convicted of an attempt to commit the offense denounced by section 288a of the Penal Code. He appeals from the judgment.

The male person who participated in the alleged attempt with the defendant was the principal witness for the prosecution. It appears to be conceded that this witness was an accomplice. See People v. McCollum, 214 Cal. 601, 602, 7 P.2d 301; People v. McRae, 31 Cal.2d 184, 185, 187 P.2d 741. Defendant's claim is that the testimony of the accomplice was not corroborated as required by section 1111 of the Penal Code.

[1, 2] The corroboration is sufficient if considered by itself it tends to connect the defendant with the offense charged in such a way as reasonably may satisfy a jury that the accomplice is telling the truth. If corroborating evidence creates more than a suspicion of guilt, it is sufficient even though it be slight and, when standing by itself, entitled to but little consideration. It is not necessary that the independent evidence be sufficient to establish the defendant's guilt. It is not necessary that the accomplice be corroborated as to every fact to which he testified. Inferences from the defendant's testimony may suffice to corroborate an accomplice. A defendant's admissions, active and passive, may constitute corroboration. A defendant's consciousness of guilt is corroborative of an accomplice. Whether the corroborating evidence by itself is as compatible with innocence as it is with guilt, is a question for the trier of fact, not for the reviewing court. People v. Henderson, 34 Cal.2d 340, 342, 346, 209 P.2d 785; People v. Trujillo, 32 Cal.2d 105, 111, 194 P.2d 681; People v. Malone, 82 Cal.App.2d 54, 61, 63, 64, 185 P.2d 870.

Without relating the sordid details, the record shows the following corroborating evidence. The defendant and the accomplice were together in the front seat of an automobile at 1:15 a.m., in an uninhabited area in Los Angeles. Two police officers saw the car and approached it. The car appeared to be empty. The officers shined a flashlight into the car. The trousers of both men were unbottoned and defendant was exposed. When asked why his trousers were down, defendant said he took them down to tuck his shirttail in. When asked why the accomplice's trousers were down, defendant replied, "I give up." The next morning defendant told a police officer that

he had never done anything like this before; he did not know what caused him to do it; he was horribly ashamed of himself; as he attempted to do the act, he became sick and was unable to do it. In his testimony defendant admitted that his statement to the officers that he took his trousers down to tuck his shirttail in was false. The testimony of defendant was an admission that an offense was attempted except that the twenty-three-year-old defendant attempted to shift criminality to the fifteen-year-old accomplice and denied any attempted criminal act.

[3] We are satisfied that the evidence related tends to connect the defendant with the commission of the offense and was sufficient corroboration of the accomplice. People v. Briley, 9 Cal.App.2d 84, 48 P.2d 734; People v. Nichols, 2 Cal.App.2d 99, 101, 37 P.2d 710.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



99 Cal.App.2d 675

WALKER v. CALLOWAY et al.

Civ. 17547.

District Court of Appeal, Second District, Division 3, California.

Sept. 27, 1950.

Action by Evelyn Walker against John Calloway, individually and as executor and special administrator of the estate of Joe Wilmond, deceased, and others, for specific performance of an oral agreement to will decedent's entire estate to plaintiff in consideration of services rendered to decedent and to establish a trust therein. The Superior Court of Los Angeles County, William S. McKesson, J., entered a judgment dismissing action after sustaining a demurrer to plaintiff's amended complaint without leave to amend, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that a complaint alleging that decedent, who was suffering the last days of cancer and who knew he had not long to live, agreed that if plaintiff, decedent's former wife, would leave her home and come and give him her companionship and affection and solace during his remaining days, he would leave his entire estate to her by will upon his death, and that plaintiff, at an advanced age, agreed and sacrificed her personal comfort, peace of mind and security, abandoned her residence, occupation and home ties and traveled over 2,000 miles to strange surroundings so as to give decedent the solace of her companionship, affectionate care and tender administration, stated sufficient facts to take case out of operation of the statute of frauds.

Reversed.

1. Frauds, statute of ⇦129(6)
Specific performance ⇦45

The mere rendition of services is not usually such part performance of a verbal agreement as will relieve contract from operation of statute of frauds, but if services are of such a peculiar character that it is impossible to estimate value by any pecuniary standard and it is evident that parties did not intend to measure them by any such standard, and if plaintiff, after performance of services, could not be restored to situation in which he was before rendition of services, it is such part performance of a verbal contract as will remove agreement from statute of frauds, and equity will grant specific performance. Civ.Code, § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6.

2. Specific performance ⇦45

Where services rendered by a party consists in nursing and caring for a person enfeebled and suffering from a horrible disease, requiring constant and unceasing watchfulness, destructive to peace and comfort of one performing services, and possibly injurious to health, it is impossible to estimate value by any pecuniary standard, and where it is evident that decedent did not intend so to measure them, it is not within power of any court to restore party to situation in which he was before contract was made or to compensate him therefor in damages.

3. Specific performance ⇐45

To enforce an oral contract to bequeath or devise property in equity by quasi specific performance, it must be shown that contract is definite and certain, consideration adequate, that contract is founded on good morals and not against public policy, that character of services is such that a money payment would not furnish adequate compensation to plaintiff, that there is such a change in plaintiff's condition and relations in reliance on contract that a refusal to complete contract would be a fraud upon him, and that remedy asked for is not harsh, oppressive or unjust to innocent third parties.

4. Pleading ⇐8(4, 6, 20), 9

It is not necessary that complaint for specific performance of an oral agreement state in so many words that there was an adequate consideration for contract or that contract was fair and just or that character of services were such that they were not susceptible of pecuniary measurement, for such allegations, standing alone, constituted mere conclusions and it was sufficient if complaint alleged facts from which these conclusions could be drawn.

5. Frauds, statute of ⇐129(6)

A complaint alleging that decedent, who was suffering last days of cancer and who knew that he had not long to live, agreed that if plaintiff, decedent's former wife, would leave her home and come 2,000 miles to his home and give him her companionship and affection and solace during his remaining days, he would leave his entire estate to her by will upon his death, and that plaintiff, at an advanced age, abandoned her residence, occupation, home ties and associations and traveled 2,000 miles to strange surroundings to give decedent the solace of her companionship, affection and care and tender ministration until his death, stated sufficient facts to take case out of operation of statute of frauds. Civ.Code, § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6.

6. Contracts ⇐61

The extent of consideration in a contract for rendition of personal services is to be measured by breadth of undertaking rather than by eventuality.

7. Executors and administrators ⇐224

Presentation of a claim to executor for services to deceased was not a condition precedent to maintenance of action for specific performance of contract to will property.

Edward S. Cooper and John Boyce-Smith, Los Angeles, for appellant.

Perry Bertram, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment dismissing the action after the sustaining of a demurrer to her amended complaint without leave to amend. The action is for specific performance of an oral agreement to will decedent's entire estate to plaintiff in consideration of services rendered decedent, and to establish a trust therein. Defendant, executor of the estate of Joe Wilmond, deceased, is sued individually and in his representative capacity. No claim was filed in the estate.

Decedent died testate January 6, 1948, leaving an estate of over $40,000 in the county of Los Angeles. His will, dated November 14, 1947, was admitted to probate on August 24, 1949. It appointed defendant executor of the estate, bequeathed $500 to plaintiff and, with the exception of several other bequests, bequeathed and devised the residue of the estate to defendant, a son of plaintiff and decedent. Plaintiff was the first wife of decedent. They were married in 1911, and had three children, including defendant. In 1915, decedent deserted plaintiff and never thereafter contributed anything to her support or to that of the children during their infancy. Decedent secured a divorce from plaintiff. Thereafter he contracted two other marriages, both of which culminated in divorce.

In addition to the foregoing, the amended complaint alleged: In May, 1947, decedent telephoned plaintiff at Dowagiac, Michigan, where she resided and was employed, and

told her he was suffering from cancer and did not expect to live much longer, he realized he had treated her badly in deserting her and leaving her to support herself and the three young children, "he had a nurse and did not need a servant or household services," he offered and agreed that if plaintiff would leave Dowagiac and come to Los Angeles "and give him her companionship and affection" and "solace his remaining days," he would leave his entire estate to her by will upon his death. Leaving Dowagiac "meant uprooting her [plaintiff's] whole plan of life at an advanced age, at great sacrifice of her personal comfort, peace of mind and security," but in reliance upon decedent's promise and at his special instance and request, plaintiff abandoned "her residence, occupation and home ties and associations" in Dowagiac and on September 22, 1947, traveled "about 2000 miles to strange surroundings, at an advanced age, to Los Angeles, California." Thereafter and up to the time of decedent's death on January 6, 1948, she gave decedent "the solace of her companionship, affectionate care and tender ministration." She would not have left Michigan and come to Los Angeles if decedent had not induced her to do so by his promise to leave her his property and estate by will. Pursuant to this agreement decedent executed a will in which practically all of his property was left to plaintiff (a copy of the instrument which is signed by decedent and the subscribing witnesses is attached to the complaint as an exhibit). Subsequent to the execution of this will, defendant fraudulently procured decedent to change his will and execute the will admitted to probate. The execution of the latter will was a fraud upon plaintiff's rights and a breach of decedent's agreement. Defendant holds the estate as trustee for the use and benefit of plaintiff by reason of the agreement and performance on her part. Although the agreement is not in writing, plaintiff fully performed the agreement on her part and "changed her position to her great detriment * * * in an amount which cannot be estimated in money, and she has no adequate remedy at law for breach of said agreement," and defendant is equitably estopped from asserting the invalidity of the verbal agreement.

The question is whether plaintiff has pleaded sufficient facts to take the oral contract out of the statute of frauds.

[1] Where a contract is within the statute of frauds, as it is here, Civ. Code, sec. 1624(6); Code Civ.Proc., sec. 1973(6), the mere rendition of services is not usually such a part performance of a verbal agreement as will relieve the contract from the operation of the statute, but "if the services are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, and if the plaintiff, after the performance of the services, could not be restored to the situation in which he was before the rendition of the services, it is such a part performance of the verbal agreement as will remove the contract from the rule, and equity, where other objections are not present, will decree specific performance. But in such cases the reason for the interposition of equity is quite obvious. Plaintiff has rendered service of extraordinary and exceptional character—such service as, in contemplation of the parties, was not to be compensated for in money, and, as in contemplation of law, cannot be compensated for in money. Therefore by no action at law could a plaintiff be restored to his original position. It would be in the nature of a fraud upon him to deny him any relief, and, the law failing by reason of its universality, equity, to promote justice, makes good its imperfections. Wat. Spec. Perf. Cont. § 41; Pom. Spec. Perf. § 114." Owens v. McNally, 113 Cal. 444, 450, 45 P. 710, 712, 33 L.R.A. 369; McCabe v. Healy, 138 Cal. 81, 70 P. 1008; Anno. 69 A.L.R. 14, 120, et seq.; 106 A.L.R. 742, 756, et seq.

The services called for under the contract here were similar in nature to those in Barry v. Beamer, 8 Cal.App. 200, 96 P. 373, and Fowler v. Hansen, 48 Cal.App. 2d 518, 120 P.2d 161, which were held to be of an unusual and exceptional character.

In Barry v. Beamer, supra [8 Cal.App. 200, 96 P. 373], the complaint alleged that

decedent, 73 years of age, "'was growing old and had not a great while to live, and he greatly desired in his declining years to have someone of his own blood near him to give to his old age the comforts of a home, to care for him in his sickness, to do his general housekeeping, to see to the cooking of his food, his washing and mending, and particularly to give to him that love and affection due from a sister to a brother.'" In holding there was such a change of position and relationship in reliance upon the oral contract and that the value of the services rendered were not subject to any pecuniary standard, the court said, 8 Cal.App. at page 209, 96 P. at page 377:

"As he [decedent] grew older, naturally life to him under such circumstances became irksome and wearisome, and with his advancing years he, naturally, the more and more yearned for the companionship and the tender care of the one who, of all living persons, could the more completely and satisfactorily fill the long-existent hiatus in an unhappy and then rapidly waning life. He earnestly and, it may be, pleadingly besought his only sister to dispose of her own home—a home where she had spent many of the years of her life in comfortable circumstances, and valued by her not more perhaps because of its intrinsic worth than because to her it was hallowed by pleasant memories and fond associations—and come to him, situated as he was, that he might be given the care and attention which he could under the circumstances only derive through the love and affection of a sister. She not alone complied with his request to live with and take care of him, but turned over to him all her means to be used in his business. * * * She rescued him from a life of uncleanliness and misery and gave him comforts to which he had been unused, and when his last illness attacked him, she tenderly and affectionately cared for him, and thus minimized the sufferings of the last, expiring hours of his life. For five years, he declared, and well could he do so, 'he had lived like a white man.'

"Is there any possible money compensation equal to the service thus rendered and the sacrifices thus made by this sister? Could the plaintiff, under the circumstances disclosed by the record, be placed in *statu quo* by any known legal remedy? Why should not equity enforce such a contract as is shown here? The evidence shows an adequate consideration; that the contract is just and reasonable as to the parties against whom it is sought to be enforced; that there is no showing, nor an attempt at showing, that the plaintiff practiced fraud or undue influence in securing the contract; that it is certain and definite, * * * and its enforcement will not involve the invasion of the legal or equitable rights of an innocent third party." See also to the same effect McCabe v. Healy, 138 Cal. 81, 70 P. 1008.

In Fowler v. Hansen, 48 Cal.App.2d 518, 120 P.2d 161, 163, plaintiff appealed from a judgment rendered on the pleadings and on a portion of the opening statement, in an action to compel specific performance of a contract to make a will and to impress a trust upon the estate of decedent. The complaint alleged that decedent promised to make a will giving plaintiff and his wife one-half of all her property provided they moved from Texas to Los Angeles and established a home for decedent's mother and "care and provide for the mother and 'administer unto her welfare and wishes and render unto her love and affection until the time of her death'." In reversing the judgment, the court stated [48 Cal.App.2d at page 523, 120 P.2d at page 164] that it was "'out of the power of any earthly tribunal to restore the parties to their original situation and environment.' * * *" [48 Cal. App.2d at page 525, 120 P.2d at page 165.] "* * * it appears from the pleading itself that the compensation intended by decedent for the peculiar and exceptional services and loving care and attention which they were giving to the mother—and their acts in taking up residence in a city other than that in which they had been living, and, we may assume, undergoing readjustments in their social and economic relationships—was to be, not any payment in dollars and cents during her lifetime, but that upon her death they should benefit to the extent of one-half of her estate."

[2] Where the services rendered by a plaintiff consisted in nursing and caring for a person enfeebled and suffering from a horrible disease, requiring constant and unceasing watchfulness, harrowing to the mind, destructive to the peace and comfort of the one performing the services, and possibly injurious to the health, it has been held that it is impossible to estimate their value by any pecuniary standard; and where it is evident that decedent did not intend so to measure them, it is out of the power of any court, after the performance of such services, to restore the plaintiff to the situation in which he was before the contract was made or to compensate him therefor in damages. See Traver v. Naylor, 126 Or. 193, 268 P. 75; Lothrop v. Marble, 12 S.D. 511, 81 N.W. 885, 76 Am.St. Rep. 626; Velikanje v. Dickman, 98 Wash. 584, 168 P. 465; Howe v. Watson, 179 Mass. 30, 60 N.E. 415; Rhodes v. Rhodes, 3 Sandf.Ch.,N.Y., 279; Bryson v. McShane, 48 W.Va. 126, 35 S.E. 848, 49 L.R.A. 527; Brinton v. Van Cott, 8 Utah 480, 33 P. 218; Fred v. Asbury, 105 Ark. 494, 152 S.W. 155; McCullom v. Mackrell, 13 S.D. 262, 83 N. W. 255; Schoonover v. Schoonover, 86 Kan. 487, 121 P. 485, 38 L.R.A.,N.S., 752; Annotations 69 A.L.R. 149; 106 A.L.R. 760, and cases cited.

[3] To enforce an oral contract to bequeath or devise property in equity by quasi-specific performance, it must be shown that the contract is definite and certain, the consideration adequate, that the contract is founded on good morals and not against public policy, that the character of the services is such that a money payment would not furnish adequate compensation to the plaintiff, that there is such a change in the plaintiff's condition and relations in reliance on the contract that a refusal to complete the contract would be a fraud upon him, and that the remedy asked for is not harsh, oppressive or unjust to innocent third parties. Brown v. Freese, 28 Cal.App.2d 608, 615, 83 P.2d 82; Fowler v. Hansen, 48 Cal.App.2d 518, 522, 120 P.2d 161; Barry v. Beamer, 8 Cal.App. 200, 210–211, 96 P. 373; Shive v. Barrow, 88 Cal.App.2d 838, 199 P.2d 693, 847; Khoury v. Barham, 85 Cal.App.2d 202, 211, 192 P. 2d 823.

[4] It is not necessary that the complaint state in so many words that there was an adequate consideration for the contract or that the contract was fair and just, or that the character of the services rendered were such that they are not susceptible of pecuniary measurement; for such allegations, standing alone, constitute mere conclusions. It is sufficient if the complaint alleges facts from which these conclusions may be drawn. Notten v. Mensing, 3 Cal. 2d 469, 477, 45 P.2d 198; Fowler v. Hansen, 48 Cal.App.2d 518, 525, 120 P.2d 161.

Cases cited by defendant were distinguished at length in Fowler v. Hansen, 48 Cal.App.2d 518, 523, 120 P.2d 161. No purpose would be served in repeating the distinguishing features here. The facts pleaded clearly distinguish the present case from Murdock v. Swanson, 85 Cal.App.2d 380, 193 P.2d 81.

[5] While the complaint here is not an exemplar of model pleading, it sufficiently pleads facts which take the case out of the operation of the statute of frauds. There are sufficient facts alleged, which upon demurrer must be taken as true, from which it appears that the contract was definite and certain, the consideration adequate, that it was not against public policy, that the services alleged to have been rendered by plaintiff were of such an extraordinary and peculiar nature that they could not be, and in the contemplation of the parties were not to be, compensated for in money, and that there was such a change in plaintiff's condition and relations in reliance on the contract that a refusal to complete the contract would be a fraud upon her. An ordinary action at law for breach of the contract would not give plaintiff the thing to which she is entitled under the allegations of her complaint—would not afford her full and adequate relief. The promise came from decedent, who was suffering the last days of cancer and who knew he had not long to live. It was made to a woman who had formerly been his wife, and to whom, in his hour of need, he turned for

that comfort, care and consolation which he felt only she could give. He allegedly desired none of the usual services of a nurse or housekeeper. The contract which he proposed, and which plaintiff accepted, answered his special needs. The promise was made to induce, and it did induce, action. Plaintiff assumed an obligation which, under the circumstances of the case, she need not have assumed, and which required of her, at a late stage in life, to abandon her own home and personal comforts, her employment, her old friendships and acquaintances, and to adjust herself to a new pattern of life laid down by the needs and requirements of decedent. The duties which she assumed, by the acceptance of the contract, must, in the very nature of things, have been most exacting and tedious and, at times, distasteful and disagreeable. In rendering the services called for by the contract, defendant received the benefit of plaintiff's society and companionship, "affectionate care and tender ministration" until his death.

[6] Respondent claims that the short duration of plaintiff's services was inadequate as a consideration to sustain specific performance. It sufficiently appears that there was adequate consideration for the contract, for, as stated in Velikanje v. Dickman, supra, 98 Wash. 584, 168 P. 465, 470, in answer to a similar contention, "* * * the extent of the consideration is to be measured by the breadth of the undertaking rather than by the eventuality. Respondent might have had to serve and nurse for many years. Each party to the agreement knowingly stood the loss or gain by that contingency." See Howe v. Watson, 179 Mass. 30, 60 N.E. 415, 418; Annotations 69 A.L.R. 115; 106 A.L.R. 756.

It also appears from the complaint that no injustice or harshness would ensue to respondent, who, since the allegations of the complaint are taken as true, appears not to be an innocent party.

[7] It was not necessary that the complaint show that, before its filing, the plaintiff presented a demand or claim for the property to the executor. Plaintiff is not asserting a claim against the estate. The relief sought is equitable. The law does not require the presentation of a claim as a condition precedent to the maintenance of an action in quasi-specific performance. Furman v. Craine, 18 Cal.App. 41, 46, 121 P. 1007; Trower v. Young, 40 Cal.App.2d 539, 542–548, 105 P.2d 160. See McKay v. Security-First Nat. Bank, 35 Cal.App.2d 349, 355, 96 P.2d 376; Annotation 113 A.L.R. 1070.

We hold that the complaint states facts sufficient to constitute a cause of action. We do not decide, however, that the complaint may not be subject to special demurrer, and the court may in its discretion require the clarification of uncertainties or ambiguities, if any, in the complaint.

Reversed.

SHINN, P. J., and WOOD, J., concur.



99 Cal.App.2d 757

DENCKER v. BERNSTEIN.

Civ. 14519.

District Court of Appeal, First District, Division 2, California.

Oct. 4, 1950.

Action by Ellen S. Dencker against David Bernstein for broker's commission allegedly earned by plaintiff's assignor. The Superior Court, City and County of San Francisco, Preston Devine, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that broker had fully performed contract of employment and was entitled to commission.

Judgment affirmed.

1. Brokers ⇐60

When real estate broker, employed simply to negotiate a sale, produces a contract executed by a solvent purchaser, he is entitled to pay for his services, whether trade is finally consummated or not.

2. Brokers ⇐60

Whether failure to complete the contract of sale of property or transaction negotiated has any bearing upon broker's right to be compensated for his services depends primarily upon terms of employment.

3. Brokers ⇐50

Where contract of employment authorized broker to act as vendor's exclusive agent for period of 30 days to sell and enter into and sign written contract for sale of certain property, and purchaser signed agreement of sale and initialed riders attached thereto modifying agreement within time period, notwithstanding that completed agreement was not delivered to vendor until after period, broker had fully performed contract and was entitled to commission.

Christin, Keegan & Carroll, Charles A. Christin, San Francisco, for appellant.

Theodore M. Monell, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff, Ellen S. Dencker as assignee of Jack M. Feder, brought an action against defendant David Bernstein for payment of $3,750 plus interest, claiming the sum to be due Feder, a real estate broker, for his services in obtaining a buyer for defendant's property.

On December 15, 1947, appellant entered into a contract with Feder to sell certain property. The Uniform Authorization to Sell read: "In consideration of the listing for sale of the property hereinafter described and in consideration of the services to be performed by the agent, the undersigned, herein designated as the seller, hereby authorizes Jack M. Feder herein designated as the agent, exclusively and irrevocably for the term of 30 days from the date hereof, *to sell and enter into and sign a written contract* in substantial conformity with the 'Uniform Deposit Receipt and Agreement of Sale' adopted by the San Francisco Real Estate Board on July 1, 1944, in the name of and for the seller, for the sale and conveyance at the price of One Hundred Thousand and no/100 ($100,000.00) Dollars of the following described property * * *". (Emphasis ours.)

On January 13, 1948, Feder presented appellant with an agreement of sale signed by Harry Friedman, the buyer. Appellant proposed that his attorney examine the papers and on the following day, January 14, 1948, the final day covered by the authorization, appellant and Feder met with the attorney at his office, a discussion followed, certain changes were made in the terms of the agreement which appellant desired, which changes were attached as riders to the agreement and Feder instructed to have the purchaser initial the riders. On that same day Feder had the riders initialed by Selby E. Pels who had been authorized by Friedman to sign for him and act as his agent. Although Feder testified he phoned Bernstein the evening of January 14 and told him the riders had been initialed, the completed Agreement of Sale was not delivered to Bernstein on that date. Feder attempted to contact appellant the following day but did not succeed in reaching him until January 16, 1948, at which time appellant refused to consummate the sale on the ground that the authorization of the broker had expired.

The question presented by appellant is: "After the period of a real estate broker's exclusive authorization has expired, is he entitled to a commission if he then presents a written agreement to purchase dated within the period of the broker's exclusive authorization, and the seller refuses to consummate the sale upon the grounds of the late tender?"

The trial court found "that plaintiff's assignor secured an offer to purchase the premises upon the terms prescribed by and within the terms of the authorization executed by defendant" and entered judgment for plaintiff in the sum of $3,750 plus interest.

Appellant contends that the agent, relying upon a written contract, must tender the contract during the period of authorization before the agent may hold the seller liable for the agent's commission. Under the terms of the contract this was not necessary.

The contract provided that within the specified time the agent was authorized "to sell and enter into and sign a written contract * * * in the name of and for the seller, for the sale and conveyance" of the property. This the agent did, and furthermore the seller not only had knowledge of such a contract but had approved it and requested Feder to secure the initials of the buyer to the changes, all within the authorized time. There is no question but that plaintiff's assignor, the agent, fully complied with the terms of the contract within the time specified.

We have found no authority which is directly in point. Those which have been cited and those hereinafter referred to relate to the commonly known broker's contract which calls upon him "to find a buyer who is ready, able and willing to purchase" at the terms and price agreed on. Here the owner employed the broker "to sell and enter into and sign a written contract." This the broker did and this was all he was required to do. And the contract which he signed with the purchaser was accepted and approved by the seller.

[1] As for appellant's contention that the agent, relying upon a written contract, must tender the contract during the period of authorization before the agent may hold the seller liable for the agent's commission it is sufficient to say that the broker's contract did not require him to deliver a contract of sale to the seller within the life of the broker's contract. It did not even require him to communicate the fact of sale to the seller within that time. In this respect the case is similar to Gunn v. Bank of California, 99 Cal. 349, 352, 33 P. 1105, 1106, where the court said: "It is, of course, well settled that when a broker employed simply to negotiate a sale of real estate has found a purchaser able, ready, and willing to purchase upon the vendor's terms, his right to the agreed commission is complete, and does not depend upon the final acceptance by the purchaser of a conveyance of the property sold." Later in the opinion the court quotes from Hayden v. Grillo, 35 Mo. App. 647, the following, 99 Cal. at page 353, 33 P. at page 1107: "'The object of the vendor is to effect a sale of his property, and, when the real-estate broker produces a contract executed by a solvent purchaser, he is then entitled to pay for his services, whether the trade is finally consummated or not * * *.'"

"If a real estate broker fully performs his contract, he cannot be prevented from recovering his commission because the owner subsequently changes his mind about making the sale or imposes such additional terms as to postpone a transfer of the title until after the expiration of the time limited. * * * There must be no breach of faith by the owner of property towards the broker who has been employed to secure a purchaser thereof." Slotboom v. Simpson Lumber Co., 67 Or. 516, 135 P. 889, 136 P. 641, 642, Ann.Cas. 1915C, 339.

[2] "Whether failure to complete the contract or transaction negotiated has any bearing upon a broker's right to be compensated for his services depends primarily upon the terms of the employment. While there are some decisions to the effect that there must be an actual performance of the contract negotiated to entitle a broker to his commissions, even though the contract of employment is silent upon the point, the great weight of authority is that unless the broker and his employer have expressly stipulated to the contrary, the broker is entitled to his compensation upon the completion of the negotiations which he undertook, irrespective of whether or not the contract negotiated is ever actually consummated * * *." 8 Am.Jur., Brokers, § 179.

[3] Far more certain is the right of a broker to his commission under a contract such as we have here where he is required to "sell and enter into and sign a written contract" within a fixed period of time. The broker having fully performed the contract the seller cannot defeat recovery by adding new conditions to the written contract.

Judgment affirmed.

GOODELL, J., concurs.

99 Cal.App.2d 760

BORDEN & BARTON ENTERPRISES, Inc. v. WARNER BROS. BROADCASTING CORPORATION et al.

Civ. 17567.

District Court of Appeal, Second District, Division 1, California.

Oct. 4, 1950.

Action by Borden & Barton Enterprises, Inc., against Warner Bros., Broadcasting Corporation and others to recover damages for alleged plagiarism in copying plaintiff's radio show and for an injunction and an accounting. The Superior Court of Los Angeles County, Wm. B. McKesson, J., sustained a demurrer to third amended complaint without leave to amend and entered a judgment of dismissal and plaintiff appealed. The District Court of Appeal, Doran J., held that amended complaint failed to state a cause of action and that sustaining a demurrer thereto without leave to amend was not abuse of discretion.

Judgment affirmed.

1. Copyrights ⇐82

Amended complaint failed to state a cause of action to recover damages for alleged plagiarism in copying plaintiff's radio show where complaint failed to show any novel idea reduced to a concrete form which had been appropriated by defendants, failed to allege any circumstances indicating any implied contract or trust relation and failed to make clear the exact similarity between plaintiff's and defendants' radio shows upon which action was predicated or to allege what portions of plaintiff's show were copied by defendants.

2. Pleading ⇐225(2)

Where third amended complaint, differing only slightly from its predecessors, failed to state a cause of action to recover damages for alleged plagiarism in copying plaintiff's radio show, sustaining a demurrer thereto without leave to amend was not abuse of discretion.

Alexander L. Oster, Los Angeles, for appellant.

Freston & Files and Eugene D. Williams, all of Los Angeles, for respondents.

DORAN, Justice.

The judgment from which the present appeal is taken is one of dismissal of plaintiff's cause of action following the sustaining of a general demurrer to a third amended complaint. The original and amended complaints attempt to state a cause of action to recover damages for alleged plagiarism in the copying of plaintiff's radio show without permission and broadcasting the same by means of radio station "KFWB".

Appellant's third amended complaint, differing only slightly from its predecessors, alleges that since March 23, 1948, "plaintiff has been the exclusive owner of a show, transmit by means of the radio, known as a 'Boom Show' ". It is then alleged that "said show is performed on the air by means of the radio as follows: Red, yellow, green, purple balloons of various sizes and shapes are used. Seated on the stage are five contestants. Above and in back of each contestant is a wooden disc. Upon each disc is one letter of the word 'Boom'; * * * the explanation mark makes the fifth. This is for identification purposes. In the center of each disc is a deflated balloon, to which is attached by a long hose an ordinary tire pump. Each contestant uses this tire pump to inflate his balloon until it goes Boom. The first to break his balloon is the winner, and prizes are awarded to the winners".

The complaint alleges that the above show was produced and presented by appellant on June 3, 1948 through the medium of the National Broadcasting Co. studios at Los Angeles, "and a recording was made of said show by plaintiff"; that a copy of the broadcast is not attached to the complaint since "it would be impracticable to attach" such a recording.

The respondents' dereliction is alleged as follows: "That for several weeks last past, the defendants * * * without the permission or consent of plaintiff, have copies and broadcast a show over the air through the medium of Station KFWB,

which show is entitled 'Barrel of Dough', and said show contains portions copied from plaintiff's show. Balloons are given to two rows of the theatre audience and at a Go Signal from the Master of Ceremonies, the contestants blow their balloons until three balloons explode. The winner row receive prizes". It is then alleged "That by reason of the unlawful acts of the defendants in using the material belonging to the show owned by plaintiff, the plaintiff has been damaged in the sum of * * * $250,000.00". In addition to the damages claimed, the complaint prays that "defendants be restrained and enjoined from using the material of said Boom Show in the future", and be required to account "for the profits denied the plaintiff".

The only question involved herein is whether the trial court "erred in sustaining the demurrer without leave to amend". It is contended by appellant that the (third amended) complaint "states facts sufficient to constitute a cause of action, or could be amended to sustain a cause of action", and that the trial court's action "was error and constituted an abuse of discretion".

Respondents' brief, answering the above argument, calls attention to the fact that in plaintiff's allegations "there is no assertion that the plaintiff's show was novel or originated by plaintiff", or that the same "was ever submitted to the defendants for consideration as to possible production or purchase". Likewise, it is particularly noted that "As a radio show, whether recorded or not, either would consist only of sound effects, conversation, description by an announcer or something of the sort, and yet there is no allegation that the two shows, as they appeared over the air in sound, were or could be at all similar".

A survey of the record indicates that the third amended complaint, like its predecessors, alleges nothing by way of pointing out the novelty of plaintiff's "Boom Show" other than by describing the balloon contest involved. Likewise, the similarity between the shows staged by plaintiff and defendants is only made to appear by the short and general description of the two shows. Although it is alleged that the defendants' show "contains portions copied from plaintiff's show", the complaint in question does not allege what portions of the plaintiff's show were "copies". As respondents' brief points out, "the two descriptions indicate no similarity in concrete form but only a similarity in idea, in that in both shows a contest was involved and balloons were used".

The recent case of Stanley v. Columbia Broadcasting System, 35 Cal.2d 653, 656, 221 P.2d 73, 75, decided August 4, 1950, has been cited by both parties. Affirming a judgment of the Superior Court, the opinion in the Stanley case says: "the right of the originator of an idea to recover from one who uses or infringes it seems to depend upon whether or not the idea was novel and reduced to concrete form prior to its appropriation by the defendant, and, where the idea was disclosed by the originator to the appropriator, whether such disclosure took place under circumstances indicating that compensation was expected if the idea was used." It was also held that "The problem of similarity between two compositions, whether literary, musical or dramatic, is a question of fact to be determined ultimately by a comparison of the two works upon the basis of the opinion of the average individual possessing a practical understanding of the subject".

The action in the Stanley case was by a writer to recover on an implied agreement of defendant broadcasting company to pay for a radio program alleged to have been originated by plaintiff and which had been submitted to the defendant in the hope that a purchase or license agreement might result therefrom. From this statement of the facts it is evident that the Stanley case is of no particular assistance in the present controversy. The facts here involved are dissimilar; for example, it is not claimed that appellant's "Boom Show" was ever submitted to respondents. Moreover, the instant appeal only involves the sufficiency of appellant's third amended complaint and the propriety of sustaining a general demurrer thereto without leave to amend. The Stanley case furnishes no support to appellant's contentions.

[1, 2] It cannot be said that the trial court's action in sustaining the demurrer was erroneous or that it amounted to an abuse of discretion. After three attempts to state a cause of action, the third amended complaint fails to allege any circumstances indicating any implied contract or trust relation, and likewise fails to show any novel idea "reduced to a concrete form", which has been appropriated by the defendants. The complaint entirely neglects to make clear what is perhaps one of the most important items, namely, the exact similarity upon which plaintiff predicates a cause of action; it fails to allege what portions of the plaintiff's show were "copies" by the defendants. As respondents' brief points out, the only similarity definitely pointed out is that both shows make use of a balloon contest involving members of an audience, and resulting in an award of prizes.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



99 Cal.App.2d 668

In re STANDING'S ESTATE.
NELSON v. BERGGREN.

Civ. 17694.

District Court of Appeal, Second District, Division 1, California.

Sept. 27, 1950.

Rehearing Denied Oct. 26, 1950.

See 223 P.2d 255.

Raymond A. Nelson, as special guardian of the person and estate of Jane Standing, an alleged incompetent, brought a proceeding by notice of motion to vacate a judgment appointing Venna Berggren as the incompetent's guardian. From an order of the Superior Court of Los Angeles County, Philbrick McCoy, J., vacating and annulling the judgment, Venna Berggren appealed. The District Court of Appeal, Drapeau, J., held that the judgment was properly vacated because of failure to serve the citation to appear at the hearing of the petition for the guardian's appointment on the alleged incompetent within the statutory time before hearing and fraud in making a false affidavit of such service.

Order affirmed.

1. Insane persons ⇐33(2)

The Superior Court's findings on directly conflicting evidence that citation to appear at hearing on petition for appointment as incompetent's guardian was not served on alleged incompetent within statutory time before hearing are conclusive on appeal from order vacating judgment appointing petitioner as guardian. Probate Code, § 1233.

2. Appeal and error ⇐1011(1)

The trial court's findings on conflicting testimony must be followed by appellate court, in absence of clear showing of abuse of trial court's discretion.

3. Appeal and error ⇐996

On appeal from order after trial of issue on affidavits, those favoring respondent's contentions establish not only facts stated therein, but all facts which may be reasonably inferred therefrom.

4. Judgment ⇐443(1)

An equity court, under proper circumstances, will set aside judgment obtained by fraud, but fraud must be extrinsic and collateral.

5. Judgment ⇐443(1)

"Extrinsic or collateral fraud", justifying equity court in setting aside final judgment, must be of such character as to prevent trial of issues presented to court for determination.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Extrinsic or Collateral Fraud".

6. Judgment ⇐443(1, 3)

Collateral fraud practiced outside court, thereby effectively depriving defendant of right to present his case or all of his defense, is "extrinsic fraud," from which equity will give relief by setting aside judgment obtained thereby.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Extrinsic Fraud".

7. Judgment ⇐443(1)

To constitute "extrinsic fraud," justifying equity court in setting aside final judgment obtained thereby, party obtaining judgment must have been guilty of misrepresentation or concealment preventing other party from having his day in court.

8. Judgment ⇐443(1)

A false affidavit of service of process on defendant constitutes "extrinsic fraud" justifying equity court in setting aside judgment for plaintiff, as defendant is thus prevented from having his day in court.

9. Judgment ⇐443(3)

An equity court will relieve defendant from unjust judgment rendered against him without either actual or constructive service of process, thereby depriving him of opportunity to be heard in his defense.

10. Judgment ⇐443(1)

"Extrinsic fraud," warranting equity court in setting aside judgment or decree, consists of false representations preventing real trial of cause on merits, like conduct inducing interested party to refrain from appearing or participating in trial, failure to serve timely notice of hearing, or acts preventing presence of material witnesses at trial.

11. Judgment ⇐443(1)

"Extrinsic or collateral fraud," for which judgment may be set aside, does not operate on matters pertaining to judgment itself, but relates to manner in which it was procured.

12. Insane persons ⇐33(1)

A judgment appointing guardian of incompetent was properly vacated on grounds of failure to serve citation on alleged incompetent within statutory time before hearing and fraud in making false affidavit of timely service thereof. Probate Code, § 1233.

Lindstrom & Bartlett, and William C. Bartlett. Los Angeles, for appellant.

Marshall Stimson and Raymond A. Nelson, Los Angeles, for respondent.

DRAPEAU, Justice.

By a verified petition filed June 29, 1948, Venna Berggren sought appointment as guardian of her grandmother, Jane Standing, who was then about 90 years of age. It was alleged therein that by reason of "extreme age and senility" said grandmother had "become mentally incompetent, either to care for herself or to manage her property." The usual citation issued directing Jane Standing to appear on July 16, 1948, the day set for hearing the petition.

On said date the citation was filed upon which was endorsed an unverified affidavit signed by Edith I. Allen, sister of Jane Standing, averring that service thereof was made upon the alleged incompetent on July 1, 1948. Two certificates of Dr. Crakow dated July 15, 1948, were presented certifying that Jane Standing was not physically or mentally capable of handling her own affairs, and was "not physically able to endure a court session."

Under section 1233, Probate Code, as then in effect, no testimony was presented at the hearing, but on the basis of the foregoing documents, the court granted the petition and fixed the bond, whereupon Mrs. Berggren qualified as guardian and entered upon her duties as such.

Thereafter, on December 15, 1948, on behalf of Jane Standing, an amended notice of motion to vacate the judgment appointing guardian, together with points and authorities and supporting affidavits, was served and filed. The grounds of said motion were:

1. That no citation was served upon the alleged incompetent within the time prescribed by law prior to the hearing;

2. That the petition "falsely and fraudulently" omitted reference to a second sister of the incompetent residing within the State.

3. That the order was obtained by fraud.

4. That the first physician's certificate was insufficient under Probate Code section 1461.

Counter affidavits in opposition to the motion were filed, and after a hearing lasting two days, the court vacated the decree appointing Mrs. Berggren as guardian, having found against her on grounds 1, 3 and 4 of the motion.

This appeal is from such order.

For a reversal of the order appealed from, appellant relies upon the following propositions:

(1) The finding of the trial court that the ward was not properly served with process is neither supported by substantial or by any credible evidence.

(2) The fact that the ward was duly served sustains the order appointing the guardian.

(3) There was no fraud.

(4) The motion for new trial should have been granted.

Among other things, the record reveals that Mrs. Standing owns two adjoining lots in Los Angeles. One is improved with a bungalow in which she lives. The other with a four-family flat building which she rents to tenants. One of these tenants, Jemima G. Stoffel averred by affidavit that she had lived in said building for five years, during which time she saw Mrs. Standing "practically every day" ; that Mrs. Standing collected the rents from affiant and other tenants and supervised repairs; and that during June and July of 1948, Mrs. Standing attended to her business; collected rents, went to the bank and grocery stores and performed her usual household duties.

The amended motion to vacate the judgment was supported by several affidavits.

That of Jane Standing, the petitioner, averred that she was not served with copy of the petition for guardianship nor with the citation until after July 16, 1948, the date of the hearing thereof; that she had no knowledge whatsoever of the proceedings for appointment of guardian until she was given copies of the petition and citation during the latter part of July or early August, 1948; that she then conferred with her attorney, Raymond A. Nelson, and handed the papers to him for investigation. She also averred that she was physically able to appear in court on the day of the hearing and had she known about it, she would have been present to oppose the appointment; that no doctor gave her a physical examination prior to the date of the hearing. It was further averred that affiant for the past thirty-eight years had managed her properties: interviewed tenants, collected rents, banked her funds, paid her taxes and other operating expenses as they became due; that she had done all of these things continuously and without interruption "except during the past few months when she had been prevented from doing so by reason of the within proceedings." That prior to July 16, 1948, affiant did her own marketing, made purchases of groceries and other necessities, and prepared her own food. That she "has continued to do so since the said 16th day of July, 1948, and is doing so as of the date of this affidavit."

The affidavit of attorney Raymond A. Nelson was to the effect that he had known Mrs. Standing for four years; that when she needed legal advice she was brought to his home by Mr. Reyes, one such occasion being in June of 1948. That early in August, she came to his home and handed him a copy of the petition for guardianship and citation rehearing thereof on July 16, 1948, and informed affiant that "she had received these papers only a day or two before the day she was at affiant's home" ; that he saw Mrs. Standing on several occasions between early August and October 15, 1948, when he took her to the Superior Court at Glendale, and at no time during this period was she physically unable to attend a court session.

Mr. Reyes averred by affidavit that he had been a neighbor of Mrs. Standing for 25 years, helped her with the work around her place, i.e., burning rubbish, mowing lawns, trimming shrubbery, etc., and that during June and July, 1948, he took her riding in his automobile almost every day, at which time she was physically able to be out and to attend to her affairs.

In her counter affidavit appellant averred that she accompanied her aunt Edith I.

Allen to Jane Standing's home on July 1, 1948; that she then and there saw Mrs. Allen "personally deliver" to Mrs. Standing copies of the petition and citation; that Jane Standing asked "what is this?", to which affiant replied that she was petitioning the Superior Court to be appointed her guardian and that the matter would be heard in Glendale on July 16, 1948; that after reading aloud to Jane Standing the whole of said petition and citation, the latter stated she was glad that affiant was going to help her by being appointed her guardian, because it would relieve her of a lot of worry. That on July 15, 1948, affiant had Jane Standing brought to her home and told her that "the hearing comes up tomorrow and I find I may have to take you to court with me. Do you want to go?" That Jane Standing replied: "I would rather not but if you need me, I will come." That affiant then told her: "I will try to arrange it so you won't have to."

Affiant further averred that thereafter she learned of the certificate of Dr. Crakow and was told by her attorney that it was not necessary for Jane Standing to be present at the hearing. That a few days after the hearing, affiant called at the home of Jane Standing and told her about the appointment, at which time Jane Standing stated: "Well, that's fine, honey."

The affidavit of Mrs. Edith I. Allen corroborates the above affidavit and also avers that Jane Standing "was pleased with the idea that she was going to be taken care of."

At the instant trial, appellant testified that she planned and had Dr. Crakow come to her home the day before the hearing to examine Mrs. Standing; that the latter was there for three or four hours, and the doctor was there about half an hour; that the doctor talked to Mrs. Standing and "held her hand". She further testified as to the unkempt appearance of Mrs. Standing and the unclean condition of her home; and as to the various matters averred in her affidavit hereinabove recited, especially as to the service upon Mrs. Standing of the petition and citation.

Dr. Crakow took the stand and was asked to explain his certificate of July 15, 1948, wherein he stated that Mrs. Standing "is not physically able to endure a court session". He stated that because Mrs. Standing was averse to being examined, he had to make what physical observation and examination he could; that he checked her pulse and found it weak and irregular and that "with her mental condition and physical condition at that time, I did not believe she was in a suitable condition to endure a court session"; that he made an examination as to her mental condition and found a condition of senile dementia which was due to softening of the brain tissue. He examined Mrs. Standing again on December 7, 1948, and found her physical condition slightly improved; that her mental condition was satisfactory at times and then would show memory lapses, confusion and incoherence.

Mrs. Wilson, who frequently visited Mrs. Standing over a period of eight years, testified Mrs. Standing's home was "rather charming", nicely arranged and comfortable, and that she noticed no dust; that Mrs. Standing did her own cooking and was always properly dressed; that she took pride in her personal appearance and when she went out wore a hat and a suitable jacket.

[1] As can readily be seen, the evidence on the question of service was directly conflicting; hence the findings made thereon are conclusive.

[2, 3] In Brainard v. Brainard, 82 Cal. App.2d 478, 480, 186 P.2d 990, 991, it was held: "The total evidence considered by the trial court upon the motion consists of a volume in excess of 110 pages (here 150 pages). It all represents a body of conflicting statements by witnesses called to support the contentions of the respective parties. Whatever might be the impression of the appellate court with reference to the inferences and findings which should be drawn from diverse proofs, it is the rule that the findings must be followed in the absence of a clear showing that discretion was abused. Trujillo v. Trujillo, 71 Cal. App.2d 257, 260, 162 P.2d 640; Cooper v. Deon, 58 Cal.App.2d 789, 790, 137 P.2d 733. In all matters in which an issue is tried upon affidavits it is the rule that those

favoring the contentions of respondent establish not only the facts stated therein but also all facts which may be reasonably inferred therefrom. Doak v. Bruson, 152 Cal. 17, 19, 91 P. 1001; Kettelle v. Kettelle, 110 Cal.App. 310, 313, 294 P. 453."

[4-9] On the question of fraud, the case of Sipe v. McKenna, 88 Cal.App.2d 1001, 1004, 200 P.2d 61, 63, is decisive. It was there held: "A court of equity under proper circumstances will set aside a judgment obtained by fraud. 15 Cal.Jur. 8, sec. 120. The fraud must be extrinsic and collateral. Huron College v. Yetter, 78 Cal. App.2d 145, 149, 177 P.2d 367. Extrinsic or collateral fraud is defined in the recent case of Gale v. Witt, 31 Cal.2d 362, at page 365, 188 P.2d 755, thus: 'The fraud which will justify the setting aside of a final judgment by a court of equity must be of such character as prevents a trial of the issues presented to the court for determination. Thompson v. Thompson, 38 Cal.App.2d 377, 101 P.2d 160; Godfrey v. Godfrey, 30 Cal. App.2d 370, 86 P.2d 357. Where the fraud practiced is collateral to and outside of court so that a party is, because of such fraud or concealment, effectively deprived of presenting his case or all of his defense, it is extrinsic and equity will give relief. (31 Cal.2d at page 366, 188 P.2d at page 757) * * * to constitute extrinsic fraud, there must have been some representation or concealment by the defendant which prevented the plaintiff from having his day in court * * *.' It has long been established that a false affidavit of service constitutes extrinsic fraud. A party is thus prevented from having his day in court. Courts of equity will relieve a party from an unjust judgment rendered against him when, without service of process, either actual or constructive, no opportunity has been given him to be heard in his defense. Bernhard v. Waring, 213 Cal. 175, 180, 2 P.2d 32; Parsons v. Weis, 144 Cal. 410, 416, 77 P. 1007; Herd v. Tuohy, 133 Cal. 55, 62, 65 P. 139; Martin v. Parsons, 49 Cal. 94, 100."

[10] In Godfrey v. Godfrey, 30 Cal. App.2d 370, 379, 86 P.2d 357, 362, extrinsic fraud is defined as follows: "Extrinsic fraud, which alone will warrant a court of equity in setting aside a judgment or decree, consists of such false representations as will prevent a real trial of the cause upon the merits of the issues involved, like the conduct which may induce an interested party to refrain from appearing or participating in the trial, a failure to serve timely notice of the hearing, or acts preventing the presence at the trial of material witnesses. (Citation of authorities.)"

[11] "Extrinsic or collateral fraud operates not upon matters pertaining to the judgment itself but relates to the *manner* in which it was procured." Deyl v. Deyl, 88 Cal.App.2d 536, 540, 199 P.2d 424, 426.

[12] The order appealed from is affirmed.

WHITE, P. J., and DORAN, J., concur.



99 Cal.App.2d 885

DONOVAN v. SUPERIOR COURT OF LOS ANGELES COUNTY.

Civ. 18067.

District Court of Appeal, Second District, Division 1, California.

Aug. 17, 1950.

Proceeding by John F. Donovan against the Superior Court of Los Angeles County. The District Court of Appeal, Per Curiam, held that since no denial of judge's disqualification had been filed within five days and matter was thereafter heard by another judge, it would be assumed that first judge was disqualified and that the matter had been transferred by him to judge who heard the matter.

Petition denied.

Doran, J., dissented.

Appeal and error ⇐911(1)

Where judge against whom an affidavit of prejudice had been filed did not file a denial of his disqualification within five

days and matter was subsequently heard by another judge, District Court of Appeal would assume that first judge was disqualified and that the matter was transferred by him to judge who subsequently heard it pursuant to statutory proviso that where there are two or more judges of the same court, action or proceeding may be transferred to a judge who is not disqualified. Code Civ.Proc. § 170.

PER CURIAM.

Petitioner was adjudged guilty of contempt and given four fines of $500 each. He filed an affidavit of prejudice against Judge Rhodes; the matter was continued to a subsequent date and heard by Judge Bartlett. The petition is based on the technical ground that the question of Judge Rhodes' disqualification had to be heard in the manner specified in section 170 of the Code of Civil Procedure. However, that section has a proviso reading as follows: "provided, however, that when there are two or more judges of the same court, one of whom is disqualified, the action or proceeding may be transferred to a judge who is not disqualified." Thereafter Judge Rhodes for five days failed to file a denial of his disqualification, and we assume he was disqualified and that the matter was by him transferred to Judge Bartlett. The petition is denied.

DORAN, J., votes to grant the petition.



99 Cal.App.2d 767

BARNETT v. FURST.

Civ. 7777.

District Court of Appeal, Third District, California.

Oct. 7, 1950.

George S. Barnett sued Leslie Gordon Furst for injuries sustained by plaintiff when defendant's automobile which plaintiff was washing for defendant as defendant's employee rolled forward down slight slope in alley in which plaintiff had parked automobile as instructed by defendant, and struck plaintiff. The Superior Court, Plumas County, J. O. Moncur, J., rendered a judgment adverse to defendant and defendant appealed. The District Court of Appeal, Adams, P. J., held that evidence justified judgment for plaintiff on ground that defendant knew brakes of automobile were defective but did not warn plaintiff of such fact, and that accident was not proximately caused by failure of plaintiff to pull emergency brake handle out as far as it would go when plaintiff parked automobile.

Judgment affirmed.

1. Appeal and error ⇐930(1)

On defendant's appeal from judgment for plaintiff in action for injuries sustained by plaintiff as result of defendant's alleged negligence, evidence would be taken in aspect most favorable to plaintiff.

2. Automobiles ⇐244(33, 41, 58)

In action for injuries sustained by plaintiff when defendant's automobile which plaintiff was washing for defendant as defendant's employee rolled forward down slight slope in alley in which plaintiff had parked automobile as instructed by defendant, and struck plaintiff, evidence justified judgment for plaintiff on ground that defendant knew brakes of automobile were defective but did not warn plaintiff of such fact, and that accident was not proximately caused by failure of plaintiff to pull emergency brake handle out as far as it would go when plaintiff parked automobile.

3. Trial ⇐194(16)

In action for injuries sustained by plaintiff when defendant's automobile which plaintiff was washing for defendant as defendant's employee rolled forward down slight slope in alley in which plaintiff had parked automobile as instructed by defendant, given instructions were not erroneous as constituting statement that brake was defective and thus taking from jury question of whether brake was defective, in view of other given instructions.

4. Damages ⇐132(6)

$7,500 damages for injuries which were permanent in that head of a plaintiff's left

thigh bone was forced through socket of pelvis, and would remain in such condition and cause plaintiff to limp and would disable plaintiff for heavy work such as plaintiff had done previously, was not excessive.

5. Damages ⇐127

In view of the decreased value of the dollar, verdicts for injuries that might in earlier years have been held to be excessive can no longer be so considered.

Russell A. Harris, Sacramento, for appellant.

Samuel A. Rosenthal, Los Angeles, for respondent.

ADAMS, Presiding Justice.

This is an appeal from a judgment for $7500.00 in favor of plaintiff, after a verdict by a jury, in an action for damages for personal injuries sustained by plaintiff by reason of negligence on the part of defendant.

[1] The evidence, taken in the aspect most favorable to plaintiff, as it must be by this court, shows that plaintiff was employed by defendant to wash the latter's automobile, and was instructed by defendant to take the vehicle to a place in an alley where there was a slight slope; that plaintiff parked the car at the designated place and set the brakes; and that while he was engaged in the process of washing the car, and was bending over a bucket in front of it, to rinse his wash rag, the car rolled forward and struck him, and, as a result, he sustained the injuries for which he sought recovery. The negligence of defendant relied upon by plaintiff was that the brakes on the car were defective, that defendant was aware of that fact, but did not so advise plaintiff, or warn him.

Defendant here contends that the evidence fails to support the implied finding of the jury that defendant was negligent, but, on the contrary, shows that plaintiff's own negligence was the proximate cause of his injuries; that the trial court erred in giving certain instructions; and that the verdict is excessive and obviously the result of passion and prejudice.

[2] As for the sufficiency of the evidence to support the verdict, while there is conflict in some respects, defendant himself, called by plaintiff as a witness under section 2055 of the Code of Civil Procedure, admitted that he had trouble with the brakes of his car and had a new brake spring installed which proved inefficient, whereupon he, himself, put in another because the brakes slipped. An automobile mechanic who worked in a service station testified that about three weeks prior to the accident he worked on defendant's car, at which time it rolled backward; that he then checked the brakes, and that the spring was weak; that he mentioned to defendant that the spring was weak and should be checked. Another witness, a garage owner, testified as to the type of brakes on defendant's car, and the manner in which they operated, indicating that the spring might give way at any time. The chief of police of Portola testified that shortly after the accident he talked with defendant about the brakes and that defendant told him that he had trouble with the brake's releasing, and was going to have the manufacturer repair or exchange the brake assembly. Plaintiff testified that he had taken the car to the place indicated by defendant, had put it in low gear and pulled the emergency brake on—had pulled it out as far as it would go and believed it would hold the car. There is no evidence that defendant told plaintiff that the brake spring was defective or that he warned him regarding the possibility of its slipping, or advised him as to what if any precaution he should take to set the brake to prevent its slipping. This evidence is sufficient to sustain the verdict and judgment as to negligence on the part of defendant; and as for defendant's contention that the accident was proximately caused by failure of plaintiff to pull the brake handle out to its full extent, since the jury has found to the contrary, it cannot be said that the testimony does not sustain its conclusion.

Regarding appellant's criticism of three of the instructions given by the trial court, they read as follows:

"The owner of an automobile owes to a person whom he has employed to work on

said automobile a duty to advise or warn said person of any mechanical defects of said automobile including defective brakes that he knows or would have known of on making reasonable inspection of said automobile."

"The owner of an automobile owes to his employee engaged to work on said automobile the duty of exercising ordinary care in making inspection of the mechanical condition of the brakes of said automobile and the question of determining whether the defendant herein made reasonable inspection thereof is one of fact for you to determine."

"The length of time during which a defective or dangerous condition existed may be so considerable as to justify an inference that if the owner of the automobile had exercised ordinary care he would have known of the existence of the condition in time to have had reasonable opportunity to repair or improve the same before the accident in question."

[3] Appellant contends that the wording of such instructions constituted a statement by the court that the brake was defective, and thus took from the jury its independent determination of that fact. He says that these were the only instructions given on the topic of the alleged defective brake. He does not contend that such instructions do not state the law correctly, see Miller v. Pacific Constructors, Inc., 68 Cal.App.2d 529, 545, 157 P.2d 57; Dunn v. Shamoon, 37 Cal.App.2d 486, 99 P.2d 1113; Roberts v. Pacific Gas & Electric Co., 102 Cal.App. 422, 427–428, 283 P. 353, and we are satisfied, after a careful review of the instructions as a whole, that appellant's criticism is without merit. We note particularly that the jury was advised, in an instruction presented by appellant, that plaintiff alleged that defendant was negligent in that he had knowledge of the alleged defective condition of the brakes and failed to warn plaintiff; that defendant denied those allegations; that they were not to assume. Because the accident happened, that defendant was careless or negligent; that the burden was on plaintiff to prove by a preponderance of the evidence that defendant was careless or negligent, and that, if shown, it was the proximate cause of the accident. It was also instructed that it was the exclusive province of the jury to determine the facts, that they were not to be influenced by anything the judge had said or done that might suggest that he inclined to favor either party; that the court had not expressed or intended to express any opinion in regard to what facts had been established or as to what inferences might be drawn; that the law did not require the defendant to prove that he was not negligent or careless, but placed the burden of proof of this issue upon plaintiff. We fail to see that defendant suffered an injury by the three instructions which he attacks.

[4] The remaining complaint of appellant, that the verdict of $7500.00 is excessive and the result of passion or prejudice, is also without merit. The evidence shows that plaintiff's injuries are permanent in that the head of the left thigh bone was forced through the socket of his pelvis, and will remain in that condition, causing him to limp and disabling him for heavy work such as he had done previously; that his knee still bothered him, and that he had had to quit a job of ditch digging because of pain in his left hip and leg; that he was required to wear special shoes, costing $27.00 a pair; and that his only earnings since the accident were for taking care of a sick man for three hours a day for twenty days.

[5] Appellant filed a motion for a new trial asserting as one ground therefor that the verdict was excessive. The motion was denied. It has been noted in numerous recent cases that in view of the decreased value of the dollar, verdicts that might, in earlier years, have been held to be excessive, can no longer be so considered. This was discussed by this court in Brown v. Boehm, 78 Cal.App.2d 595, 603, 178 P.2d 49. Also see our decisions in Couch v. Pacific Gas & Electric Co., 80 Cal.App.2d 857, 867, 183 P.2d 91; Potter v. Empress Theatre Co., 91 Cal.App.2d 4, 14, 204 P.2d 120; Johnson v. Marquis, 93 Cal.App.2d 341, 355, 209 P.2d 63; and Duffey v. General

Petroleum Corp., 93 Cal.App.2d 757, 761, 209 P.2d 986. Respondent directs our attention to the case of Du Val v. Boos Bros. Cafeteria Co., 45 Cal.App. 377, 378–379, 187 P. 767, decided in 1919, wherein an award of $7500.00 for a broken pelvis and attendant suffering from the accident was upheld as not excessive.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.



PEOPLE v. ONE 1941 CHEVROLET COUPE, et al.

Civ. 17354.

District Court of Appeal, Second District, Division 3, California.

Sept. 26, 1950.

Rehearing Denied Oct. 16, 1950.

Hearing Granted Nov. 20, 1950.*

Forfeiture proceeding by the People against one 1941 Chevrolet Coupe, Engine No. AA430562, Serial No. 5AHO123201, 1948 License No. 90D650, wherein Fred W. Gray Co., legal owner, answered denying the allegations of the notice of seizure and intended forfeiture proceedings. The Superior Court, Los Angeles County, Philip H. Richards, J., entered judgment of forfeiture, and the Fred W. Gray Company, legal owner, appealed. The District Court of Appeal, Vallée, J., held that the legal owner had a constitutional right to a trial by jury of the issues of fact of the case, and the denial of a trial by jury to him constituted a miscarriage of justice which required a reversal of the judgment.

Judgment reversed.

1. Forfeitures ⇐5

There can be no forfeiture of property without notice to owner and a hearing at which he can be heard, except where property is kept in violation of law and is incapable of lawful use.

2. Forfeitures ⇐5

Where property sought to be forfeited is what is termed innocent property threatening no danger to public welfare, owner must be afforded a fair opportunity to be heard, and this is true whether it be a common-law or judicial forfeiture, one which does not take effect until by a judgment the rights of the state have been established in a suit instituted for that purpose, or a statutory or legislative forfeiture, one where forfeiture is effective on commission of offense, and in either case, law requires proceedings to be instituted for purpose of ascertaining facts of forfeiture.

3. Forfeitures ⇐5

A statutory or legislative forfeiture is in rem against property itself.

4. Forfeitures ⇐5

A common-law or judicial forfeiture is in personam against a defendant.

5. Forfeitures ⇐7

Under statute providing that any vehicle used to unlawfully transport any narcotics or in which any narcotic is unlawfully kept, deposited or concealed, or is unlawfully possessed by an occupant thereof, shall be forfeited to state, forfeiture prescribed is in rem, and effect of such forfeiture is to transfer title to vehicle from owner to state. Health and Safety Code, §§ 11610–11622.

6. Jury ⇐10

The right of trial by jury guaranteed by Constitution is right as it existed at common law at time Constitution was adopted. Const. art 1, § 7.

7. Common law ⇐3, 7

The common law at time Constitution was adopted includes not only lex non scripta but also written statutes enacted by Parliament.

8. Jury ⇐31(2)

Any act of Legislature attempting to abridge constitutional right to trial by jury is void. Const. art. 1, § 7.

9. Jury ⇐14(12)

The right of trial by jury did not exist at common law in a suit to abate a public

* Subsequent opinion 231 P.2d 832.

nuisance, and is not a constitutional right now. Const. art. 1 § 7.

10. Jury ⇐19(15)

While property kept in violation of law which is incapable of lawful use and declared to be a nuisance per se may be forfeited without a trial by jury under police power, property ordinarily used for lawful purposes may not be forfeited without a trial by jury where an issue of fact is joined as to whether property was being used for an unlawful purpose or is to be taken from an innocent owner.

11. Jury ⇐19(15)

There is no general constitutional right to a jury trial in actions for seizure and forfeiture of contraband articles, but property is not contraband or a public nuisance merely because it was instrumental in commisison of public offense. Const. art. 1, § 7.

12. Jury ⇐13(2)

The right to trial by jury cannot be avoided by merely calling an action a special proceeding or equitable in nature, and Legislature cannot convert a legal right into an equitable one so as to infringe on right of trial by jury. Const. art. 1, § 7.

13. Jury ⇐13(1)

In determinig whether action was one triable by a jury at common law, court is not bound by form of action, but rather by nature of rights involved and facts of particular case, and jury trial must be granted where gist of action is legal, where action is in reality cognizable at law.

14. Jury ⇐10

The right of trial by jury is not limited strictly to those cases in which it existed before adoption of Constitution, but is extended to cases of like nature as may afterwards arise, and embraces cases of same class thereafter arising. Const. art. 1, § 7.

15. Jury ⇐19(15)

Where at common law, prior to adoption of Constitution, a party against whom forfeiture of property used in violation of law was sought to be enforced was entitled to a trial by jury, such right exists now.

16. Statutes ⇐234½

The introduction of a new subject into a class renders it amenable to its general rules, not to its exceptions.

17. Jury ⇐19(15)

Where forfeiture proceeding against automobile was commenced under statute providing for forfeiture of vehicles used to unlawfully transport any narcotics, proceeding was type of action cognizable in a common-law court, and triable by a jury in the Court of Exchequer, and owner of automobile had constitutional right to trial by jury of issues of fact in case. Health and Safety Code, §§ 11610–11622; Const. art. 1, § 7.

18. Appeal and error ⇐1035

The denial of a trial by jury to one constitutionally entitled thereto constitutes a miscarriage of justice and requires a reversal of judgment. Const. art. 1, § 7.

Macfarlane, Schaefer & Haun, William Gamble and E. J. Caldecott, all of Los Angeles, for appellant.

Fred N. Howser, Attorney General, Dan Kaufmann, Deputy Attorney General, for respondent.

VALLÉE, Justice.

Appeal from a judgment ordering the forfeiture of an automobile to the State.

The State instituted this proceeding by filing a "Notice of Seizure and Intended Forfeiture Proceedings" as provided by sections 11612 and 11613 of the Health and Safety Code. The notice alleged that the automobile had been seized pursuant to section 11611 of that Code and that it "was used to unlawfully conceal, convey, carry or transport marihuana, and marihuana was unlawfully in the possession of an occupant." The registered owner and the legal owner answered separately, denying the allegations of the notice. The legal owner alleged that, prior to the seizure, it loaned $886.52 to the registered owner and received a chattel mortgage which was duly filed for record and is a

first lien on the automobile. It also alleged that, prior to making the loan, it made a "reasonable investigation of the moral responsibility, character and reputation of the [registered owner] * * * and found the same to be good," and that there was a balance due of $865.57, with interest.

The court found that the automobile was used contrary to the provisions of section 11610 of the Health and Safety Code and that the legal owner did not, prior to the loan, make a reasonable investigation of the moral responsibility, character and reputation of the registered owner. The legal owner appeals from the judgment.

Prior to the setting of the cause for trial, appellant filed a demand for trial by jury. Thereafter respondent filed objections to the demand and a notice of motion to set the cause for trial without a jury. The respondent's motion was granted. When the cause came on for trial appellant renewed its demand and moved the trial judge for a trial by jury. The motion was denied.

Appellant contends it was denied its right to a trial by jury in violation of article I, section 7, of the Constitution of California.

Health and Safety Code section 11610 provides that a vehicle used to unlawfully transport any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed, or is unlawfully possessed by an occupant thereof, shall be forfeited to the State. At the time of the seizure in 1948, section 11611 (amended, Stats.1949, ch. 1475, sec. 22) provided that any peace officer upon making, or attempting to make, any arrest for violation of the narcotics provisions of the Code, shall seize any vehicle so used unlawfully and hold it "as evidence until a forfeiture has been declared or a release ordered." Provision is made for notice to owners, answers, notice of hearing, hearing, and for judgment of forfeiture or release. Health and Safety Code, secs. 11612–11622, both inc.

[1–5] There can be no forfeiture of property without notice to the owner and a hearing at which he can be heard, except in a few cases of necessity, i. e., property kept in violation of law which is incapable of lawful use. Where the property is what is sometimes termed innocent property, threatening no danger to the public welfare, the owner must be afforded a fair opportunity to be heard. This is true whether it be a common-law or judicial forfeiture (one which does not take effect until by a judgment the rights of the state have been established in a suit instituted for that purpose), or a statutory or legislative forfeiture (one where the forfeiture is effective on the commission of the offense). In either case the law requires proceedings to be instituted for the purpose of ascertaining the facts of the forfeiture. People v. Broad, 216 Cal. 1, 3, 7, 12 P.2d 941. A statutory or legislative forfeiture is *in rem* against the property itself. A common-law or judicial forfeiture is *in personam* against a defendant, 37 C.J.S., Forfeitures, p. 5, § 2. The forfeiture prescribed by the Health and Safety Code is *in rem*. People v. Broad, 216 Cal. 1, 12 P.2d 941; 37 C.J.S., Forfeitures, p. 5, § 2. The effect of such a forfeiture is to transfer the title to the vehicle from the owner to the State.

[6–8] "The right of trial by jury shall be secured to all, and remain inviolate". Cal.Const., Art. I, sec. 7; Cal.Const. of 1849, Art. I, sec. 3. The right to trial by jury guaranteed by the Constitution is the right as it existed at common law at the time the Constitution was adopted. People v. Richardson, 138 Cal.App. 404, 408, 32 P.2d 433. The common law at the time the Constitution was adopted includes not only the *lex non scripta* but also the written statutes enacted by Parliament. Moore v. Purse Seine Net, 18 Cal.2d 835, 838, 118 P.2d 1. The common law respecting trial by jury as it existed in 1850 is the rule of decision in this State. Farrell v. City of Ontario, 39 Cal.App. 351, 356, 178 P. 740. Any act of the legislature attempting to abridge the constitutional right is void. People v. Kelly, 203 Cal. 128, 133, 263 P. 226; People v. Bruneman, 4 Cal.App.2d 75, 79, 40 P.2d 891; Cassel v. Gregori, 28

Cal.App.2d Supp. 769, 774, 70 P.2d 721.[1] It is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution. It is necessary, therefore, to ascertain what was the rule of the English common law upon this subject in 1850.

Long before the adoption of the California Constitution there were numerous statutes in England providing for the seizure and forfeiture of property used in violation of law.[2]

At common law the trial of actions for forfeiture to the Crown of property used in violation of law was in the Court of Exchequer. "The term 'Common Law' often refers to those principles of English Law which were evolved in the Common Law Courts, as opposed to the principles which were applied in the Courts

1. The right has always been regarded as sacred and has been jealously guarded by the courts. People v. Peete, 54 Cal.App. 333, 363, 202 P. 51. "Trial by juries is the *Englishman's* birth-right, and is that happy way of trial, which, notwithstanding all revolutions of time, hath been continued beyond all memory to the present day; the beginning whereof no history specifies, it being contemporary with the foundation of this state, and one of the pillars of it, both as to age and consequence." Burns, Justice of the Peace (23d ed.), Vol. III, p. 80. See also Parsons v. Bedford, 3 Pet. 433, 28 U.S. 433, 447, 7 L.Ed. 732, 736.

2. [1381] 5 Rich. II, stat. 1, ch. 2, act respecting transfer of gold and silver; [1400] 2 Hen. IV, ch. 5, act to prevent gold and silver from being carried out of realm; [1604] 1 James I, ch. 2, sec. 43, act re tanners, curriers, shoemakers, etc.; [1660] 12 Chas. II, ch. 4, sec. 5, act providing duties; [1660] 12 Chas. II, ch. 18, sec. 2, act to encourage shipping —Navigation Act; [1662] 13 & 14 Chas. II, ch. 11, secs. 14, 17, 22, 23, 26, 31, act for preventing frauds; [1662] 14 Chas. II, cap. 7, act to restrain exportation of leather and raw hides; [1663] 14 Chas. II, ch. 11, sec. 1, act to prevent frauds of brewers and other persons; [1663] 15 Chas. II, ch. 7, secs. 6, 8, act to encourage trade; [1688] 1 W. & M. ch. 32, sec. 2, act to prevent exportation of wool; [1692] 4 & 5 W. & M. cap. 5, sec. 8, act to prevent frauds in importation of spirits; [1700] 11 & 12 Will. III, ch. 10, sec. 2, act to encourage manufacturers and affecting importations; [1709] 8 Anne, ch. 7, sec. 17, act relating to imports; [1718] 5 Geo. I, ch. 11, secs. 1, 2, 3, 4, 6, 8, 15, 21, act relating to smuggling; [1721] 8 Geo. I, ch. 18, act to prevent clandestine running of goods and infection thereby; [1724] 11 Geo. I, ch. 30, sec. 16, act to prevent frauds and abuses in public revenues; [1725] 12 Geo. I, ch. 28, secs. 13, 14, act for improvement of his Majesty's revenues; [1728] 1 Geo. II, ch. 17, sec. 7, act prohibiting certain imports; [1736] 9 Geo. II, ch. 35, secs. 22, 23, act relating to revenues; [1746] 19 Geo. II, ch. 12, secs. 3, 17, 19, 20, 21, act relating to duties on glass, etc.; [1763] 3 Geo. III, ch. 22, secs. 5, 6, 8, act relating to seizures; [1765] 5 Geo. III, ch. 43, sec. 27, act relating to revenues; [1765] 6 Geo. III, ch. 19, sec. 1, act relating to imports; [1781] 21 Geo. III, ch. 37, secs. 1, 2, act to prevent exportation to foreign parts of certain goods; [1781] 21 Geo. III, ch. 55, secs. 13, 20, 21, 24, 29, 30, act relating to duties and preventing frauds; [1784] 24 Geo. III, ch. 19, reenactment of 1 James I, ch. 22, sec. 43; [1784] 24 Geo. III, ch. 47, sec. 4, act to prevent smuggling; [1786] 26 Geo. III, ch. 77, sec. 10, act relating to duties; [1787] 27 Geo. III, ch. 32, secs. 1, 2, 3, 5, 7, act relating to smuggling; [1793] 33 Geo. III, ch. 2, sec. 4, act relating to exportation of arms and ammunition; [1794] 34 Geo. III, ch. 50, secs. 2, 8, 9, act relating to imports; [1797] 38 Geo. III, ch. 89, sec. 8, act relating to duties; [1798] 39 Geo. III, ch. 59, secs. 5, 14, act relating to imports; [1802] 42 Geo. III, ch. 38, sec. 20, act relating to duties and to prevent frauds; [1805] 45 Geo. III, ch. 121, sec. 6, act to prevent smuggling; [1807] 47 Geo. III, ch. 66, secs. 3, 8, 9, 10, 13, 14, act to prevent smuggling; [1825] 6 Geo. IV, ch. 107, secs. 64, 71, 128, act regulating customs; [1825] 6 Geo. IV, ch. 108, secs. 2, 45, act to prevent smuggling; [1833] 3 & 4 Will. IV, ch. 52, secs. 10, 14, 20, 24, 28, 61, 118, act regulating customs; [1833] 3 & 4 Wm. IV, ch. 53, secs. 2, 3, 6, 14, 28, 31, 47, act to prevent smuggling; [1842] 5 & 6 Vict. ch. 47, secs. 10, 11, 18, 36, 42, act relating to customs; [1842] 5 & 6 Vict. ch. 93, secs. 8, 10, act regulating excise on tobacco.

of Chancery and Admiralty and the Ecclesiastical Courts. The Courts of Common Law before the passing of the Judicature Acts, 1873-5, were the three Royal Courts of King's Bench, Common Pleas or Common Bench, and Exchequer, which had emerged from the King's Council *(Curia Regis)* as separate Courts by the end of the thirteenth century." Phillips, The Principles of English Law and the Constitution, 70.[3] The Court of Exchequer was not a criminal court; and all suits for penalties, though for the King, were considered as civil. Burns, Justice of the Peace (23d ed.) Vol. I, p. 806. By the end of the thirteenth century there was a recognized distinction between the Exchequer of Account and Receipt, and the Court of Exchequer or "Exchequer of Pleas." Radcliffe & Cross, The English Legal System, p. 54. The proceedings of the Court of Exchequer were originally confined to bills by the Attorney General to recover money or property for the Crown. Idem. 160. It was originally, and continued to be, a common-law court. Idem. 166; Plucknett, a Concise History of the Common Law, 4th ed., 152. The Court of Exchequer was absorbed by the Supreme Court of Judicature in 1875. Idem. 201.

Blackstone says: "An *information* on behalf of the crown, filed in the exchequer by the king's attorney general, is a method if fuit for recovering money or other chattels, * * * It is grounded on no writ under feal, but merely on the intimation of the king's officer the attorney-general, who 'gives the court to underftand and be informed of' the matter in question: upon which the party is put to anfwer, and trial is had, as in fuits between fubject and fubject. The moft ufual informations are thofe * * * for any forfeiture due to the crown upon the breach of a penal ftatute." 3 Bl.Com. (12th ed.) 261.[4]

In Moore v. Purse Seine Net, 18 Cal. 2d 835, 118 P.2d 1, 4, certiorari granted, C. J. Hendry Co. v. Moore, 316 U.S. 643, 62 S.Ct. 1036, 86 L.Ed. 1728, it was held that: a proceeding for forfeiture of a fish net used in violation of law is a type of action that was cognizable in a common-law court; "an action *in rem* can be brought by the state in an ordinary common law court for the forfeiture of goods or articles used in violation of laws imposing such a penalty," 18 Cal.2d page 839, 118 P.2d page 4; "[s]uch forfeiture to the state of illegally used articles has continued as an accepted common law procedure," 18 Cal.2d at page 840, 118 P.2d at page 4; and "the forfeiture of illegally used nets authorized by the California statute involves a traditional common law remedy cognizable in the state courts, even though the statute was enacted long subsequent to the Judiciary Act." 18 Cal.2d at page 842, 118 P.2d at page 5.

While perhaps not binding as a precedent because certiorari was granted, the conclusions of our Supreme Court in the Moore case were followed by the Supreme Court of the United States in the decision of the case, C. J. Hendry Co. v. Moore, 318 U.S. 133, 63 S.Ct. 499, 87 L.Ed. 663. In what Dean Dickinson[5] has described as "at once a monumental piece of erudition and a notable contribution to the meaning of the much mooted phrase 'common law remedy,'"[6] Mr. Chief Justice Stone, writing for the court, said, 318 U.S. 133, 63 S. Ct. 501, 87 L.Ed. 666:

"Forfeiture to the Crown of the offending object, because it had been used in violation of law, by a procedure in rem was a practice familiar not only to the English admiralty courts but to the Court of Ex-

3. For the distinction between Queen's Bench, Common Pleas and Exchequer, see The Attorney-General v. Hallett, 15 M. & W. 97, 153 Eng.Rep. 777, 781.

4. See also Cox, Institutions of the English Government, 517. An information filed in the Court of Exchequer was the first judicial proceeding *in rem* towards the legal condemnation of goods seized as forfeited. The Attorney General v. Jefferys, 13 Price, 545, 147 Eng.Rep. 1077, 1078.

5. Former Dean School of Jurisprudence, University of California, now Professor of Law, University of Pennsylvania.

6. 36 Cal.L.Rev. 173.

chequer. The Exchequer gave such a remedy for the forfeiture of articles seized on land for the violation of law. And, concurrently with the admiralty, is entertained true proceedings in rem for the forfeiture of vessels for violations on navigable waters. Such suits in the Exchequer were begun on information and were against the vessel or article to be condemned. Under the provisions of many statutes the suit might be brought by an informer qui tam, who was permitted to share in the proceeds of the forfeited article; the judgment was of forfeiture and the forfeited article was ordered to be sold. This was the established procedure certainly as early as the latter part of the seventeenth century. * * *

"Separate courts exercising the jurisdiction of the Court of Exchequer were never established in the American Colonies. Instead, that judisdiction was absorbed by the common law courts which entertained suits for the forfeiture of property under English or local statutes authorizing its condemnation. Long before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising judisdiction in rem in the enforcement of forfeiture statutes. Like the Exchequer, in cases of seizure on navigable waters they exercised a jurisdiction concurrently with the courts of admiralty. * * * By that time [about 1700], the jurisdiction of common law courts to condemn ships and cargoes for violation of the Navigation Acts had been firmly established, apparently without question, and was regularly exercised throughout the Colonies. In general the suits were brought against the vessel or article to be condemned, *were tried by jury,* closely followed the procedure in Exchequer, and if successful resulted in judgments of forfeiture or condemnation with a provision for sale. [Italics added.]

"The rise of the vice-admiralty courts—prompted in part by the Crown's desire to have access to a forum not controlled by the obstinate resistance of American juries—did not divest, the colonial common law courts of their jurisdiction to proceed in rem in cases of forfeiture and condemnation. * * *" [318 U.S. 133, 63 S.Ct. at page 501, 87 L.Ed. at page 674.]

"It is noteworthy that Blackstone's Commentaries, more read in America before the Revolution than any other law book, referred to the information in rem in the Court of Exchequer as the procedure by which forfeitures were inflicted for violation of Acts of Parliament. Bk. III, p. 262. And Kent, in his Commentaries, pointed out that 'seizures, in England, for violation of the laws of revenue, trade or navigation, *were tried by a jury in the Court of Exchequer, according to the course of the common law;* and though a proceeding be in rem, it is not necessarily a proceeding or cause in the admiralty' (12th Ed., Vol. 1, p. 374). He declared that, within the meaning of § 9 of the Judiciary Act, the common law was competent to give such a remedy 'because, under the vigorous system of the English law, such prosecutions in rem are in the Exchequer, according to the course of the common law'. [Italics added.] * * *" [318 U. S. 133, 63 S.Ct. at page 509, 87 L.Ed. at page 675.]

"* * * In all this we perceive a common understanding of judges, lawyers and text writers, both before and after the adoption of the Constitution of the common law nature of the procedure and judgment in rem in forfeiture cases and of its use in such proceedings in the Exchequer and in the American common law courts.

"We conclude that the common law as received in this country at the time of the adoption of the Constitution gave a remedy in rem in cases of forfeiture, and that it is a 'common law remedy' * * *."

There is evidence that at a very early date (1236 and 1299) in the history of the Court of Exchequer the trial of common-law actions was by jury.[7] Apparently during that period the jury consisted of twelve witnesses gathered from the neigh-

7. Jenkinson, Select Cases in the Exchequer of Pleas, p. 1; idem. p. lxxxii.

borhood to decide disputed questions of fact upon their previous knowledge.[8]

As early as 1301, a case involving forfeiture of a ship and goods for piracy was tried by a jury.[9] In 1457 on an information in the Exchequer for the King's goods which were stolen, the Exchequer Chamber said, "the jurors are the judges of the fact."[10] In 1662 a statute was enacted providing for a jury of "natural and free born fubjects of the King" in actions, suits and informations commenced for the forfeiture of ships or goods used in unlawful importation or exportation.[11] In 1766 a statute was enacted providing that in suits for forfeitures under the Act a defendant could plead the general issue "and if it fhall appear to have fo done, then the jury fhall find for the defendant or defendants." [12]

A case decided in 1766, Mitchell, who prosecutes for the King and Himself, v. Torup,—Exchequer—Parker, 227, 145 Eng. Rep. 764, was an information of seizure. It alleged that the plaintiff seized a ship and goods therein for unlawfully bringing the goods into Britain. The prayer was that the ship and goods remain forfeited. Issue was joined. The cause was tried by a jury. In the course of the opinion the court said: "it is objected, that the penalty or forfeiture, imposed by the fourth clause of the act, is only applicable to cases where there is some crime or guilt; but no crime or guilt can be imputed to the master, mate or owners, without their privity, the mariners being the only criminal or guilty persons, and therefore they ought to be the only sufferers. To which I answer, that though penalty or forfeiture, generally speaking, is the consequences of some crime or guilt, yet neither penalty nor forfeiture necessarily imply the one or the other, though punishment always does. To show this, several instances were mentioned upon the arguments: as where a murder is committed with the sword of an innocent man, the sword is forfeited; the like of all deodands. So, by the 4th of William and Mary, c. 8, the horses of innocent owners, upon which robberies are committed, are forfeited. And by the 8th of Anne, c. 7, s. 17, the vessels, boats, horses and other cattle, and carriages, made use of in the landing or removing, carriage or conveyance of any uncustomed or prohibited goods, are forfeited. And there are several other acts to the same purpose, which I shall barely refer to 13 & 14 Car. 2, c. 11, s. 7. 1 W. & M. c. 32, s. 2. 7 & 8 W. 3, c. 28, s. 8. 8 Ann. c. 13, s. 16. 10 Geo. 1, c. 10, s. 27. 12 Geo. 2, c. 24, s. 11. 24 Geo. 2, c. 41, s. 22. But by the 4th clause of the Navigation Act, the forfeiture is not upon the person, but upon the ship; nor is this a proceeding in personam, but in rem, for the condemnation of the ship as forfeited. And I am credibly informed, that the informations upon this clause of the act have been in this form from the time of passing it, which shows how this law has been understood; and as no privity has been laid in them, it was not necessary to prove more than was laid. And though I agree that the jury are not concluded from finding the truth of the fact where it is within the issue; yet here the jury have found the issue for the plaintiff: and their finding the importation to be without the privity of the master, mate or owners, is nugatory

8. Jenkinson, Select Cases in the Exchequer of Pleas, p. cxvi, p. 20 (58), p. 37 (88), p. 40 (94, 95), p. 56 (116), p. 66 (128), p. 88 (146), p. 103 (162), p. 116 (171), p. 121 (174), p. 131 (181), p. 133 (183), p. 140 (189), p. 146 (193), p. 150 (198), p. 168 (215), p. 172 (219A), p. 174 (221), p. 180 (227B), p. 183 (228), p. 196 (243), p. 198 (245), p. 200 (246), p. 206 (251); Case LXII (1457) Jenk. 83, 145 Eng.Rep. 59.

9. Jenkinson, Select Cases in the Exchequer of Pleas, p. 168 (215).

10. Case LXII [1457] Jenk. 83, 145 Eng. Rep. 59.

11. [1662] 13 & 14 Chas. II, ch. 11, sec. 21. See Roe v. Roe [1673]—Exchequer—Hardres, 185, 145 Eng. Rep. 443, where it was held that the issue of fact for the jury in an information for selling and importing to be sold foreign woollen contrary to statute was whether such cloth was imported to be sold.

12. 6 Geo. III, ch. 19, sec. 10 [1766]; see also 33 Geo. III, ch. 1, sec. 8 [1793]; 39 Geo. III, ch. 59, sec. 26 [1799].

and void, because it is not comprized in the issue. Bro. Verdict, pl. 78, 2 Ro.Abr. 707, pl. 37. Hob. 53, Lord Raym. 860, 865, Tomkin and Crocker. Mr. Attorney insisted, that the ship, in this case was to be considered as the offender; and this is countenanced by the words in the latter part of the first clause; 'all such ships or vessels as shall have offended contrary hereunto.' "

Many of the English statutes provided for forfeiture of the conveyance used in carrying articles in violation of law, together with all goods therein.[13]

There are reports of many cases in the Court of Exchequer in which articles used in violation of law were forfeited to the Crown pursuant to statute, in all of which the cause was tried by a jury.[14]

Cases involving penalties to the Crown, other than forfeiture of conveyances and

13. If certain goods were unlawfully imported the goods were forfeited "together with the veffels and boats, and all the horfes, and other cattle and carriages whatfoever, made ufe of in the landing, removing, carriage, or conveyance of any of the aforefaid goods." 8 Anne, c. 7, s. 17 [1709]. If glass was unlawfully imported into Great Britain from Ireland in addition to the forfeiture of glass the vessel in which it was imported was also forfeited with her tackle, apparel, and furniture. 9 Geo. II, c. 12, s. 19, 20, 21 [1746]; see also 33 Geo. III, c. 2, s. 4 [1793]; 39 Geo. III, c. 59, s. 14 [1798]. On the forfeiture of tea removed from the kingdom "the fame, together with the canifters, bags and other package whatfoever, containing the fame and the veffels and boats, and the horfes, and other cattle and carriages employed in removing the fame, fhall be forfeited, and fhall and may be feized by any officer or officers of excife." 21 Geo. III, c. 55, s. 20 [1781]. On a forfeiture of salt for failure to declare or pay duties the salt was forfeited "together with the packages containing the fame, and the fhips, boats and veffels, and all the horfes, and other cattle and carriage whatfoever made ufe of in the removing, landing, carriage, or conveyance of fuch falt, and the fame refpectively fhall and may be feized by any officer or officers of the cuftoms or excife." 38 Geo. III, c. 89, s. 8 [1797]. The statute of 3 & 4 Wm. IV, c. 53, s. 28 [1833] provided that if any goods liable for duties shall be unshipped "all such goods as aforesaid shall be forfeited, together with all Horses and other animals, and all carriages and other things, made use of in the Removal of such Goods." The statute 5 & 6 Vict. c. 93, s. 8 [1842] provided that no person cut, colour or manufacture, or have in his possession, any leaves or other matters to imitate or to be mixed with tobacco or snuff subject to forfeiture of 200 lbs., and that the leaves and other matters, "together with all Machines, Tools, Materials, Vessels, and Utensils for cutting, grinding, pounding, colouring, staining, dyeing, manufacturing or preparing the same shall be forfeited."

14. Anonymous Case LXX [1459], Jenk. 87, 145 Eng. Rep. 62, was for the forfeiture to the King of merchandise alleged to have been shipped with intent to transport it to an unlawful place. The manner of obtaining a jury is discussed. Anonymous Case XCVI [1506], Jenk. 191, 145 Eng. Rep. 128, was an information in behalf of the King for transporting "cloath," custom not being paid. The "cloath" was forfeited to the King. An information against Page [1607], Lane, 19, 145 Eng. Rep. 264, was for buying butter, and selling it at retail contrary to the statute. Rook's Case [1655], Hardres, 20, 145 Eng. Rep. 359 was an information for importing "pottacoes" of tobacco of foreign growth in a foreign vessel. The case was tried by a jury resulting in forfeiture of the tobacco which was later set aside because of defects in the information. Jones v. Clerk [1655], Hardres, 46, 145 Eng. Rep. 373, was "Upon an information for not garbling [culling] two and twenty bags of spice according to the statute of 21 Jacob, whereby it became forfeited." In Holton v. Raworth [1775 or 1776], Hardres, 358, 145 Eng. Rep. 496, a trial by jury was had on an information upon seizure of wines for not paying custom. In Rex v. Southerby [1716], Bunbury, 4, 145 Eng. Rep. 575, Southerby was outlawed and a writ of execution issued. A trial by jury was then had and "his house and goods seized by virtue thereof." Bill v. Robinson [1719], Bunbury, 48, 145 Eng. Rep. 591, was a suit against an informer after a verdict for the defendant on the trial of an information upon seizure. Bradley qui tam v. Long [1721], Bunbury, 78, 145 Eng. Rep. 601, was an information for importing brandy in a collier. Verdict was for the King. Rickson qui tam v.

Sandford [1724], Bunbury, 192, 145 Eng. Rep. 644, forfeiture of seized wines; Idle qui tam v. Vanheck [1727], Bunbury, 231, 145 Eng. Rep. 657, forfeiture of ships for unlawful importation of goods; Attorney General v. Jackson [1727], Bunbury, 234, 145 Eng. Rep. 658, seizure and forfeiture of ships and goods. Robinson qui tam v. Lequesne [1728], Bunbury, 251, 145 Eng. Rep. 664, was upon "an information of seizure of Jesuits bark * * * for fraudulent exportation of Jesuits bark, two casks out of six being dust." Scott, who prosecutes for His Majesty and Himself, v. A'Chez [1743], Parker, 20, 145 Eng. Rep. 702, was an information grounded on the statute of 12 Car. 2 c. 18, the Navigation Act. It alleged that plaintiff seized a ship and goods therein because the goods were imported unlawfully. The prayer was "that the ship and goods may remain forfeited." Issue was joined. The penalty provided by the act was forfeiture of the ship and cargo. Attorney General v. Munn [1748], Parker, 91, 145 Eng. Rep. 723, was an information "on a seizure of several parcels of tobacco stalks as forfeited, by being imported contrary to the act 12 Geo. I, c. 28, s. 13." Malden v. Bartlett [1750], Parker, 105, 145 Eng. Rep. 727, was an information by the plaintiff suing for the King and himself. It was alleged that the plaintiff had seized a parcel of tobacco imported unlawfully. The statute provided that the tobacco be forfeited to the King and burned. Bartlett came in and claimed the property. The issues were tried by a jury. The Attorney General v. Parke [1793], 1 Anst. 240, 145 Eng. Rep. 860, was an information for forfeiture for violation of a statute relative to the making of glass. The Attorney General v. Brown [1796], 3 Anst. 720, 145 Eng. Rep. 1018, was an information for forfeiture of a cutter alleged to have been found out of the limits of her license in violation of law. On the same facts The Attorney General v. Roote [1796], 3 Anst. 726, 145 Eng. Rep. 1020. The Attorney General v. Sheriff [1801], Forrest, 41, 145 Eng. Rep. 1107, was an information for the forfeiture of a ship and cargo for unlawfully importing wines. The Attorney General v. Forge [1801], Forrest, 104, 145 Eng. Rep. 1127, was an information for the forfeiture of treble the value of candles possessed unlawfully. The statute also provided forforfeiture of the candles. The Attorney General v. Wilson [1817], 3 Price, 431, 146 Eng. Rep. 311, was an information for condemnation of a ship and her cargo on the ground of illicit importation of flaxseed, etc. The Attorney General v. Theakstone [1820], 8 Price, 89, 146 Eng. Rep. 1140, was an information for condemnation of a vessel after seizure for having prohibited gunpowder on board. The Attorney General v. Jefferys [1824], 13 Price, 545, 147 Eng. Rep. 1077, was an information (of seizure in rem) for the condemnation of machines unlawfully packed for export. The statute (21 Geo. III, ch. 37, sec. 2) provided for forfeiture. The prayer was that the goods "might remain forfeited." The Attorney General v. Vondiere [1834], 1 C. M. & R. 570, 149 Eng. Rep. 1207, was an information for the condemnation of "silk waistcoats." The goods had been illegally removed from a warehouse. The statute (3 & 4 Will. IV, ch. 52, sec. 28) provided that the goods "together with all horses and other animals, and all carriages and other things made use of in the removal of such goods" be forfeited. Attorney General v. Schiers [1835], 2 C. M. & R. 286, 150 Eng. Rep. 124, was an information praying the forfeiture of a foreign vessel, seized by officers of the customs, for being found on the high seas within one league of the coast of the United Kingdom with contraband spirits aboard. The statute (3 & 4 Will. IV, ch. 53, sec. 2) provided for forfeiture of the vessel and goods. Attorney General v. Catt [1837], 3 M. & W. 7, 150 Eng. Rep. 1033, was an information for being concerned in unshipping goods liable to duties; for concealing goods illegally shipped; and for "harbouring" goods illegally imported. Attorney General v. Le Revert [1840], 6 M. & W. 405, 151 Eng. Rep. 469, on like facts was tried by a jury and the vessel and goods forfeited. The Attorney General v. Rogers [1843], 11 M. & W. 670, 152 Eng. Rep. 974, was "an information filed against the defendant, a tobacconist, for penalties for mixing saccharine matter with tobacco in the course of manufacture, and for having in his possession saccharine matter for the purpose of using it in the manufacture of tobacco." The statute provided for forfeiture of the tobacco (5 & 6 Vict. c. 93). The Attorney General v. Clerc [1844], 12 M. & W. 640, 152 Eng. Rep. 1355, was an information for the condemnation of foreign wines after seizure. The statute (5 & 6 Vict. ch. 47, sec. 18) provided for forfeiture. See also Anonymous Case XCIV, Jenk. 229, 145 Eng. Rep. 159; The Attorney General v. Woodmass [1727], Bunbury, 246, 145 Eng. Rep. 662; The Attorney General v. Norstedt [1816], 3 Price, 97, 146 Eng.

goods, were also tried by a jury in the Court of Exchequer.[15]

The determination of a question of fact by means of a jury, and public and oral procedure, was common to all the courts of law. Fischel, The English Constitution, 237, 238, 263. "* * * each form of action was started by a different writ and had its own peculiarities, but there was one characteristics possessed by nearly all of them, the submission of issues of fact to a jury. It is true that the common law knew of other methods of trial; appeals of felony and writs of right might result in trial by battle, and the defendant in an action of debt or detinue could resort to 'compurgation'; but, broadly speaking, one may say that actions in the common law courts were tried by jury." Radcliffe & Cross, The English Legal System, p. 83. Blackstone says: "For it is a part of the liberties of England, and greatly for the safety of the

Rep. 203; The Attorney General v. Stevens [1816], 3 Price, 72, 146 Eng. Rep. 195; The Attorney General v. King [1817], 5 Price, 195, 146 Eng. Rep. 579; The Attorney General v. Delano [1819], 6 Price, 383, 146 Eng. Rep. 841; The Attorney General v. Kent, [1819], 7 Price, 533, 146 Eng. Rep. 1052; The Attorney General v. French [1819], 7 Price, 557, 146 Eng. Rep. 1060; The Attorney General v. Goodman [1820], 8 Price, 220, 146 Eng. Rep. 1184; The Attorney General v. Hall [1823], 11 Price, 760, 147 Eng. Rep. 629; Attorney General v. Greaves [1835], 2 C. M. & R. 669, 150 Eng. Rep. 284. As stated, all of these cases were tried by a jury.

15. Isabell Fortescues Case [1611], Lane, 91, 145 Eng. Rep. 324, was that a penalty be imposed upon her for recusancy (absence from church). An inquisition issued and the case was tried by a jury. In The Protector v. Sir Thomas Ashfield [1656], Hardres, 62, 145 Eng. Rep. 381, two parts of Ashfield's land were seized for recusancy. He pleaded conformity. The court held that before the lands could be forfeited to the King conformity must be tried by the common law. Stevens v. Duckworth [1775 or 1776], Hardres, 338, 145 Eng. Rep. 486, was an information "tam quam" for forfeiture of five pounds a day for selling wines without a license. The Attorney General v. Brewster [1795], 2 Anst. 559, 145 Eng. Rep. 966, was an information for a penalty of 500 l. for concealing soap in violation of 1 Geo. I, st. 2, c. 31. The Attorney General v. Brown [1801], Forrest, 110, 145 Eng. Rep. 1129, was an information for penalties, for assisting in unshipping spiritous liquors and tobacco before the duties were paid. The Attorney General v. Saggers [1814], 1 Price, 182, 145 Eng. Rep. 1370, was for treble the value of goods unlawfully imported. The Attorney General v. Farr [1817], 4 Price, 122, 146 Eng. Rep. 414, was for assisting in unshipping prohibited and unaccustomed goods. The prayer was for treble the value of the goods. The Attorney General v. Horton [1817], 4 Price, 237, 146 Eng. Rep. 451, was an information for smuggling salt which had been seized. The Attorney General v. Key [1830], 1 C. & J. 159, 148 Eng. Rep. 1375. An information for penalties (treble value) for "harbouring" and concealing smuggled goods. See also The Attorney General v. Courtice [1821], 9 Price, 450, 147 Eng. Rep. 147; The Attorney General v. Vew Llette [1822], 10 Price, 9, 147 Eng. Rep. 225; The Attorney General v. Freer, [1822], 11 Price, 183, 147 Eng. Rep. 441; The Attorney General v. Bevington [1822], 11 Price, 222, 147 Eng. Rep. 454; The Attorney General v. Tongue [1823], 12 Price, 51, 147 Eng. Rep. 653; The Attorney General v. Woolhouse [1823], 12 Price, 65, 147 Eng. Rep. 657; The Attorney General v. Hatton [1824], M'Cle. 214, 148 Eng. Rep. 91; The Attorney General v. Good [1825], M'Cle. & Yo. 286, 148 Eng. Rep. 421; The Attorney General v. Barrell [1827], 1 Y. & L. 495, 148 Eng. Rep. 766; The Attorney General v. Key [1830], 1 C. & J. 159, 148 Eng. Rep. 1375; The Attorney General v. Siddon [1830], 1 C. & J. 220, 148 Eng.Rep. 1400; The Attorney General v. Slee [1824], M'Cle. 567, 148 Eng. Rep. 237; The Attorney General v. Key [1831], 2 C. & J. 2, 149 Eng. Rep. 1; The Attorney General v. Dyer [1834], 2 C. & M. 664, 149 Eng. Rep. 927; The Attorney General v. Tomsett [1835], 2 C. M. & R. 170, 150 Eng. Rep. 73; The Attorney General v. Kenifeck [1837], 2 M. & W. 715, 150 Eng. Rep. 944; The Attorney General v. Hurel [1843], 11 M. & W. 585, 152 Eng. Rep. 938; The Attorney General v. Lockwood [1842], 9 M. & W. 378, 152 Eng. Rep. 160; The Attorney General v. Bailey [1846], 16 M. & W. 74, 153 Eng. Rep. 1104. See also Hale's Pleas of the Crown, Vol. I, pp. 493, 530; Gilbert, a Treatise on the Court of the Exchequer, 62–64.

fubject, that the king may not enter upon or feife any man's poffeffions upon bare furmises without the intervention of a jury." 3 Bl.Com. 259.[16]

The common-law courts in the Colonies and in the states during the period of Confederation exercised jurisdiction *in rem* in the enforcement of forfeiture statutes. In general the actions were brought against the article to be condemned, were tried by jury, closely followed the procedure in the Court of Exchequer,[17] and, if successful, resulted in judgments of forfeiture or condemnation with a provision for sale.[18]

In C. J. Hendry Co. v. Moore, supra, 318 U.S. 133, 63 S.Ct. 499, 510, 87 L.Ed. 663, 675, it was said that the court "has repeatedly declared that, in cases of forfeiture of articles seized on land for violation of federal statutes, the district courts proceed as courts of common law according to the course of the Exchequer on informations in rem *with trial by jury*. The Sarah, 8 Wheat. 391, 396, note (a), 5 L.Ed. 644 [645]; note (a), 5 L.Ed. 644; 443 Cans of Frozen Egg Product v. United States, 226 U.S. 172, 33 S.Ct. 50, 57 L.Ed. 174, and cases cited." (Italics added.) [19]

In exhaustive opinions the Court of Appeals of New York in Colon v. Lisk, 1897,

16. "Actions *qui tam* are fuch as are given by acts of parliament, which impofe a penalty, and create a forfeiture for the neglect of fome duty, or commiffion of fome crime, to be recovered by action or information, at the fuit of him who profecutes as well in the king's name as in his own." Bacon's Abridgement, 5th ed. Vol. 1, p. 61. Bacon says that most penal statutes directed that the penalty might be recovered by action or information, and "a new trial may be had after a *verdict* for the defendant. Wilfon v. Raftall, 4 Term. Rep. 753," (Idem. Italics added.), and "Such information may demand what is due to the informer, without mentioning what is due to the king; alfo, if the *quantum* depend *on what fhall be found by the jury*, a blank may be left for the fum," (Idem. 63. Italics added.) and "Alfo where a ftatute limits fuits by an informer qui tam to other courts, yet any one may, by conftruction of law, exhibit an information in the Exchequer for the whole penalty, for the ufe of the king," (Idem. 65.) and "If the jury find a general verdict with one penalty for the plaintiff, and he apply it to one count, he fhall not be permitted afterwards to apply it to another count. * * *" (Idem. 69.) 3 Bl. Com. 258, 259; Kent's Commentaries, 13th ed. Vol. I, pp. 375–378.

17. The procedure under the common law in the Court of Exchequer for the forfeiture of property used in violation of law was similar to that prescribed by the Health and Safety Code. Attorney General v. Lade [1745], Parker, 57, 145 Eng. Rep. 712; Malden v. Bartlett [1750], Parker, 105, 145 Eng. Rep. 727; 13 & 14 Chas. II, c. 11, s. 28; 31 Eliz. c. 5, s. 5; 3 Geo. III, c. 22, s. 1, 6; 6 Geo. III, c. 19, s. 3, 4, 6, 10; 21 Geo. III, c. 37, s. 6, 7, 8, 9; 26 Geo. III, c. 77, s. 13; 45 Geo. III, c. 121, s. 13, 14.

18. Footnotes 4, 5, and 6 to the opinion in C. J. Hendry Co. v. Moore, 318 U. S. 133, 63 S.Ct. 499, 87 L.Ed. 663, contain references to many such cases. In Virginia by 1690 forfeiture cases under the Navigation Acts were tried at common law by a jury. In Maryland forfeiture cases were tried generally in courts of oyer and terminer acting with the jury. In Massachusetts forfeiture cases under the Navigation Acts were regularly tried by the Court of Assistants before juries, apparently in the same manner as other common-law cases. In New Jersey proceedings to condemn forfeited property were tried by a jury as early as 1685. In Pennsylvania forfeiture cases under the Navigation Acts were tried in the common-law courts by a jury. In New Hampshire forfeiture cases were tried in the court of common pleas with a jury as early as 1679. In Connecticut a cargo of a vessel was condemned by a jury in the county court in 1692. In Maine a vessel was cleared by a jury in 1680. Idem. footnote 4. In New York before 1691 forfeiture cases were tried in the General Quarter Sessions of the Peace with a jury; after 1691 in the Supreme Court of Judicature with a jury. C. J. Hendry Co. v. Moore, 318 U.S. 133, 87 L.Ed. 663, 670, 63 S.Ct. 449, and footnotes 5–9.

19. See also Garnharts v. U. S., 16 Wall. 162, 21 L.Ed. 275, 276; The J. W. French, D.C., 13 F. 916, 924; 651 Chests of Tea v. United States, Fed.Cas.No.12,916, 1 Paine 499; United States v. Yamoto, 9 Cir., 50 F.2d 599.

153 N.Y. 188, 47 N.E. 302, 60 Am.St.Rep. 609,[20] the Supreme Court of Oklahoma in Keeter v. State, 1921, 82 Okl. 89, 198 P. 866, 17 A.L.R. 557,[21] and the Supreme Court of Oregon in State v. 1920 Studebaker Touring Car, 1926, 120 Or. 254, 251 P. 701, 50 A.L.R. 81,[22] held that before a claimant can be deprived of his property in proceedings of this kind he is entitled to a trial by jury as a matter of constitutional right.[23]

We are referred to State v. Lee, 113 Kan. 462, 215 P. 299, and In re One Chevrolet Automobile, 205 Ala. 337, 87 So. 592, in support of the claim that appellant was not constitutionally entitled to a trial by jury. In the Lee case the statute expressly provided that "All automobiles * * * used in the transportation or carrying of intoxicating liquors * * * are hereby declared to be common nuisances", and that if the court after trial "in a summary manner" should find that the automobile was "at the time a common nuisance," it should be forfeited. Laws 1919, c. 217. The court held that the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the Kansas Constitution; that, therefore, the statute did not violate the constitutional guaranty of trial by jury. In the Alabama case the action was by the state to condemn an automobile used in transporting contraband liquor. Without discussion of the common law or the authorities, the court merely said that the statute "creates a cause of action and prescribes a remedy for the enforcement of same not existing at the time of the adoption of the Constitution." [205 Ala. 337, 87 So. 593.] The statement is erroneous. The case was not well considered and is not persuasive.

Van Oster v. Kansas, 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354, 358, cited by respondent, is not analogous. The Kansas statute declared that a vehicle used in the transportation of intoxicating liquors was "a common nuisance". Laws 1919, c. 217. The record did not indicate that a jury trial was demanded and the question was not raised by the assignments of error.

[9] The right of trial by jury did not exist at common law in a suit to abate a public nuisance. People v. McCaddon, 48 Cal.App. 790, 792, 192 P. 325. Hence it is not a constitutional right now.

[10, 11] Automobiles, carriages, wagons, horses, and mules, that are ordinarily used for lawful purposes cannot be classified with narcotics, gambling paraphernalia, counterfeit coins, diseased cattle, obscene books and pictures, decayed fruit and fish, unwholesome meat, infected clothing, or other contraband, which are ordinarily used for an unlawful purpose, and are public nuisances *per se*.[24] While property kept in violation of law which is incapable of lawful use and declared to be a nuisance *per se* may be forfeited without a trial by jury under the police power, it does not follow that property ordinarily used for lawful purposes—innocent property—may be forfeited without a trial by jury where an issue of fact is joined as to whether the property was being used for an unlawful purpose or is to be taken from an innocent owner. There is no general constitutional right to a jury trial in actions for the seizure and forfeiture of contraband articles.[25] But property is not contraband or

20. See same case below Colon v. Lisk, 13 App.Div. 195, 43 N.Y.S. 364.

21. The charge was using an automobile to transport liquor in violation of law. The Oklahoma statute expressly provided that the hearing be "without a jury". 37 O.S.1941 § 112.

22. The statute provided that the return of seizure should be tried without a jury. The lower court forfeited the automobile of the appellant because her husband drove it with a pint of whisky in his pocket. She did not know that her husband carried the whisky in the car.

23. See also Lorance v. State, Tex.Civ.App., 172 S.W.2d 386; Donovan v. Mayor, etc., of Vicksburg, 29 Miss. 247, 249, 64 Am.Dec. 143.

24. See State v. Intoxicating Liquor, 55 Vt. 82; State v. Certain Intoxicating Liquors, 53 Utah 171, 177 P. 235.

25. See Moore v. Brett, 193 Okl. 627, 137 P.2d 539, 540; People v. One Pinball Machine, 316 Ill.App. 161, 44 N.E.2d 950, 957.

or a public nuisance merely because it was instrumental in the commission of a public offense.

[12, 13] It is argued that this proceeding for the forfeiture of property used in violation of law is a special proceeding, equitable in nature. Statements in some of the cases to the effect that the relief sought in this type of proceeding is such as under the old system obtained only in a court of chancery, and, therefore, of equitable cognizance, were either not necessary to the decision or if pertinent they are patently not in harmony with the historical fact. The right to a trial by jury cannot be avoided by merely calling an action a special proceeding or equitable in nature. If that could be done, the legislature, by providing new remedies and new judgments and decrees in form equitable, could in all cases dispense with jury trials, and thus entirely defeat the provision of the Constitution. The legislature cannot convert a legal right into an equitable one so as to infringe upon the right of trial by jury.[26] The provision of the Constitution does not permit the legislature to confer on the courts the power of trying according to the course of chancery any question which has always been triable according to the course of the common law by a jury. If the action has to deal with ordinary common-law rights cognizable in courts of law, it is to that extent an action at law.[27] In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the gist of the action. A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law.

[14-16] It is suggested that the statute was enacted since the adoption of the Constitution, and for that reason is not within the guaranty of trial by jury. The constitutional right of trial by jury is not to be narrowly construed. It is not limited strictly to those cases in which it existed before the adoption of the Constitution but is extended to cases of like nature as may afterwards arise. It embraces cases of the same class thereafter arising. At common law, prior to the adoption of the Constitution, a party against whom the forfeiture of property used in violation of law (then a carriage, wagon, horse or mule, now usually an automobile), was sought to be enforced was entitled to a trial by jury. Consequently such right exists now.[28] The introduction of a new subject into a class renders it amenable to its general rules, not to its exceptions.[29]

There were petty offenses against statutes or municipal ordinances which were not triable by jury at the time the Constitution was adopted. As to them, the right of trial by jury has never existed; and, since they were triable without a jury when the Constitution was adopted, they are now triable without a jury. Blackstone gives a number of illustrations.[30] In none of the illustrations given by Blackstone was the power sanctioned or upheld to enforce, in a summary proceeding, without a jury, the forfeiture of property which may be, and ordinarily is, used for lawful purposes.

We, like the Supreme Court of Oklahoma, "are cognizant of the fact that a jury trial is not an infallible mode of ascertaining truth, and like all human institutions it has its imperfections; still it remains the best protection for the citizen in his property rights as well as his liberty. It has stood the test of experience better than any other legal institution that ever existed among men, and it has met with universal approbation among those who

26. Norris's Appeal, 64 Pa. 275, 280.

27. Donahue v. Meister, 88 Cal. 121, 127, 25 P. 1096, 22 Am.St.Rep. 283; Cassell v. Gregori, 28 Cal.App.2d Supp. 769, 774, 70 P.2d 721.

28. Colon v. Lisk, 13 App.Div. 195, 202, 43 N.Y.S. 364, 369; State v. 1920 Studebaker, 120 Or. 254, 251 P. 701, 50 A.L.R. 81.

29. Wood v. City of Brooklyn, 14 Barb.,N.Y., 425, 432; Cooley, Constitutional Limitations, 8th ed., Vol. I, pp. 668–674. Cf. Moore v. Purse Seine Net, 18 Cal.2d 835, 837, 118 P.2d 1.

30. 4 Bl.Com. (12th ed.) ch. 20. 281 et seq.

lived under it, and by the greatest thinkers who have investigated it impartially. It is the imperative duty of the courts to jealously guard any unauthorized encroachment upon the right of trial by jury as guaranteed to the citizens by the Constitution." Keeter v. State, 82 Okl. 89, 198 P. 866, 873, 17 A.L.R. 557.

[17] We conclude that this forfeiture proceeding by the State is the type of action which was cognizable in a common-law court, and triable by a jury in the Court of Exchequer, according to the course of the common law; that trial by jury was recognized as a right in the trial of actions for the forfeiture of property seized because used in violation of law at common law at the time of the adoption of the Constitution of California, and that appellant had a constitutional right to a trial by jury of the issues of fact in this case.

[18] The denial of a trial by jury to one constitutionally entitled thereto constitutes a miscarriage of justice and requires a reversal of the judgment. Cowlin v. Pringle, 46 Cal.App.2d 472, 476, 116 P.2d 109.

Reversed.

SHINN, P. J., and WOOD, J., concur.



99 Cal.App.2d 183

McGUFFIN v. MAURER.

Civ. 14468.

District Court of Appeal, First District, Division 2, California.

Aug. 23, 1950.

Lyman E. McGuffin brought action against William Maurer for damages for libel. A judgment for plaintiff was entered by the Superior Court of San Mateo County, Edmund Scott, J., and the defendant appealed. The District Court of Appeal, Dooling, J., held that defendant could not rely upon acts of a co-candidate with whom plaintiff campaigned jointly as a team for membership on city council to establish defense of truth of the publication, in absence of a foundation showing plaintiff's knowledge of and responsibility for co-candidate's conduct.

Judgment affirmed.

1. Threats ⇐3

Fact that plaintiff and another campaigned jointly as a team for membership on city council would not make plaintiff responsible for his co-candidate's alleged attempt by blackmail to induce another candidate to withdraw from the race.

2. Principal and agent ⇐8

Agency requires precedent authorization or subsequent ratification.

3. Conspiracy ⇐24

Conspiracy requires as one of its elements a knowledge of the unlawful purpose, since conspiracy requires a corrupt agreement or concert of action.

4. Evidence ⇐260

In action for libel based on newspaper article charging that plaintiff and a co-candidate with whom plaintiff campaigned jointly as a team for membership on city council used blackmail to force another candidate to withdraw from the race, trial court properly ruled that acts of plaintiff's co-candidate were not binding on plaintiff and could not be proved against him to establish truth of publication as a defense unless a foundation showing plaintiff's knowledge of and responsibility for co-candidate's conduct was first laid. Civ. Code, § 48a.

5. Appeal and error ⇐1043(6)

Sustaining objection to question asked plaintiff on cross-examination as to whether he had visited either certain person or such person's wife in attempt to get such person to withdraw from race for city councilman, standing alone, might have been error, but was without prejudice, in view of subsequent cross-examination wherein plaintiff testified that he at no time had any knowledge that such person had been asked to withdraw from the race.

J. W. Coleberd and Richard P. Lyons, So. San Francisco, for appellant.

Saul N. Ross, San Bruno, for respondent.

DOOLING, Justice.

Defendant appeals from a judgment awarding plaintiff $500 actual and $250 punitive damages for libel. Plaintiff and one Risso were the two successful candidates at an election for city councilmen of San Bruno. They conducted a joint campaign, had a joint campaign committee, issued point campaign literature and referred to themselves in the conduct of their campaign as a "team."

One Cunningham was a rival candidate for the same office. Shortly before the election at a meeting with Cunningham at which Risso was present, but not the plaintiff, an effort was made to induce Cunningham to withdraw as a candidate. Out of this meeting the libelous publication grew. After the election of plaintiff and Risso defendant published an article in his newspaper headed: "Blackmail Marks Local Election," in which it was stated:

"The recent City election campaign was a far cry from having been the 'clean' campaign the McGuffin-Risso team had declared they would conduct. Instead it degenerated into a disgraceful affair, marked by intimidation, coercion, and blackmail. * * *

"Apparently determined to win at all costs, the victors * * * even resorted to coercion and blackmail on the eve of the election to force one of the leading candidates to withdraw from the race to assure the election of both McGuffin and Risso."

Then followed a more detailed statement with quotations from other newspapers. The article continued:

"Do You Know: That one of the members of the successful McGuffin-Risso team * * * was among the blackmailers who cornered and then browbeat Council candidate 'X' into signing the withdrawal papers? that his teammate was in on the deal?———

"Fellow citizens, in view of the indisputable blackmail facts can you truly feel secure in the sanctity of your home with blackmailers nestling in City Offices?"

The plaintiff, McGuffin, in writing demanded the publication of a retraction, after which defendant, instead of a retraction, published a reaffirmation of the previous publication thus satisfying for plaintiff's action the requirements of section 48a, Civil Code.

[1-3] The libelous character of the publication as to plaintiff is not questioned, the sole defense being the truth of the publication. The fact that plaintiff and Risso campaigned jointly as a team standing alone obviously would not make plaintiff responsible for Risso's attempt by blackmail (assuming its proof) to induce Cunningham to withdraw as a candidate. Plaintiff testified that he had no knowledge of the intended meeting with Cunningham and neither on principles of agency nor conspiracy could plaintiff be held responsible for the attempt of his co-candidate to use blackmail in the effort to eliminate an opposing candidate. Agency requires precedent authorization or subsequent ratification, neither of which was proved; and conspiracy requires as one of its elements a knowledge of the unlawful purpose, People v. Bucchierre, 57 Cal.App.2d 153, 163, 134 P.2d 505, since a conspiracy requires a corrupt agreement or concert of action. 2 Wharton's Criminal Law, 12th ed., § 1608, p. 1865.

[4] There is no substance in the complaint of errors in the exclusion of evidence. The court properly ruled that the acts of Risso were not binding on plaintiff and might not be proved against him unless a foundation showing plaintiff's knowledge of and responsibility for Risso's conduct was first laid.

[5] In an effort to lay such foundation plaintiff was asked on cross-examination: "Do you know whether or not Mr. Risso visited either Mr. John Cunningham or Mr. John Cunningham's wife in an attempt to get him to withdraw from this race for City Councilman?" The sustaining of an objection to this question, standing alone, might have been error, but the subsequent

cross-examination shows that it was without prejudice. At a later point in the cross-examination the following question to plaintiff and answer by him appear:

"Q. Is it your statement now that you at no time had any knowledge that Mr. Cunningham was to be asked to withdraw from this race? A. I had absolutely no knowledge there was to be any meeting, that he was to be asked any questions, and his name had never been mentioned to me, other than that of any other candidate in the race."

Instead of pursuing the inquiry further counsel for defendant immediately terminated his cross-examination with the statement: "That is all."

We find no prejudicial error in the record.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concurred.



99 Cal.App.2d 748

Ex parte BARENTS.

Cr. 2236.

District Court of Appeal, Third District, California.

Oct. 2, 1950.

Proceeding in the matter of the application of Jacoba Marie Barents on behalf of Baby Boy Barents for a writ of habeas corpus to obtain custody of minor child from proposed adoptive parents. The District Court of Appeal, Van Dyke, J., held that where consent to adoption of illegitimate minor child was fully and freely given by mother without fraud or duress and accepted by Department of Social Welfare before statutory amendment providing for withdrawal of consent with court approval became effective, such consent was irrevocable and attempted withdrawal thereof did not deprive Superior Court of jurisdiction to proceed in adoption proceeding.

Writ discharged.

1. Habeas corpus ⇐120

Action of trial court in discharging writ of habeas corpus issued on mother's petition to obtain custody of minor child from proposed adoptive parents was not res judicata in habeas corpus proceeding subsequently instituted by mother in appellate court for the same purpose, where prior proceeding in trial court had been disposed of solely upon issues of law without any evidence being taken.

2. Bastards ⇐15

The mother of an illegitimate minor child is entitled to its custody. Civ. Code, § 200.

3. Habeas corpus ⇐99(3)

Mother's right to custody of illegitimate minor child during proceedings for its adoption by others could not be determined in habeas corpus proceeding instituted by mother, in absence of evidence as to best interests of child. Civ.Code, § 200.

4. Adoption ⇐1, 10

The matter of adoption and the procedure under which it must be accomplished are entirely statutory and have never been a part of the constitutional jurisdiction given to courts. Civ.Code, §§ 224, 226.

5. Adoption ⇐7

Consent of parent or parents entitled to custody of minor child and charged with duty of caring for it is essential to give superior court jurisdiction to make an order of adoption. Civ.Code, § 224.

6. Infants ⇐2

The state in its position of parens patriae is charged with a continuing interest in the welfare of minor children within its borders.

7. Statutes ⇐263

Every presumption and intendment is against retroactive application of legislation and statutes are presumed to operate prospectively only and will be so construed unless the legislative intent to make them retroactive clearly appears. Civ. Code, § 3.

8. Adoption ⇐7

Statutory amendment providing for withdrawal with court approval of parents' consent to adoption of minor child did not apply retroactively to attempted withdrawal after effective date of amendment of consent to adoption of illegitimate child given by mother before amendment became effective. Civ. Code, §§ 3, 224, 226, 226a.

9. Adoption ⇐7

Where consent to adoption of illegitimate minor child was fully and freely given by mother without fraud or duress in the manner prescribed by statute and accepted by Department of Social Welfare before 1949 amendment providing for withdrawal of consent with court approval, became effective, such consent was irrevocable and attempted withdrawal thereof by mother did not deprive superior court of jurisdiction to proceed in adoption proceeding. Civ. Code, §§ 3, 224, 226, 226a.

10. Adoption ⇐13

Superior court must determine on the hearing of adoption petition whether adoption is then for the best interest of child, all the facts and circumstances being considered. Civ.Code, § 226.

11. Adoption ⇐7, 13

Mother may contest adoption of minor child, though she has previously given her consent thereto, and changed conditions of either the proposed adoptive parents or consenting parents may weigh heavily for or against the granting of petition. Civ. Code, §§ 224, 226.

12. Evidence ⇐83(1)

It must be assumed that Department of Social Welfare performed the duty expressly imposed upon it by statute of accepting mother's consent to adoption of illegitimate minor child, particularly in absence of any showing to the contrary. Civ. Code, §§ 224, 226.

Gordon McKenzie, Ruth E. Bates, Santa Rosa, for petitioner.

C. W. Anderson, Santa Rosa, for respondent.

VAN DYKE, Justice.

[1] On May 11, 1949, there was born to petitioner, Jacoba Marie Barents, a male child. The child was illegitimate. On May 15th following petitioner signed a written instrument, stating that she was giving the infant into the possession of respondents, Jacob Jens Jorgensen and Mildred Jorgensen, for purposes of adoption and that she would sign any further documents necessary to effectuate such adoption. On June 17th respondents herein, having had the infant in their possession since the mother gave it to them, petitioned the Superior Court for Sonoma County for the adoption of the baby. Pursuant to statute the State Department of Social Welfare was notified and on July 28th the mother signed, in the presence of an agent of the Department, the form of consent to adoption required by the statute. Therein she stated that she was the mother of the infant, was entitled to its sole custody and did give her full and free consent to its adoption by respondents herein. On October 20th following she gave to the Department a document entitled "withdrawal of consent", stating therein that she did thereby withdraw her consent to the adoption of the child by respondents and refused to consent thereto. Thereafter she filed in the Sonoma County court a petition for a writ of habeas corpus, wherein she sought to have the child taken from the custody of the proposed adoptive parents and given to her. That court having issued the writ upon motion, discharged the same and it is conceded here that no evidence was taken and that the matter was disposed of purely upon issues of law. The action of the trial court is therefore not res judicata here. In re White, 49 Cal.App.2d 160, 121 P.2d 100. The mother thereupon petitioned this court for a writ of habeas corpus, which was issued, and respondents having appeared in opposition to the petition, and no issue of fact having been raised, the matter has been submitted for decision.

It is the claim of petitioner that although her consent to adoption had been given she had a right to withdraw that consent at any time before the final decree of adoption should have been made by the Superior

Court and that she has exercised that right; that therefore the Superior Court is without jurisdiction to proceed further in the adoption proceedings and would be without jurisdiction to make any order of adoption, and that as a consequence she is now entitled to the custody of her child.

[2, 3] The mother of an illegitimate minor is entitled to its custody. Civ.Code, Sec. 200. That right of custody has not in this case been interrupted or terminated by any judicial decree. However, we understand that the parties wish this matter decided upon the narrow issue of jurisdiction first above stated. Prima facie the petitioner here might be entitled to the custody of her infant during the adoption proceedings, but the determination of whether or not an order to that effect should be made would involve findings as to the best interests of the minor and neither by evidence introduced nor by suggestion has that issue been considered. We shall, therefore, confine this decision strictly to the issues which the parties have asked this court to determine.

[4, 5] The necessity of consent to adoption either by the parents of legitimate children or by the mother of an illegitimate child is not and could not be disputed, but the question of whether or not in adoption proceedings, such consent having been given, it can then be withdrawn prior to adoption, and the conditions under which it may be withdrawn, have been the subject of conflicting decisions in the courts of this State and of other states. It is conceded by all, as indeed it must be, that in this State the matter of adoption and of the procedure under which it must be accomplished is completely statutory and has never been a part of the constitutional jurisdiction given to courts. In re Stevens' Estate, 83 Cal. 322, 330, 23 P. 379, 17 Am.St.Rep. 252; In re Williams' Estate, 102 Cal. 70, 81, 36 P. 407, 41 Am.St.Rep. 163; In re Estate of Sharon, 179 Cal. 447, 454, 177 P. 283. Responsive to the need for legislative action our Legislature has from the earliest years of statehood provided a statutory plan whereunder adoptions could be carried out. A fundamental requisite has always been the consent of the parent or parents entitled to the custody of the child and charged with the duties of caring for it. As was said by the Supreme Court in Re Matter of Cozza, 163 Cal. 514, 522, 126 P. 161, 164, Ann.Cas.1914A, 214: "* * * Consent lies at the foundation of statutes of adoption, and under our law this consent is made absolutely essential to confer jurisdiction on the superior court to make an order of adoption, unless the conditions or exceptions exist specially provided by the statute itself and which render such consent of the parents unnecessary. Unless such consent is given, or, for the exceptional causes expressly enumerated is dispensed with, the court has no jurisdiction in the matter."

[6] The state in its position of parens patriae is of course charged with a continuing interest in the welfare of children within its borders and our State has surrounded the matter of their custody and care, including their adoption, with many protective statutory laws. With regard to adoption, the statutory scheme is complete and detailed and the requisite of consent has been carefully preserved and is general, except where statutorily defined exceptions exist. With these exceptions we are not here concerned.

With respect to consent the Civil Code, by Section 224, provides that an illegitimate child cannot be adopted "without the consent of its parents if living". By Section 226 the Code declares that the first step in an adoption proceeding is the filing of a petition for that purpose in the superior court, and the giving of immediate notice of the pendency of such proceeding to the State Department of Social Welfare. It is then provided that in cases where consent is required such consent must be signed in the presence of an agent of the Department and filed with the clerk of the court. The statute then declares that with respect to cases such as this, the consent having been so executed, it shall be the duty of the Department to accept it and to ascertain whether the child is a proper subject for adoption, and whether the proposed home is suitable, filing its report on those matters with the court. It is provided that the consent shall be on a form prescribed

by the Department. The provision making it the duty of the Department to accept the consent was added to the existing code requirements in 1945 and was in effect when the consent of petitioner here was given. In 1949 the Legislature added a statutory provision affecting such consents by declaring in Section 226a of the Civil Code that once given such consent to adoption might not be withdrawn except with court approval, and providing a method whereby the issue of the right of the consenting parent or parents to withdraw the consent might be presented to and determined by the court in which the adoption proceedings were pending. This last legislation went into effect after the consent of petitioner here had been given, but before her attempted withdrawal of that consent.

[7, 8] Petitioner has not attempted to avail herself of this method of obtaining court approval to her withdrawal of her consent, contending that the provisions therefor do not apply to her; that the consent she gave was withdrawable at her pleasure at any time before an order of adoption should have been signed, and that the legislation referred to could not take away her absolute right which she claims existed and would exist from the time she gave her consent up to and until such order was made. We may say here that if, under the statutes governing adoption, it could be said that the consenting parent or parents had such right of unilateral action and could so withdraw and revoke consent so given then the Legislature could not take away that absolute right by legislation adopted during the interval between the giving of such qualified and revocable consent and the termination of the adoption proceedings. On this point we think it enough to say that every presumption and intendment is against such retroactive application of legislation. Statutes are presumed to operate prospectively only, Jones v. Union Oil Co., 218 Cal. 775, 25 P.2d 5, statutes will be construed as prospective in operation unless the legislative intent to make them retroactive clearly appears, Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; our Civil Code provides that no part thereof is retroactive unless expressly so declared, Civ.Code, Sec. 3, which declaration does not here exist; and no reason has been suggested, and we can think of none, why retroactive effect ought to be given in this instance.

[9] But in our opinion petitioner here, having given her consent under the statute in force at the time and in the form in which she gave it, was not free to withdraw the same or to revoke it merely because she had changed her mind, whether that change originated in whim and caprice or rationally by reason of changed conditions, which latter ground she avers in her petition. When the Legislature, exercising its wellnigh plenary power over the subject of adoptions, required the consent of a parent or parents to the adoption of a child and when it provided that such consent should be given by the execution of a form prescribed by the Department and before an agent thereof; when it provided further that this consent should be accepted by the Department and filed in the adoption proceedings, it could only have meant, although not expressly so declaring, as it later did, that the consent which the statute required was then to be considered as having been given irrevocably. We think that from that moment on the consent continued without the power of revocation until the court should have ruled on the adoption. This assumes, of course, that the consent was, as the form declared it to be, fully and freely given without fraud or duress, but we think that when such real consent had been so given it was intended that the statutory requisite of consent had thereby been irrevocably supplied.

[10, 11] If the consent is irrevocable then its attempted withdrawal has not deprived the superior court of jurisdiction to proceed. This, however, is not to say that the doors of the court are closed to the mother. Under our laws that court is charged with the duty of determining, on the hearing of the adoption petition, whether adoption is then for the best interest of the child, all the facts and circumstances being considered, and if she desires to do so, the mother may contest the adoption, even though she has given consent at an

earlier time. The welfare of the child can never be excluded from the issues, no matter what preliminary action its parent or parents may have taken. The changed conditions of either the proposed adopters or of the consenting parents may heavily weigh the scales for or against the granting of the petition.

In Erickson v. Raspperry, 320 Mass. 333, 69 N.E.2d 474, where consent to adoption had been given by the mother of an illegitimate child and where, after such consent, the mother had married and upon proof thereof the court in which the proceedings for adoption were pending found that it was for the best interests of the child that the adoption should be denied and the child restored to its mother, the court said 69 N.E.2d at page 475: "Relying upon the findings of the judge that the respondent had originally assented in writing to the allowance of the petition, that her consent was given voluntarily and with full knowledge of the effect of her consent and the effects of adoption, and that the petitioners are proper persons to bring up the child, the petitioners argue in substance that the respondent's consent to the petition was binding upon her and irrevocable and that the judge was without authority to dismiss the petition. The consent of the respondent to the petition, however, was not binding upon the judge. * * * It was the duty of the judge to be guided by the established principles governing the disposition of petitions for adoptions, the most fundamental of which is that the paramount issue is the welfare of the child. [Citing cases.] That question the judge has resolved in specific terms in favor of the respondent upon findings before set forth which support his decision."

Suppose here, for instance, that after consent and before adoption the natural father should come forward and marry the child's mother, as the mother here alleges is their mutual intent, thus legitimating the infant, such legitimation, considering its effect upon the child's welfare alone, might persuade the court that adoption should not be ordered. In saying this we do not pass upon the question of whether such marriage during adoption proceedings would make it jurisdictional that the consent of the natural father should then be secured, as was held in Re Adoption of Doe, 231 N.C. 1, 56 S.E.2d 8, since that question is not before us. On the other hand, suppose some intervening, or theretofore unknown, occurrence in the life of one of the petitioners in adoption should convince the court their petition should not be granted, surely that court could, in the exercise of a sound discretion and for the welfare of the child, deny adoption. It is quite apparent that proceedings for adoption under our statutes are something much more than mere solemnization of a contractual relationship, and that there are committed to the court by the pertinent legislative enactments grave judicial functions transcending the immediate desire of petitioners for adoption and of consenting parents; and while it is true the statutes do not provide expressly how the matters we have been discussing shall in all instances be put in issue and tried, yet we have no doubt the court could and would adopt a procedure sufficient to permit interested and proper parties to appear and present evidence to the end that the substantial and underlying issue of child welfare will be properly decided.

Of course what we have said about the revocability of consent would have but limited, if any, application when consent had been given under the 1949 amendment re consent, for therein the legislature has provided expressly that the consent cannot be withdrawn without court action and has further provided a means of application for such order. Therefore, the Legislature has impliedly declared that the consent is not now irrevocable absolutely. What we have said is that before these amendments took effect the consent, when fairly given, was irrevocable; that the matter of consent was thenceforth behind the parties and the court; but that the court must still go forward to determine all other issues involved and that it had full jurisdiction to do so.

[12] In arriving at the foregoing holdings we have given attention to recent holdings by our appellate courts, both District and Supreme, but we think those decisions are not decisive here. We refer to In re

Adoption of McDonnell, 77 Cal.App.2d 805, 176 P.2d 778; In re Adoption of Parker, 31 Cal.2d 608, 191 P.2d 420, and other appellate decisions cited to us. But the statutory changes intervening materially distinguish those cases from this. Also the form of consent required has been changed by the Department of Social Welfare, probably influenced by those same decisions. The consent executed by petitioner was couched in terms of finality conditional only on an order of adoption and nothing in the form here used indicates either an optional or conditional consent. The courts deciding the cited cases were much concerned with acceptance of consent, but after the opinions therein were rendered the Legislature made it the express duty of the Department to accept the consent when given, leaving nothing to the discretion of the Department in that matter. We think we must assume the Department did its duty, certainly where, as here, no showing to the contrary is made. That having been done, the consent being full and free when made, it remained for the Department in this case to go forward and file with the court its report touching the final question of adoption or not. But that final determination is for the court and it has jurisdiction to proceed. Therefore, the writ heretofore issued must be discharged.

When this matter was heard in this Court a request was made and granted that the Department of Social Welfare might, through its counsel, file a brief herein for the purpose, as we understood it, of informing the Court as to its interpretation of the statutes in the matter of consent and the reasons therefor. No such brief has been filed. However, we have examined the Manual of Adoption Policies and Procedures and find the following with respect thereto: Prior to the 1945 amendment it was the policy of the Department that where possible a sufficient investigation of the case be made to determine the advisability of the adoption before the consent was signed and then it was the policy and practice of the Department when the consent was taken to make it clear to the natural parents that the consent might be withdrawn at any time prior to the final court action on the petition. Further it was to be explained that the consent would not be accepted by the Department until a determination had been made that the adoption was for the child's best interests. After the 1945 amendment the manual noted that it was then the duty of the Department to accept the consent of the natural parents and the wording of the consent form was changed and the directive that the parents consenting should be informed that the consent was revocable was omitted. However, the manual stated: "While the consent may be withdrawn by the parent prior to the court order granting adoption, the agent should help the parent recognize that in fairness to all parties the execution of the consent should represent as nearly as possible a final decision." It is thus apparent it was still the Department's interpretation, contrary to what we have herein said, that the consent, although accepted by the Department, could, nevertheless, be withdrawn by the consenting parent at any time before court order granting adoption. The petition before us does not contain any allegation upon the subject of whether petitioner here was told by the Department that she would have the right to withdraw her consent; no evidence was presented upon the point; and the briefs do not discuss any contention that the petitioner here was so informed, relied upon such information and believed when she informed the Department that she was withdrawing her consent that she was exercising a right which had been reserved to her. We cannot assume that any such statements were made and what we have said relative to the matter is said because we do not wish our holding herein to be considered as including any determination of what the effect would be upon the revocability of consent if obtained under such circumstances as would justify the mistaken belief on the part of the parent giving such consent that it could be withdrawn at any time before an order of adoption was made.

The writ is discharged.

ADAMS, P. J., and PEEK, J., concur.

99 Cal.App.2d 764

FIRST NAT. BANK OF FAIR OAKS v. TURNBULL et al.

Civ. 7776.

Sec. 6069.

District Court of Appeal, Third District, California.

Oct. 7, 1950.

The First National Bank of Fair Oaks sued Thomas H. Turnbull, M. M. Haslett, B. D. Christensen and L. L. Anderson, individually and as copartners doing business under the firm name and style of Fair Oaks Manufacturing Company, for breach of a contract, an amount due on a note, and foreclosure of a chattel mortgage. From an order of the Superior Court, Sacramento County, Malcolm C. Glenn, J., denying defendant Anderson's motion to vacate and set aside a deficiency judgment against him and defendants Haslett and Christensen for a balance due after payment to plaintiff of the proceeds of a sale of the mortgaged personalty by defendant Turnbull's bankruptcy trustee and an execution levied on certain assets of defendant Anderson, he appealed. The District Court of Appeal, Adams, P. J., held that the grounds of the motion having existed before entry of the judgment, so as to be available on appeal therefrom, the order denying the motion was not appealable.

Appeal dismissed.

1. Judgment ⇐138(1), 143(3, 16)

A motion to vacate default judgment for plaintiff, as granting relief contrary to that prayed for in complaint, after lapse of time for appeal therefrom, did not lie under statute authorizing vacation of judgment based on erroneous conclusions of law inconsistent with or unsupported by trial court's fact findings or judgment inconsistent with or unsupported by jury's special verdict on aggrieved party's motion within specified time, nor under statute authorizing relief from judgment taken against party through his mistake, inadvertence, surprise or excusable neglect, in absence of prayer for relief on any of such grounds or accompanying copy of moving defendant's answer or other proposed pleading. Code Civ.Proc. §§ 473, 663, 663a.

2. Appeal and error ⇐113(2)

An appeal does not lie from order denying motion to vacate judgment on grounds existing before entry of judgment and available on appeal therefrom.

3. Chattel mortgages ⇐287

Mortgagors, contracting to repay mortgagee bank all monies advanced to them thereby, including any deficiency, if proceeds of sale of mortgaged personalty proved insufficient to repay amount advanced, became liable for deficiency resulting from one mortgagor's bankruptcy trustee's sale of such personalty.

4. Appeal and error ⇐113(2)

An order denying a mortgagor's motion to set aside deficiency judgment for balance due mortgagee bank, after payment to mortgagee of proceeds of another mortgagor's bankruptcy trustee's sale of mortgaged personalty, on grounds that relief granted mortgagee was contrary to that prayed for in its complaint, that court had no jurisdiction to render judgment in absence of foreclosure decree and order of sale, and that sheriff or commissioner made no return showing balance unpaid by movant, was not appealable, as such grounds existed before entry of judgment and were available for review on appeal therefrom.

Murle C. Shreck, E. R. Vaughn, Sacramento, for appellant.

W. P. Dwyer, Jr., and Elliott, Atkinson & Sitton, Sacramento, for respondent.

ADAMS, Presiding Justice.

Plaintiff filed this action on May 28, 1947, seeking a judgment for $18,941.04, for interest, attorney's fees and costs, and for the foreclosure of a mortgage securing the payment of the moneys claimed. The action was based upon a contract executed by Thomas H. Turnbull, M. M. Haslett, B. D. Christensen and L. L. Anderson, alleged to be a copartnership carrying on business as Fair Oaks Manufacturing Company, and upon a promissory note executed by them. The contract, attached to the complaint as an exhibit, provided that the bank should

make advances to the borrowers to finance their business, from time to time, and that the latter should execute a mortgage upon its personal property, and take other designated steps to secure such advances, the agreement to be a continuing one to apply to future as well as existing transactions. A note for $15,000 was executed by defendants, the latter agreeing that the mortgage should cover equipment added or substituted, and that they would keep same in repair and fully insured. The complaint then alleged failure of defendants to comply with their agreement in several respects, and that defendants were indebted to plaintiff in the sum claimed. It prayed that the mortgage be foreclosed, and for general relief.

All defendants except Turnbull defaulted in said action, the record showing that appellant Anderson was served with summons on June 14, 1947, and that upon failure to appear, his default was entered July 17, 1947. Turnbull filed an answer admitting the allegations of the complaint, but setting forth that he had been adjudicated a bankrupt on June 3, 1947, that the obligation upon which plaintiff sued was included in his schedule of debts, and that by virtue of said adjudication he was released from the obligation set forth in plaintiff's complaint.

On October 8, 1948, after a hearing at which plaintiff produced evidence, the court made and entered a judgment which recited that all of the allegations of plaintiff's complaint were found to be true, that subsequent to the filing of the complaint the personal property covered by the mortgage set forth in the complaint had been taken into the possession of the trustee in bankruptcy in Turnbull's bankruptcy proceeding and sold, and that the proceeds of such sale had been paid to plaintiff in partial satisfaction of its debt proved in that proceeding; and that, after the application of such payment, there remained due and unpaid to plaintiff the sum of $1,600.79 plus attorney's fees and interest, for the amount of which judgment was entered against defendants Haslett, Christensen and Anderson. On January 5, 1949, an execution was issued and levied upon certain of appellant's assets, which resulted in recovery of sufficient funds to satisfy the judgment on January 14, 1949.

On March 28, 1949, appellant Anderson filed a notice of motion for an order "vacating and setting aside" the deficiency judgment entered October 8, 1948, and the execution thereafter issued, upon the asserted ground that the judgment was void for the reasons (1) that the relief granted plaintiff was contrary to that prayed for in its complaint, (2) that no decree of foreclosure was had in said action nor was any order of sale of the mortgaged premises made, (3) that the court was without jurisdiction to render a deficiency judgment in the absence of a foreclosure and sale, and (4) that the sheriff or commissioner did not make return showing the balance that remained unpaid by defendant. It was not asserted by appellant that this motion was based upon either section 473 or section 663 of the Code of Civil Procedure.

[1] An order denying said motion was made June 6, 1949, and Anderson has appealed from such order. No appeal was taken from the court's judgment and the time within which same could have been taken by this defendant—if at all—had elapsed long prior to his motion made on April 4, 1949, which was subsequent to the levy of the execution upon his assets. Obviously such motion was not made pursuant to sections 663 and 663a of the Code of Civil Procedure, since they are inapplicable to this case; and if section 473 is relied upon, appellant failed to comply with same since he did not seek to be relieved of his default or the judgment taken against him "through his mistake, inadvertence, surprise or excusable neglect", nor did he accompany his application for relief by a copy of an answer or other proposed pleading.

[2] It appears to be well settled that an appeal does not lie from an order denying a motion to vacate a judgment if the grounds upon which the moving party sought to have the judgment vacated existed before its entry and were available on appeal therefrom. Colbert v. Colbert, 28 Cal.2d 276, 281, 169 P.2d 633; Mather v. Mather, 22 Cal.2d 713, 720, 140 P.2d 808; Lawson v. Guild, 215 Cal. 378, 381, 10 P.

2d 459; Nagelmann v. McIntyre, 27 Cal. App.2d 621, 622–623, 81 P.2d 466; Linne v. Union Central Life Ins. Co., 119 Cal. App. 490, 6 P.2d 521; Barry v. Learner, 113 Cal.App. 651, 653, 299 P. 82; Home Owners' Loan Corp. v. Engelbertson, 54 Cal.App.2d 46, 48, 128 P.2d 424.

[3] Turning to the alleged grounds upon which appellant relied for vacation of the judgment, we think it is apparent that all of them existed before its entry and were available on appeal from it. If the relief granted to plaintiff was contrary to that prayed for—which we think it was not—the variance could have been reached by such an appeal. See Colbert v. Colbert, supra, 28 Cal.2d at page 281, 169 P.2d 633. The complaint was based primarily upon the contract between the defendants and plaintiff wherein defendants obligated themselves to repay all moneys advanced to them, including any deficiency if the property mortgaged proved insufficient. When that property was sold in the bankruptcy proceeding, and a deficiency resulted, defendants became liable for same. Also note the grounds relied upon in Linne v. Union Central Life Insurance Co., supra, where it was contended that the judgment was void because it granted relief in excess of that prayed for in the complaint; and Lawson v. Guild, supra, where it was urged that the judgment was void because the cross-complaint failed to contain a description of the property the title to which was quieted in defendant.

[4] The matters relied upon by appellant having been available for review on appeal from the judgment, the order refusing to set it aside is not an appealable order, and this appeal must therefore be dismissed.

Appeal dismissed.

PEEK and VAN DYKE, JJ., concur.

36 Cal.2d 152

GOLCEFF v. SUGARMAN.
S. F. 18185.

Supreme Court of California, in Bank.
Oct. 13, 1950.

Walter P. Golceff sued E. Sugarman and others, for injuries incurred by plaintiff in a fall from a ladder in a retail store owned by named defendant. The Superior Court, San Francisco County, Theresa Meikle, J., entered a judgment of nonsuit at close of plaintiff's case and plaintiff appealed. The Supreme Court, Schauer, J., held that whether employee of defendant knew ladder to be dangerous and unsound when not held was for jury.

Judgment reversed and cause remanded for new trial, and purported appeal from an order denying motion for new trial, a nonappealable order, dismissed.

Prior opinion, 217 P.2d 120.

1. Trial ⇐139(1), 142, 143

A trial court must deny a motion for a nonsuit at close of plaintiff's case if there is any substantial evidence which, with aid of all legitimate inferences favorable to plaintiff, tends to establish averments of complaint, or, where plaintiff's evidence is sufficient to support a judgment on verdict, and trial court should deny a nonsuit even where there is a conflict in evidence and some evidence tends to sustain plaintiff's case, or when evidence of plaintiff is such that different conclusions can reasonably be drawn therefrom, and if there is any doubt it is duty of court to let case go to jury.

2. Appeal and error ⇐927(3)

In disposing of an appeal from a judgment of nonsuit, court must view evidence in light most favorable to appellants and must disregard all inconsistencies and draw only those inferences from evidence which can reasonably be drawn which are favorable to appellant.

3. Master and servant ⇐332(1)

Where store employee climbed ladder to store balcony to find what plaintiff wanted to buy, and requested plaintiff to climb ladder, and ladder slipped when plaintiff had climbed first steps and after store employee released hold on ladder which employee had when plaintiff started to climb ladder, causing plaintiff to fall, whether employee negligently left plaintiff on ladder while it was in a dangerous and unsound condition, was for jury.

4. Master and servant ⇐329

In order to state a cause of action against defendant for a wrong committed by his servants, ultimate fact necessary to be alleged is that wrongful act was in legal effect committed by defendant and this may be alleged either by alleging that defendant by his servant committed act, or, without noticing servant, by alleging that defendant committed act.

5. Master and servant ⇐329

In action against store owner and store employee for injuries resulting when plaintiff fell from ladder in store, where complaint alleged that store owner negligently permitted ladder to become dangerous, defective and unsound, proof that acts which allegedly caused plaintiff's injuries were committed by employee was not a variance amounting to failure of proof as against store owner.

6. Appeal and error ⇐110

An order denying a motion for a new trial is a nonappealable order.

Hallinan, MacInnis & Zamloch and Nicholas Alaga, all of San Francisco, for appellant.

Alexander, Bacon & Mundhenk and Herbert Chamberlin, all of San Francisco, for respondent.

SCHAUER, Justice.

In this action to recover damages for personal injuries the court, at the close of plaintiff's case, granted defendant's motion for a nonsuit, and plaintiff appeals from the subsequently entered judgment. Upon consideration of the entire record, and of the authorities governing courts in passing on such motions, we are of the view that plaintiff's evidence was sufficient to require

submission of the case to the jury, and that the judgment should be reversed.

[1, 2] A trial court must deny a motion for a nonsuit at the close of plaintiff's case "if there is * * * any substantial evidence, which, with the aid of all legitimate inferences favorable to the plaintiff, tends to establish the averments of the complaint, or, in other words, where the plaintiff's evidence is sufficient to support a judgment on the verdict. It should deny a nonsuit even where there is a conflict in the evidence and some evidence tends to sustain the plaintiff's case, or when the evidence of the plaintiff is such that different conclusions can reasonably be drawn therefrom. If there is any doubt, it is the duty of the court to let the case go to the jury." (9 Cal.Jur. 558–559.) And as to our duty, "The uniform rule which an appellate court should follow in disposing of an appeal from a judgment of nonsuit is, that the court must view the evidence in the light most favorable to appellant, must disregard all inconsistencies and draw only those inferences from the evidence which can reasonably be drawn which are favorable to appellant. [Citations.]" (Kirk v. Los Angeles Ry. Corp. (1945), 26 Cal.2d 833, 837–838, 161 P.2d 673, 164 A.L.R. 1; see also Milana v. Credit Discount Co. (1945), 27 Cal.2d 335, 342–343, 163 P.2d 869, 165 A.L.R. 621; Mastrangelo v. West Side Union High School Dist. (1935), 2 Cal.2d 540, 544–545, 42 P.2d 634.)

Plaintiff, a general repair man of the age of 42, was the only witness concerning the happening of the accident here involved. He testified as follows: He entered defendant's store and there showed to an employe of defendant a cloth pattern of a tank cover plaintiff wished to purchase. The employe requested plaintiff to hold a ladder while the employe climbed it to a balcony. The balcony was at a height which plaintiff, who is "five feet ten or eleven" inches tall, could reach by putting his "hand in the air," and the ladder was "not a stepladder," but just a "plain ladder * * * two sticks and then sticks cross together," which was leaning against and extending "about two feet above" the balcony. Plaintiff held the ladder, and the employe "Went on the balcony" and then stated to plaintiff, "here are the tank covers * * * come on up here." With the employe holding the ladder at the top plaintiff climbed "two or three steps" up the ladder to a point where his head was "Over the balcony"; at that point plaintiff handed the pattern to the employe, the employe left the ladder, the ladder began to slip, and plaintiff "awakened" in the hospital.

[3] The epitomized evidence is sufficient to require the case to go to the jury. Certainly a business "invitor's responsibility is not absolute but he is 'required to use ordinary care for the safety of the persons he invites to come upon the premises * * *.'" (Hinds v. Wheadon (1942), 19 Cal.2d 458, 460, 121 P.2d 724; see also Blodgett v. B. H. Dyas Co. (1935), 4 Cal.2d 511, 512, 50 P.2d 801; Johnston v. De La Guerra Properties, Inc. (1946), 28 Cal.2d 394, 399–400, 170 P.2d 5.) In his complaint plaintiff alleged that he was invited to use the ladder, that defendant negligently permitted the ladder "to become dangerous, defective and in an unsound condition" so that plaintiff was caused to "fall off" the ladder and "to be thrown to the floor" and injured. In connection with the other circumstances the fact that the employe asked plaintiff to hold the ladder from the bottom would support an inference by the jury that the ladder was, and that the employe knew it to be, dangerous and unsound when not held and that in letting go his own hold of the ladder after plaintiff had begun to climb it in response to the invitation to "come on up here," the employe negligently left plaintiff upon the ladder while it was in a dangerous and unsound condition.

[4, 5] Defendant suggests that such a "theory of proof" contemplates a cause of action different from that stated in the complaint, in that the complaint charges *defendant* with negligence whereas the proof rested upon negligence of defendant's employe. It is a generally accepted rule, however, that "In order to state a cause of action against defendant for a wrong com-

mitted by his servant, the ultimate fact necessary to be alleged is that the wrongful act was in legal effect committed by defendant. This may be alleged either by alleging that defendant by his servant committed the act, or, without noticing the servant, by alleging that defendant committed the act." (57 C.J.S., Master and Servant, § 614, page 386; see also Martin v. Leatham (1937), 22 Cal.App.2d 442, 445–446, 71 P.2d 336; 7 Labatt, Master and Servant, 2d ed., sec. 2527, p. 7776; 4 A.L.R.2d 292–313.)

[6] For the reasons above stated the judgment is reversed and the cause is remanded for a new trial; the purported appeal from an order denying a motion for a new trial, a non-appealable order (Nichols v. Mitchell (1948), 32 Cal.2d 598, 600, 197 P.2d 550), is dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.



36 Cal.2d 146

WOODCOCK v. DICK.

Sac. 6135.

Supreme Court of California, in Bank.

Oct. 11, 1950.

Original application by P. F. Woodcock against Nell M. Dick, as Auditor of the County of Humboldt, for a peremptory writ of mandate directing respondent to pay petitioner, Superintendent of Schools of Humboldt County, balance of his compensation under statute providing for an increase in the petitioner's salary. The Supreme Court, Gibson, C. J., held that under constitutional amendment providing that, notwithstanding any provision of Constitution to contrary, Legislature shall prescribe qualifications required of county superintendents of schools and shall fix their salaries, such provisions gave Legislature the power to increase the salary of a superintendent during his term of office.

Writ granted.

1. Officers ⇐100(1)

The power to fix compensation includes power to adjust or regulate and implies a plenary right to act by lowering or raising salaries.

2. Officers ⇐100(2)
Schools and school districts ⇐46

Constitutional provision that, notwithstanding any provision of Constitution to contrary, Legislature shall prescribe qualifications required of county superintendents of schools and shall fix their salaries, gives Legislature complete authority over payment of compensation, including power to increase salaries of incumbent officers. Const. art. 9, § 3.1, art. 11, § 5; Education Code, §§ 400 to 459, 400.2.

3. Constitutional law ⇐20

Where Legislature has by statute adopted a reasonable construction of a constitutional provision, its action has strong persuasive force and will ordinarily be followed.

4. Officers ⇐100(2)
Schools and school districts ⇐46

Constitutional provision that, notwithstanding any provision of Constitution to contrary, Legislature shall prescribe qualifications required of county superintendents of schools and shall fix their salaries, gives Legislature complete authority over payment of compensation, including power to increase salaries of incumbent officers and statute enacted providing for payment of increased salaries to incumbent county superintendents is a reasonable construction of constitutional provision. Const. art. 9, § 3.1, art. 11, § 5; Education Code, § 425.

Gardiner Johnson and Thomas E. Stanton, Jr., San Francisco, for petitioner.

Harold L. Hammond, District Attorney, Eureka, for respondent.

GIBSON, Chief Justice.

The sole question raised by this proceeding is whether section 400.2 of the Educa-

tion Code can be constitutionally applied so as to increase the salary of a county superintendent of schools during his term of office. Section 400.2 provides: "The salary and qualifications of each county superintendent of schools of each county shall be as set forth in this article. The salaries set forth in this article are payable to incumbent county superintendents of schools." The article referred to in this section embraces sections 400 to 459.

Petitioner was elected superintendent of schools of Humboldt County for the term beginning January 6, 1947, and ending January 8, 1951. In 1949 the Legislature amended section 425 of the Education Code by providing for an increase in petitioner's salary, and he seeks a writ of mandate to compel payment of his salary at the increased rate.

Respondent auditor has refused to make the requested payments on the theory that petitioner may not be granted an increase in salary during his term of office by reason of section 5 of article XI of the Constitution, as amended in 1933,[1] which provides that "The compensation of any * * * municipal officer shall not be increased * * * during his term of office." This section also provides that "boards of supervisors in the respective counties shall regulate the compensation of all officers" with certain exceptions not relevant here. In 1946, however, a radical change was made by the adoption of section 3.1 of article IX which provides that "Notwithstanding any provision of this Constitution to the contrary, the Legislature shall prescribe the qualifications required of county superintendents of schools and shall fix their salaries * * *." The question thus presented is whether the provisions of section 3.1 gave the Legislature power to increase the salary of a superintendent during his term of office.

Substantially the same situation was presented in Sevier v. Riley, 198 Cal. 170, 244 P. 323, 324. In that case section 17 of article VI, as amended in 1906, provided that the salaries of superior court judges of certain counties should not be increased during their terms of office, and section 11 of that article was subsequently amended to provide that the compensation of "judges of all courts of record shall be fixed and the payment thereof prescribed by the Legislature." It was held that the amendment transferred the entire matter of compensation to the Legislature, investing it with full control over the matter of the amount and manner of payment of judicial salaries, and that an incumbent judge was entitled to the increased compensation prescribed by a statute enacted during his term of office.

It is argued that the Sevier case is distinguishable because the amendment involved in that case provided that the compensation of judges "shall be fixed and the payment thereof prescribed by the Legislature", whereas section 3.1 relating to county superintendents merely states that the Legislature "shall fix their salaries" without adding that it shall prescribe payment thereof. It appears, however, that there was a reason for using the word "prescribe" in that case. Section 17 of article VI, in addition to prohibiting increases in an incumbent's salary, also specified the manner of payment by providing that one-half of the salary of each superior court judge should be paid by the state and the other half by the county for which he was elected.[2] It was therefore appropriate to use the words "prescribe payment" in order to make it manifest that the Legislature was being given the power to change this method of payment of salaries, whereas in the present case there was no need to use such language because there was no similar constitutional provision relating to the compensation of

1. Article XI, section 5, was also amended in 1944, but the quoted portions were not changed.

2. Section 17, article VI, has not been amended since 1906, but following the amendment of section 11 the Legislature made changes in the proportion of superior court judges' salaries to be paid by the state. This proportion has ranged, in different counties, from about 40% to 100% of the total salary. See Pol. Code, § 736b; Stats.1927, p. 578; Stats. 1931, p. 573; Stats.1945, p. 1544; Stats. 1947, p. 1718.

county superintendents. Cf. art. XI, §§ 5, 7½.

[1-4] The word "fix" means to determine, to assign precisely, to make definite and settled. Webster's New Internat. Dict., 2d ed. To fix compensation is to prescribe a rule or rate by which it is to be determined. Flagg v. Columbia County, 51 Or. 172, 94 P. 184, 186; Anderson's Law Dict. It has been held that the power to fix compensation includes the power to adjust or regulate and implies a plenary right to act by lowering or raising salaries. Fidler v. Board of Trustees, 112 Cal.App. 296, 302–303, 296 P. 912; McKann v. Town of Irvington, 133 N.J.L. 63, 42 A.2d 391; Buckbee v. Board of Education, 115 App.Div. 366, 100 N.Y.S. 943, 949, affirmed 187 N.Y. 544, 80 N.E. 1106; Abrams v. La Guardia, 174 Misc. 421, 21 N.Y.S.2d 891. When section 3.1 is read in the light of these definitions, it is clear that the intent was to give the Legislature complete authority over the payment of compensation, including the power to increase the salaries of incumbent officers. See Sevier v. Riley, 198 Cal. 170, 173–175, 244 P. 323; Crawford v. Payne, 12 Cal.App.2d 485, 486–487, 55 P.2d 1240; cf. Busch v. Turner, 26 Cal.2d 817, 819–821, 161 P.2d 456, 171 A.L.R. 1063; Hall v. Williams, 2 Cal.2d 186, 39 P.2d 419. The Legislature therefore has adopted a reasonable construction of section 3.1 by enacting section 400.2 of the Education Code which provides that the salaries set forth in sections 400 to 459 are payable to incumbent county superintendents. Stats. 1947, p. 2833. It is well settled that where the Legislature has by statute adopted a reasonable construction of a constitutional provision its action has strong persuasive force and will ordinarily be followed. Pacific Indemnity Co. v. Indus. Acc. Com., 215 Cal. 461, 463–464, 11 P.2d 1, 82 A.L.R. 1170; San Francisco v. Industrial Acc. Com., 183 Cal. 273, 279–280, 191 P. 26.

Let a peremptory writ of mandate issue directing respondent to pay petitioner the balance of his compensation, as prayed, pursuant to the provisions of section 425 of the Education Code, as amended in 1949.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



36 Cal.2d 149

SEIDEL v. WARING.
S. F. 18171.

Supreme Court of California, in Bank.
Oct. 11, 1950.

Original application by Vaughn D. Seidel against Eugene V. Waring, as Auditor of the County of Alameda, for a writ of mandate directing respondent to pay petitioner, County Superintendent of Schools, balance of his compensation under statute increasing salaries of incumbent county superintendents of schools. The Supreme Court, Gibson, C. J., held that constitutional provision authorizing Legislature to prescribe qualifications required of county superintendents of schools and to fix their salaries takes precedence over constitutional provisions that county charter may provide for various officers, such as superintendent of schools, and for fixing of their compensation, and that Legislature is authorized to increase incumbent's salary during his term of office although county charter prohibits such an increase.

Writ of mandate granted.

1. Officers ⇐100(2)
Schools and school districts ⇐46

Constitutional provision that, notwithstanding any provision of Constitution to contrary, Legislature shall prescribe qualifications of county superintendents of schools and shall fix their salaries, supersedes conflicting constitutional provisions and takes precedence over provision that county charters may provide for various officers such as superintendents of schools

and for fixing of their compensation and also over the county charter provisions enacted pursuant thereto and authorizes Legislature to increase salary of incumbent county superintendent of schools although county charter prohibits such an increase during an incumbent's term of office. Const. art. 11, §§ 5, 7½; Education Code, §§ 400 to 459, 400.2, 403; Const. art. 9, § 3.1.

2. Officers ⇐100(2)

Where by constitutional amendment Legislature was authorized to prescribe qualifications required of county superintendents of schools and to fix their salaries, county charter provision that county school superintendents shall be elected and compensation of elective officers shall not be increased or diminished during term of office were limitations on power of board of supervisers, and were not limitations on power of Legislature to increase salaries of incumbent county superintendents of schools once Legislature had been invested with plenary control over subject matter. Const. art. 9, § 3.1, art. 11, § 7½; Education Code, §§ 400 to 459, 400.2, 403.

Gardiner Johnson and Thomas E. Stanton, Jr., San Francisco, for petitioner.

J. F. Coakley, District Attorney, R. Robert Hunter, Assistant District Attorney, Richard H. Klippert and John P. Sparrow, Deputy District Attorneys, all of Oakland, for respondent.

GIBSON, Chief Justice.

This is a companion case to Woodcock v. Dick, ante, Cal.Sup., 222 P.2d 667, and that decision is determinative of most of the contentions made herein. This proceeding, however, also raises the additional question whether the Legislature has power to increase the salary of an incumbent county superintendent of schools when the county charter, adopted pursuant to section 7½ of article XI of the Constitution, prohibits such an increase during an incumbent's term of office.

Petitioner was elected superintendent of schools for Alameda County, a charter county of the third class, for the term commencing January 6, 1947, and ending January 8, 1951. In 1947 the Legislature adopted sections 400 to 459 of the Education Code, relating to the salaries of county superintendents, and provided by section 400.2 that the specified salaries were payable to incumbents. In 1949, section 403, relating to petitioner's salary, was amended to provide for an increase which was payable to the incumbent under section 400.2. Respondent auditor has refused to pay the salary specified in the 1949 amendment, and petitioner seeks a writ of mandate to compel such payment.

Section 5 of article XI of the Constitution, involved in the Woodcock case, prohibits any increase in the compensation of a county officer during his term of office, but it also states that its provisions shall not be construed to abridge, modify or otherwise affect the provisions of section 7½ of that article. Section 7½, as amended in 1914, states that county charters may provide for various officers, such as superintendents of schools, and for the fixing of their compensation. Pursuant to this section the Alameda County Charter provides that the county school superintendent shall be elected (§ 15) and that the compensation of elective officers shall be fixed at least six months prior to election and shall not be increased or diminished during the term of office (§ 12b). In 1946 there was added to the Constitution section 3.1 of article IX which provides that "Notwithstanding any provision of this Constitution to the contrary, the Legislature shall prescribe the qualifications required of county superintendents of schools and shall fix their salaries * * *."

We held in the Woodcock case that section 3.1 supersedes section 5 of article XI and that, as to counties which do not have conflicting charter provisions, the Legislature is given complete authority to fix the amount and manner of payment of compensation of county superintendents, including the power to increase the salary of an incumbent during his term of office

[1] Respondent concedes that section 3.1 gives the Legislature power to fix the salary of a county superintendent as to any future term of office, but contends that

the section does not permit the Legislature to increase an incumbent's salary during his term of office when the county charter prohibits such an increase. It would seem clear, however, that the intent of the voters was to supersede all conflicting constitutional provisions and that section 3.1 therefore takes precedence over section 7½ of article XI and also over any county charter provisions enacted pursuant thereto. See Holland v. Byram, 28 Cal.2d 567, 568, 170 P.2d 937. Section 3.1 expressly provides that the Legislature shall fix the salaries of county superintendents "Notwithstanding any provision of this Constitution to the contrary," and this intent is further shown by the printed argument submitted to the voters in support of the adoption of this section. 1946 Voters Pamphlet, p. 8. After stating that the section will permit improvement in the county superintendencies and "makes it possible for the Legislature to establish salaries for county superintendents," the argument continues: "Until this constitutional amendment is passed qualifications cannot be established nor can salary adjustments be made *because charter provisions in some counties nullify legislative action.* Salary and qualifications go hand in hand in attracting qualified professional people to that office." (Italics added.)

[2] The construction of section 3.1 advocated by respondent is contrary to the intent shown by the quoted portion of the argument to the voters. Further, such a construction would make the effective date of an increase different in different counties depending on whether or not there was a county charter provision prohibiting increases during an incumbent's term of office, whereas the adoption of the section amounts to a declaration by the voters that the compensation of county superintendents is a matter of statewide concern which should not be treated separately by each county or controlled by charter provisions. See Cunningham v. Hart, 80 Cal.App.2d 902, 907-908, 183 P.2d 75. Moreover, the county charter provisions were adopted as limitations on the power of the board of supervisors, and they cannot be considered as limitations on the power of the Legislature once it has been invested with plenary control over the particular subject matter.

Let a peremptory writ of mandate issue directing respondent to pay petitioner the balance of his compensation, as prayed, pursuant to the provisions of section 403 of the Education Code, as amended in 1949.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



ESTRADA et al. v. ALVAREZ.
Civ. 17896.

District Court of Appeal, Second District, Division 2, California.

Oct. 16, 1950.

Rehearing Denied Oct. 30, 1950.

Hearing Granted Dec. 14, 1950.*

Mary Estrada and others brought action against Ben Alvarez to rescind conditional sales contract for a truck. A judgment sustaining general demurrer to third amended complaint was entered by the Superior Court of Los Angeles County, William B. McKesson, J., and the plaintiffs appealed. The District Court of Appeal, McComb, J., held that the third amended complaint alleged facts sufficient to constitute a cause of action against the defendant.

Judgment reversed with directions.

1. Sales ⇐130(2)

Count in complaint which alleged that plaintiffs entered into conditional sales contract with defendant to purchase truck and trailer, that defendant for purpose of deceiving, defrauding and inducing them to enter contract made certain specific representations which were in fact untrue, and which defendant knew to be untrue, and that defendant had received back everything he gave under terms of contract, constituted a cause of action against defendant.

2. Election of remedies ⇐3(2)

Fact that plaintiffs in original complaint in first amendment thereto attempted

* Subsequent opinion 240 P.2d 278.

to allege cause of action relying upon conditional sales contract and suing for damages for breach thereof and in second complaint sought damages predicated upon fraud allegedly perpetrated on them by defendant did not preclude them from thereafter seeking a rescission of the contract under doctrine of election of remedies, in absence of showing that defendant has suffered any detriment or disadvantage due to fact that plaintiffs were seeking a different relief in their third amended complaint.

3. Election of remedies ⇐14

A showing that the defendant has suffered a detriment or disadvantage due to fact that plaintiffs had previously sought a different relief was essential to make applicable the doctrine of election of remedies.

Larwill & Wolfe, Los Angeles, for appellants.

C. Paul Du Bois, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment sustaining a general demurrer to plaintiffs' third amended complaint in an action to rescind a conditional sales contract for a truck, plaintiffs appeal.

Facts: In the first count of the complaint plaintiffs alleged that they entered into a conditional sales contract with defendant to purchase a truck and trailer; that defendant for the purpose of deceiving, defrauding and inducing them to enter into the contract made certain specific representations which were in fact untrue, and which defendant knew to be untrue. They also allege that defendant has received back everything that he gave under the terms of the contract.

Plaintiffs pray that the conditional sales contract be declared void and for a return of the consideration paid by them.

Question: Was the demurrer to the complaint properly sustained?

[1-3] This question must be answered in the negative. The facts alleged as set forth above, if sustained by proof, constituted a cause of action against defendant. (Philpott v. Superior Court, 1 Cal.2d 512, 523 et seq., 36 P.2d 635, 95 A.L.R. 990.) It is true that in plaintiffs' original complaint and the first amendment thereto plaintiffs attempted to allege a cause of action relying upon the contract and suing for damages for breach thereof, while in the second amended complaint they sought damages predicated upon the fraud perpetrated on them by defendant. In the third amended complaint, which is now before this court, they seek a rescission. Hence defendant argues that there was an election of remedies in the original complaint and the first and second amendments thereto which is inconsistent with the relief plaintiffs now seek, and that therefore plaintiffs are now estopped to seek a different relief, to wit, a rescission.

The doctrine of election of remedies is not applicable in the instant case for the reason that defendant has failed to show that he has suffered any detriment or disadvantage due to the fact that plaintiffs have sought a different relief in their third amended complaint. Such a showing is essential to make applicable the doctrine of election of remedies. (Mansfield v. Pickwick Stages, 191 Cal. 129, 131, 215 P. 389.) This was not done in the present case.

The second count in the complaint alleged a cause of action for a violation of sections 2981 and 2982 of the Civil Code. (See also Carter v. Seaboard Finance Co., 33 Cal.2d 564, 572 et seq., 203 P.2d 758.)

The third count was a common count. Each of the counts in the complaint was valid as against a general demurrer and defendant has failed to show wherein any of his grounds for special demurrer were well taken.

The trial court erred in sustaining the demurrer to the third amended complaint and the judgment is reversed with direction to the trial court to overrule the demurrer and permit defendant to file an answer within fifteen days after the remittitur is filed in the office of the clerk of the superior court of Los Angeles county.

MOORE, P. J., and WILSON, J., concur.

99 Cal.App.2d 801

WILLIAMS et al. v. GURWITZ et al.
Civ. 17776.

District Court of Appeal, Second District, Division 2, California.

Oct. 11, 1950.

Action by Ray A. Williams and another against Fred Gurwitz and another to recover damages alleged to have been suffered by plaintiff in a collision with defendants' automobile. The Superior Court of Los Angeles County, Charles E. Haas, J., entered judgment for defendants after jury verdict and plaintiffs appealed. The District Court of Appeal, Wilson, J., held that where jury was fully instructed upon the question of right of way and as to the duties in deciding the case upon the evidence, refusal of trial court to grant a mistrial after a police officer was asked whether he had reached a conclusion as to which party violated the right, was not reversible error.

Affirmed.

1. Evidence ⇐472(4), 512

It is within province of jury to determine which party, if either was negligent and which party, if either, violated right of way rule, and matter is not the subject of expert testimony and neither a police officer nor any other witness should be asked whether he had reached a conclusion as to which party violated right of way or to state such a conclusion if he had arrived at one.

2. Appeal and error ⇐1060(2)

In action for damages arising out of an automobile collision, where jury was fully instructed upon question of right of way and as to their duties in deciding the case upon evidence, failure of trial court to grant a mistrial after a police officer was asked which party had violated the right of way rules, was not reversible error.

3. Trial ⇐220

In action for damages arising out of an automobile collision, where police officer was asked whether he had reached a conclusion as to which party violated right of way, refusal of trial court to give an immediate instruction to jury stating that jury was sole judge of who did violate right of way rules, was not error, since all questions of law are customarily covered by instruction given at the close of the evidence.

4. Automobiles ⇐246(9)

In action for damages arising out of an automobile collision, an instruction stating that an obligation rested upon plaintiff to maintain a reasonable lookout for vehicles coming in other directions while plaintiff made a left-hand turn was not error.

5. Trial ⇐260(8)

In action for damages arising out of an automobile collision, where subject matter of requested instruction was completely covered by other instructions, trial court's refusal to give requested instruction was not error.

George Cohn and Charles Kaplan, Los Angeles, for appellants.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondents.

WILSON, Justice.

Plaintiffs have appealed from a judgment entered on a verdict in favor of defendants in an action to recover damages alleged to have been suffered by plaintiffs in a collision of two automobiles at the intersection of Washington Boulevard and Redondo Boulevard in Los Angeles.

Plaintiff Ray Williams, accompanied by his wife, was driving in a westerly direction on Washington Boulevard. Obeying a traffic signal he stopped on the easterly side of Redondo. Upon the change of signals in favor of the traffic on Washington plaintiff Ray Williams extended his arm signalling for a left-hand turn, proceeded to the center of Redondo and commenced his turn. At that time he did not see any cars traveling in an easterly direction. Defendant Fred Gurwitz was driving in an easterly direction on Washington. His car collided with plaintiffs' car at about the center of Redondo.

Plaintiffs have not raised any question concerning the sufficiency of the evidence.

Plaintiffs assign as prejudicial error two questions asked on cross-examination of a police officer. The first reads: "In further corroboration of what Mr. Williams said or told you, both as to where the accident happened and as to whether or not he ever saw the other car, you indicated right here on your police report that Mr. Williams violated the right of way of Mr. Gurwitz, did you not?" Plaintiffs objected and were sustained; thereupon counsel asked a second question reading as follows: "Based upon what Mr. Williams told you about the accident, did you come to a conclusion and put it on your police report—as to whether or not Mr. Williams, under his own statement to you, had violated Mr. Gurwitz' right of way?" Plaintiffs' attorney objected to the second question and assigned it as misconduct. The court did not rule upon the objection and the witness did not answer the question. Plaintiffs made a motion for mistrial on the grounds that the questions were improper, called for the statement of a conclusion of law and invaded the province of the jury. The court denied the motion, whereupon counsel asked the court to instruct the jury "that they are the sole judges of who did violate the right of way." The court did not give such an instruction at that time but responded, "You can cover that in your instructions."

[1, 2] It is elementary that it is within the province of the jury to determine which party, if either, was negligent and which party, if either, violated the right of way rules. Such a matter is not the subject of expert testimony and neither a police officer nor any other witness should be asked whether he had reached a conclusion as to which party violated the right of way or to state such conclusion if he had arrived at one. However, the questions did not furnish a ground for mistrial. The court is not required to declare a mistrial whenever an improper question is asked. If such were the custom mistrials would be the rule rather than the exception. Since the jury was fully instructed upon the question of right of way and as to their duties in deciding the case upon the evidence the asking of the questions is not reversible error.

[3] The court properly refused to give an immediate instruction to the jury as requested by plaintiffs' counsel. Such instruction was not necessary or proper at that time since all questions of law are customarily covered, and in this case were covered, by the instructions given at the close of the evidence.

[4] Plaintiffs assign as error the giving of the folowing instruction: "You are instructed that the plaintiff Mr. Williams was required to maintain a reasonable lookout for vehicles approaching from the opposite direction both before starting to make his turn and while making the turn. If you find from the evidence that Mr. Williams either negligently failed to look at all, or that he did look and failed to see an automobile which was approaching in plain sight to be seen by anyone exercising ordinary care, then you must find that Mr. Williams was negligent." Plaintiffs contend that by the first sentence of the instruction the court told the jury that it was obligatory upon plaintiff driver to maintain a lookout for vehicles approaching from the opposite direction "while making the turn." Such is not the effect of the instruction. It does not state that an obligation rested upon plaintiff driver to maintain a continuous lookout for vehicles coming from the west but states that he was required to maintain a "reasonable" lookout in that direction—in other words to use ordinary care. He was under the same obligation to exercise care as is a pedestrian in crossing a street. Young v. Tassop, 47 Cal.App.2d 557, 564, 118 P.2d 371.

Similar language is found in BAJI [1] Instruction No. 142, which was requested by plaintiffs but was not given by the court, reading as follows: "The words just quoted from the Vehicle Code (Section

1. Book of Approved Jury Instructions (California Jury Instructions Civil) 3d revised edition, West Publishing Company, 1943.

544) namely, that 'no person shall turn a vehicle unless and until such movement can be made with reasonable safety', do not mean that the driver of a motor vehicle, before making a turn, must know that there is absolutely no possibility of accident. They mean that before starting to turn a vehicle on a public highway, *and while making the turn*, the driver of the vehicle must use such precaution as would satisfy a reasonably prudent person acting under similar circumstances, that the turn can be made safely." (Emphasis added.)

[5] Plaintiffs requested the foregoing instruction and assign as error the failure of the court to give it. Since the subject matter of the instruction is completely covered by others, including the first above quoted, the court's refusal to read it to the jury is not error.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



99 Cal.App.2d 772

WOMEN'S ATHLETIC CLUB OF SAN FRANCISCO v. ANGLO CALIFORNIA NAT. BANK OF SAN FRANCISCO.

Civ. 14402.

District Court of Appeal, First District, Division 2, California.

Oct. 9, 1950.

Hearing Denied Dec. 7, 1950.

Action by the Women's Athletic Club of San Francisco, a corporation, against the Anglo California National Bank of San Francisco to quiet title to real property. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment for the defendant, and the plaintiff appealed. The District Court of Appeal, Goodell, J., held that athletic club had authority to issue bonds secured by a deed of trust, and such deed of trust was valid.

Judgment affirmed.

1. Corporations ⇐469

Statute which provided for creation or increase in bonded indebtedness of corporation having capital stock, by a vote of stockholders representing at least two-thirds of subscribed or issued capital stock did not apply to athletic club organized as a social corporation. Civ.Code, § 359.

2. Corporations ⇐469

In absence of charter or statutory restrictions, corporation has implied power to execute and issue its bonds for any purpose for which it may borrow money or contract a debt.

3. Corporations ⇐471, 477(1)

Where statutes provided that every corporation had power to enter into any obligation or contract without limitation, and authorized articles of corporation to provide for contracting, securing and limiting amount of their indebtedness without limitation, mortgage bonds issued by social corporation in 1924, as authorized by superior court after proper proceedings, and as contemplated by corporation's articles, were valid, and deed of trust as security therefor was valid. Civ.Code, §§ 354, 359, 403, 598, 599.

Morgan J. Doyle, J. Joseph Sullivan, San Francisco, for appellant.

McKinstry, Haber & Coombes, San Francisco, for respondent.

GOODELL, Justice.

Appellant sued to quiet title to real property. Judgment went in favor of respondent and this appeal was taken.

In 1915 appellant was incorporated under title XII of part IV, division I, of the Civil Code—"Religious, Social and Benevolent Corporations"—for the purpose of maintaining an athletic club for women.

Prior to January 19, 1924 the Club had acquired a piece of land with a frontage of 137 feet 6 inches on the northerly line of Sutter Street west of Mason, in San Francisco, and on that day it initiated a proceeding in the Superior Court under § 598, Civ.Code for authority to borrow mon-

ey and issue bonds secured by a deed of trust on the property. On January 30 the order was made, and on February 1, 1924 the corporation executed to Anglo California Trust Co., predecessor of respondent as trustee, a deed of trust securing the bonded indebtedness of $250,000 so authorized.

At the time this suit was commenced $95,000 of bonds remained unredeemed, on which no interest had been paid since August 1, 1934.

The underlying purpose of appellant in this litigation is to secure on adjudication that its real property is free and clear of the deed of trust. The contention is that the bonds thereby secured were unauthorized by law.

After the bonded indebtedness was approved the corporation law of this state was extensively amended, but on this appeal we are of course concerned only with the statute law as it read when the deed of trust was executed.

At that time the subject of "Corporations" was dealt with in part IV of division I, of the Civil Code. Part IV was divided into 25 titles, the first thereof containing "General Provisions Applicable to all Corporations", and the other 24 relating specifically to different types of corporate organizations.

Section 354, which appeared under "General Provisions Applicable to all Corporations", provided that "Every corporation, as such, has power: * * * 8. To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation." This language meant, of course, that *every corporation* had this inherent power by virtue of its existence *as such.*

Section 354 placed no limitation or restriction on any type or kind of corporation or on the type or kind of security. Its only restriction was with respect to the application of the borrowed money, and in this case that question is set at rest by a stipulation that the $250,000 was used "in part in discharge of then existing indebtedness of plaintiff, and in part in paying the cost of betterments and improvements of a building * * * on said real property * * *."

Turning to Title XII under which the Club was organized, we find that § 599 read as follows: "Corporations now organized or that may hereafter be organized for purposes other than profit, may, either in their by-laws, ordinances, constitutions, or articles of incorporation, provide for: * * * (7) Contracting, securing and limiting the amount of their indebtedness; * * *."

There is found therein no restriction as to the type or kind of security and no prohibition against issuing bonds. It is interesting to note that in neither of its briefs does appellant mention, or in any way recognize the existence of, that provision. Section 599 is perfectly consonant with § 354, the basic section dealing with *all* corporations, and both sections are authority for the provisions in the Club's articles with respect to indebtedness and security. In the statement of purposes the articles contain the following: "* * * to maintain a club-house, gymnasium, general athletic equipment, and all accomodations of every description for the use of its members; to purchase, lease, sell, convey, *mortgage, encumber by deed of trust,* and otherwise generally operate *such real estate, buildings,* and personal property as may be necessary and convenient to carry on the purposes of the said corporation, and *to issue bonds,* notes and all other evidences of indebtedness *secured by mortgage, deed of trust or other form of security upon* either *real property* or personal property, or both, necessary and convenient to carry on the purposes of said corporation, and to provide for the convenience and comfort of its members, * * *." (Emphasis added.)

Section 598, in Title XII, contained the statutory machinery for authorizing a religious, social or benevolent corporation to encumber its property. It read: "Before selling, *mortgaging,* aliening, *encumbering* or granting *its real property,* or any part thereof, * * * a corporation organized under this title must first make it appear that the same is for its interest

to the satisfaction of the superior court of the county wherein said real property is situated." The procedure is then prescribed for such proceeding and the hearing therein. It then provided: "if satisfied that it is for the interest of said corporation, said court shall thereupon grant said leave, and may authorize the said corporation to sell and convey its said property and to *incur indebtedness and secure the same by deed of trust or mortgage upon its said real property*". (Emphasis added.)

Again, there was no restriction against issuing bonds.

The corporation proceeded under § 598 to obtain the authorization of the Superior Court to place upon its real property a deed of trust to secure a bonded indebtedness of $250,000 and to issue and sell the bonds. It is admitted that all the prescribed procedural steps were taken.

Appellant's contention on this appeal revolves entirely around § 359, Civil Code. That section was found among the "General Provisions Applicable to all Corporations" and plainly dealt with corporations "having a capital stock". A mere glance shows that it was never designed for a non-stock, social corporation. It read: "* * * Every corporation organized under the laws of this state *having a capital stock* * * * may create or increase its * * * bonded indebtedness subject to the following provisions: * * 3. The bonded indebtedness of a corporation may be created or increased by a vote of the *stockholders* representing at least *two-thirds of the* subscribed or issued *capital stock* at a meeting called by the board of directors or trustees, * * *." (Emphasis added.)

Appellant argues that § 359 was the only section providing for the issuance of corporate bonds; that it gave the power to issue bonds to such corporations only as had a capital stock; that the Club made no attempt to comply with that section (which is admitted), and that, because a social club is not within its purview, it is not only not authorized to issue bonds but definitely prohibited from doing so. Section 359 having spoken on the subject, so it is argued, every other medium and method is excluded ("Expressio unius est exclusio alterius").

These arguments ignore § 598, Civil Code, which, avowedly, was the section under which the Club sought and obtained its authority to issue bonds, and they ignore as well the provisions of § 403, Civil Code (just as appellant ignored the provisions of § 599). Section 403 read as follows: "*Title one to apply to all corporations, with certain exceptions.* The provisions of this title are applicable to every corporation, unless such corporation is excepted from its operation, or *unless a special provision is made in relation thereto inconsistent with some provision in this title, in which case the special provision prevails.*" (Emphasis added.)

Section 598 was designed to provide religious, social and benevolent corporations with the legal machinery for borrowing money for their own needs, and its provisions are certainly inconsistent with those of § 359.

[1] Appellant's argument that § 359 applies to *all* corporations in support of which it cites Market Street Railway Co. v. Hellman, 109 Cal. 571, 42 P. 225 and Boyd v. Heron, 125 Cal. 453, 58 P. 64, is entirely destroyed by the provisions of § 403. So, also, is its argument based on the "Expressio unius est exclusio alterius" rule.

It is true that neither § 598 nor § 599 expressly mentions "bonded indebtedness", while § 359 does. This, however, can make no difference. The basic section 354, gives the power to every corporation, as such, "To enter into *any* obligations or contracts * * *" without limiting the type or kind of obligations. Section 599 authorizes the articles to provide for "Contracting, securing and limiting the amount of their indebtedness" without limitation. The Club's articles, as we have seen, contemplate the issuance of bonds. Section 598 places no limitation on the kind or type of security.

It seems to be settled law that in 1924 a bond mortgage could be entered into without any express provision in the statute for "bonds" or "bonded indebtedness".

In 7 Cal.Jur. p. 89, § 580, which was written before the corporation law was amended, we find: "Authority to borrow money and give evidences of indebtedness created is an implied power of corporations which may be exercised whenever necessary to carry out their purposes. Bonds constitute one form of evidence of indebtedness, and are generally used where large amounts are involved, and a formal authorization required. In their nature as contracts, however, there is no essential difference between bonds and promissory notes. * *" A footnote adds: "At common law, a corporation has power to issue a bond or note to pay a debt, and it has just as much right to do so under the general law as a natural person. McLane v. Placerville, etc., Co., 66 Cal. 606, 6 P. 748."

"It is well settled generally that corporations, under their implied or incidental power to enter into obligations which serve to effectuate the purposes of their creation, have the power, in the absence of an inhibitory statute, to issue bonds or debentures as evidence of their indebtedness. A like power exists as an incident of the power to borrow money." 13 Am.Jur. p. 842, § 847.

[2] In 19 Corpus Juris Secundum, Corporations, § 1147, we find: "In the absence of charter or statutory restrictions, a corporation has the implied power to execute and issue its bonds for any purpose for which it may borrow money or contract a debt * * *. This power is implied from the power to borrow money, or to contract debts, or to hold, purchase, and convey real estate, or to purchase shares of another corporation, or to make contracts, or to mortgage its property."

Jones on Bonds and Bond Securities, Vol. 2 § 631, says: "There is no proposition more definitely determined than the one that private corporations, in the absence of any regulatory or inhibitory statute, have the power to issue bonds as evidence of indebtedness under their incidental power to incur obligations in carrying out the ends of their creation." See, also, Id. § 632.

6a Fletcher, Cyclopedia of Corporations (permanent edition) § 2650 contains substantially the same statement.

[3] We are satisfied that by virtue of the order of January 30, 1924, which was made under the provisions of § 598, Civil Code, the appellant was legally authorized to issue and sell its $250,000 Refunding 6% Sinking Fund Gold Mortgage Bonds dated February 1, 1924, maturing 20 years from that date and secured by deed of trust, and that the latter instrument is, as found in the decree, "in all respects valid."

Other points are discussed in the briefs, but as the arguments thereon are based on the possibility of irregularity a review of such points and the authorities supporting them is wholly unnecessary and would be inconsistent with our conclusion that the bonds and deed of trust are perfectly valid.

The judgment is affirmed.

NOURSE, P. J., concurs.



STOUMEN v. REILLY et al.
Civ. 14666.

District Court of Appeal, First District, Division 2, California.

Oct. 10, 1950.

Rehearing Denied Nov. 9, 1950.
Hearing Granted Dec. 7, 1950.*

Proceeding in certiorari-mandamus by Sol M. Stoumen against George R. Reilly, and others, as members of and constituting the State Board of Equalization of the State of California, and others to review and set aside an order of the board suspending liquor licenses of Sol M. Stoumen. The Superior Court, City and County of San Francisco, Robert L. McWilliams, J., entered judgment for the respondents and the petitioner appealed. The District Court of Appeal, Nourse, P. J., held that the use of licensed premises as regular meeting place for known homosexuals warranted suspension of liquor licenses.

Judgment affirmed.

* Subsequent opinion 234 P.2d 969.

1. Mandamus ⇐157

Proceeding in mandamus can originate either by an order to show cause or by notice of motion. Code Civ.Proc. § 1088.

2. Mandamus ⇐164(2)

The return made to order to show cause in mandamus proceeding is like an answer to motion for writ and may tender both issues of law and of fact. Code Civ. Proc. § 1088.

3. Mandamus ⇐187(9)

Where after a full hearing on the law and facts the trial court enters judgment denying writ of mandate, applicant is not prejudiced by method or language used in arriving at such judgment, and it is sufficient that judgment recites that application is denied, and if demurrer to petition is sustained after full hearing on the merits the judgment on the merits is not subject to attack because the ruling on the demurrer might have been error. Code Civ.Proc. § 1088.

4. Administrative law and procedure ⇐313

The provision in Administrative Procedure Act dealing with evidence in hearings before administrative boards should be read in the light of the topic of evidence in the Tenth Biennial Report of the Judicial Council of California dealing with the administrative procedure act. Government Code, § 11513.

5. Intoxicating liquors ⇐108(9)

Liquor licensee could not complain that he was not represented by counsel in proceeding before State Board of Equalization for suspension of liquor licenses, notwithstanding that board member may have made representations, where licensee knew that member was not authorized to bind board, and licensee stated that he was ready to proceed with the hearing, and licensee took an active part in the hearing and showed familiarity with legal procedure. Government Code, §§ 11500–11528.

6. Mandamus ⇐13

Liquor licensee's objection that one member of State Board of Equalization voting for suspension of licenses was prejudiced against licensee and had prejudged the matter must be urged prior to taking of evidence at hearing before board and could not be urged for the first time in mandamus proceeding to review board's order suspending licenses. Government Code, § 11512(c); Code Civ.Proc. § 1094.5.

7. Administrative law and procedure ⇐314

The purpose of provision in Administrative Procedure Act that any party may request disqualification of hearing officer or agency member by filing affidavit prior to taking of evidence at hearing is to cut to a minimum the delays necessarily involved. Government Code § 11512(c).

8. Intoxicating liquors ⇐106(2)

Count of accusation charging that liquor licensee conducted disorderly house and meeting place for known homosexuals stated valid and sufficient grounds for suspension or revocation of liquor license. Gen.Laws, Act 3796, § 58.

9. Criminal law ⇐1167(1)
Indictment and Information ⇐171

A variance between pleadings and proof, even in the criminal courts, does not operate to accused's prejudice or impair his substantive rights and does not mislead or hinder him in preparing and making his defense and does not constitute a ground for reversal.

10. Intoxicating liquors ⇐108(9)

Slight variance between accusation and decision of hearing officer did not require setting aside suspension of liquor licenses where variance did not prejudice or impair substantive rights of licensee and did not mislead or hinder licensee in preparing or in making his defense to the accusation. Government Code, §§ 11500–11528; Gen.Laws, Act 3796, § 58.

11. Intoxicating liquors ⇐106(2)

Restaurateur's liquor licenses were subject to revocation for knowingly permitting his premises to be regularly used as a meeting place by persons of known homosexual tendencies. Government Code, §§ 11500–11528; Gen.Laws, Act 3796, § 58; Pen.Code, §§ 286, 288a.

12. Constitutional law ⇐70(3)

Any complaint against statute prohibiting crime against nature and oral copulation, based on theory that sexual mores of present times have changed since enactment of statutes, should be directed to legislature and not to court in mandamus proceeding to set aside suspension of liquor licenses for use of licensed premises as meeting place for homosexuals. Government Code, §§ 11500–11528; Gen.Laws, Act 3796 § 58; Pen.Code §§ 286, 288a.

13. Mandamus ⇐163

State Board of Equalization's demurrer to liquor licensee's mandamus petition to set aside board's order suspending licenses for use of licensed premises as meeting place for homosexuals would be sustained without leave to amend, where evidence taken before hearing officer was sufficient to sustain charge that the premises were so used. Government Code, §§ 11500–11528.

14. Intoxicating liquors ⇐108(5)

In proceeding for suspension of liquor licenses, evidence warranted finding that liquor licensee sold liquor to minor. Government Code, §§ 11500–11528.

Morris Lowenthal, San Francisco, for petitioner and appellant.

Fred N. Howser, Atty. Gen., J. Albert Hutchinson, Deputy Atty. Gen., for respondents.

NOURSE, Presiding Justice.

Petitioner commenced this proceeding in certiorari-mandamus to review and set aside an order of the State Board of Equalization suspending his liquor licenses after an accusation filed with the board and heard by a hearing officer. The first count of the accusation charged that the licensee conducted a disorderly house and a meeting place for known homosexuals. The second charged the sale of liquor to a minor. Respondents filed a return to the alternative writ in the nature of a demurrer to the petition, a motion to dissolve the writ, and an answer to the merits consisting of a full transcript of the proceedings had before them and before the hearing officer. On the issues thus raised the matter was argued orally and by briefs following which judgment was entered for respondents after an order sustaining the demurrer to the petition without leave to amend.

On this appeal the petitioner lists ten charges of error, the first three all relating to the same claim that the court erred in sustaining respondents' demurrer without leave to amend. It should be noted that, though such an order was made, the judgment appealed from was based on findings of fact and contained the pertinent recital "and evidence having been offered by the parties and received by the Court, and the matter having been argued and submitted, the Court made findings of fact and conclusions of law and directed that the writ of mandate herein sought by petitioner be denied * * *."

[1-3] Since the record of the proceedings before the respondent board was before the trial court and the sufficiency of the evidence was fully argued it is of no consequence whether the judgment was based on the order sustaining the demurrer alone or upon the findings that the evidence taken by the respondent board was sufficient to justify the board's order. The proceeding in mandamus can originate either by an order to show cause or by notice of motion. (Code Civ.Proc. § 1088.) The return made to the order to show cause is like an answer to the motion for a writ and may tender both issues of law and of fact. If the court determines that the petitioner has not made out a proper case for a peremptory writ it is of no consequence that a demurrer to the petition has been sustained. The substantial and controlling part of the judgment is that petitioner has not shown that he is entitled to the writ. Here the trial court had the proceedings before the respondent board showing the grounds upon which the licenses were suspended. It also had the benefit of lengthy briefs and oral argument addressed particularly to the evidence found in the transcript and the pro-

priety of the proceedings before the hearing officer. Its judgment on sustaining the demurrer was in accord with Housman v. Board of Medical Examiners, 84 Cal.App. 2d 308, 313, 190 P.2d 653, 192 P.2d 45; and Dare v. Board of Medical Examiners, 21 Cal.2d 790, 794, 136 P.2d 304. To recapitulate—when, after a full hearing on the law and the facts, the trial court enters judgment denying the writ of mandate, the applicant is not prejudiced by the method or the language used in arriving at such judgment. It is sufficient that the judgment recites that the application is denied. If a demurrer to the petition is sustained *after* a full hearing on the merits the judgment on the merits is not subject to attack because the ruling on the demurrer *might* have been error.

The other matters argued in appellant's briefs are merely rearguments of those heard by the trial court. At the conclusion of the hearing the learned trial judge filed a written opinion correctly disposing of all these issues. This opinion we approve and adopt as our reasons for an affirmance of the judgment.

"In the first place let me say that many of the contentions advanced by counsel for Petitioner are answered by the provisions of the Administrative Procedure Act (Government Code sec. 11500–11528), The Act Providing for Judicial Review by Mandamus, (C.C.P. Sec. 1094.5) and The Tenth Biennial Report of the Judicial Council of California which deals with the two Acts mentioned. This last mentioned Report has been held to explain fully the purpose, intent, meaning and effect of the proposed statutory changes, and to constitute 'a most valuable aid' in ascertaining the meaning of the two Acts. See Hohreiter v. Garrison, 81 Cal.App.2d 384, 394, 397, 184 P.2d 323.

[4] "With reference to Petitioner's objection that 'hearsay evidence' was improperly received by the Hearing Officer I would call attention to the provisions of section 11513 of the Government Code dealing with the subject of evidence which section should be read in light of the treatment of that topic of evidence in the Report of the Judicial Council referred to above. On the subject of the admissibility of evidence of reputation of a place of business of the general type of Petitioner's also see Anzine v. U. S., 260 F. 827 decided by the Ninth Circuit Court of Appeals and the comparatively recent case of State v. Tacconi, Utah, 171 P.2d 388, 391. Also see Demartini v. Anderson, 127 Cal. 33, 59 P. 207.

[5] "Petitioner's contentions are based in large part on the theory that due to misrepresentations made to him he was not represented by counsel at the hearing before the Hearing Officer of the Board of Equalization. This contention is invalidated by the fact that, assuming that the representations were made by the member of the Board of Equalization to whom Petitioner refers, he was not justified in relying on those representations since he knew or should have known that that member was not authorized to bind the Board by his representations. It also overlooks the fact that when Petitioner was asked if he was ready to proceed with the hearing, he answered that he was ready. (Tr. p. 1).

"Moreover, as the record discloses, Petitioner took an active part in the hearing, examining the documentary evidence that was produced against him and cross-examining witnesses. Moreover, he showed a surprising familiarity with legal procedure as evidenced for example by his reference to the hearsay rule and by his 'withdrawing' a question after its materiality had been questioned. He apparently considered himself to be entirely competent to present his case until an adverse ruling was rendered against him. This was not surprising since as the Judicial Council's Report points out (p. 17) a large number of Respondents against whom accusations are directed by the Board of Equalization are not represented by counsel at the hearings.

[6] "As to Petitioner's contention that one member of the Board of Equalization who voted with the other members to suspend the license of Petitioner's restaurant had prejudged the matter and that he had a prejudice against Petitioner the answer, as pointed out by counsel for Respondents,

is that Petitioner is too late in urging this objection. The Government Code provides that (p. 11):

"'Any party may request the disqualification of any hearing officer or agency member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded.' (Section 11512(c).)

[7] "The purpose of this procedure according to the report of the Judicial Council above referred to (p. 20) was 'to cut to a minimum the delays necessarily involved.'

"This provision in the Administrative Procedure Act is entirely new in this state so that it is not necessary to consider the cases cited by counsel which were rendered prior to its enactment.

"Petitioner charges that Count One of the Accusation against him does not state facts sufficient to justify the suspension of his license. I cannot agree with him.

"The California Beverage Control Act provides (Sec. 58) in substance that every licensee who permits his premises to be used as a disorderly house *or* as a place to which people resort for purposes which are injurious to the public morals is guilty of a violation of that Section.

[8] "In my opinion Count One clearly stated valid and sufficient grounds for the suspension or revocation of Petitioner's license. It would be a gross and inexcusable reflection on the Legislature to find that the law as enacted by it would tolerate on the part of license holders such conduct as is charged in the accusation. Fortunately the law is not open to the construction contended for by Petitioner.

[9, 10] "It is true that there is some slight variance between the accusation and the proposed decision of the Hearing Officer. But it is in my opinion not of sufficient consequence to merit extended consideration. The law is settled that a variance between pleadings and proof, even in our criminal courts in which stricter rules prevail, which does not operate to the accused's prejudice or impair his substantive rights and does not mislead or hinder him in preparing and making his defense does not constitute a ground for reversal. 24 C.J.S., Criminal Law, § 1897, p. 878. Clearly the variance in this case did not prejudice or impair the substantive rights of Petitioner nor did it mislead or hinder him in preparing or in making his defense.

"It is also contended by Petitioner that the decision of the Hearing Officer as adopted by the Board of Equalization is insufficient to justify the action taken against him.

"The decision as adopted by the Board, insofar as it pertains to Count One, is in substance that during the period between September 3rd, 1948 and August 15th, 1949, Petitioner permitted his premises 'to be used as a disorderly house in that during that period of time persons of known homosexual tendencies patronized said premises and used said premises as a meeting place.'

[11] "The comment that I have just made as to the sufficiency of the charge as embodied in Count One of the Accusation is largely applicable to this decision. It would be a sorry commentary on the law as well as on the morals of the community to find that persons holding liquor licenses could permit their premises to be used month after month as meeting places for persons of known homosexual tendencies with all of the implications that may reasonably be drawn from that last phrase and the people's legal representatives find themselves helpless to take action against the holders of such licenses.

"Counsel for Petitioner argue that persons of homosexual tendencies may not lawfully be prohibited from collecting in groups in restaurants for the purpose of securing meals and alcoholic beverages.

"An occasional fortuitous meeting of such persons at restaurants for the innocent purpose mentioned is one thing. But for a proprietor of a restaurant knowingly to permit his premises to be regularly used 'as a meeting place' by persons of the type mentioned with all of the potentialities for evil and immorality drawing out of such meetings is, in my opinion, conduct of an

entirely different nature which justifies action on the part of the Board of Equalization.

"Counsel for Petitioner spends many pages of his brief in setting forth what appears to be an argument based on the so-called 'Kinsey Report' and similar publications to the effect that what he terms the 'social taboo' against homosexuals is unjustified.

[12] "It will not be necessary to give that phase of Petitioner's argument any extended consideration. The views of the citizens of California on that subject are to be found in Sections 286 and 288a of the Penal Code. Any complaint against those provisions based on the theory that the mores of our times have changed since the enactment of those sections should be directed to the Legislature and not to the courts.

[13] "I stated at the outset that in my opinion the demurrer of Respondent should be sustained without leave to amend. I so hold because I have read the evidence taken before the Hearing Officer and in my opinion it amply sustains the charge made in Count One against Petitioner.

"While I am on the subject I may add that in my opinion the rights of Petitioner in this case were observed with scrupulous care at the hearing before the Hearing Officer. There would have been far less criticism of administrative hearings in the past had similar care always been exercised by the Officers in charge of such hearings.

[14] "As to Count Two of the Accusation the evidence as embodied in the record which I have read also clearly sustains a finding against Petitioner. I may add, however, that the punishment meted out to him under that finding of guilty was in my judgment excessive. Nevertheless the matter is academic since I find that the action of the Board insofar as the First Count is concerned was entirely proper and justified."

Judgment affirmed. The writ of supersedeas is dissolved.

GOODELL, J., concurs.

99 Cal.App.2d 777

PODESZWA v. WHITE et al.

Civ. 17731.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1950.

Action by Dorothy Podeszwa against John White, Jr., and another for the wrongful death of plaintiff's daughter, who was riding as a guest passenger in an automobile which was struck at intersection by a truck driven by the named defendant. The Superior Court, Los Angeles County, A. W. Ashburn, J., rendered judgment in favor of plaintiff and defendants appealed. The District Court of Appeal, Wilson, J., held that defendant who made no effort to avoid collision was negligent.

Judgment affirmed.

Automobiles ⇐227(3)

Where defendant who was driving his truck on a through highway at speed of 40 to 50 miles per hour saw automobile in which plaintiff's decedent was an occupant approaching intersection and saw automobile pass intersection stop sign at speed of 5 to 10 miles per hour but defendant made no effort to avoid collision and truck struck rear wheel of automobile at about center line of pavement, and by very slight swerve of his truck defendant could have avoided accident, defendant was negligent and fact that driver of automobile did not make boulevard stop did not justify defendant's failure to reduce his speed or change direction of his truck in an effort to avoid accident. Vehicle Code, § 552, 577.

Kenneth J. Murphy, Los Angeles, for appellants.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondent.

WILSON, Justice.

Plaintiff, the mother of decedent Mary Patricia White, brought this action for the wrongful death of her daughter, who was riding as a guest passenger in a car driven

by one Maxwell. The case was tried before the court without a jury. Judgment was rendered in favor of plaintiff and defendants have appealed.

Orangethorpe Avenue is a through highway extending easterly and westerly; it is paved to a width of between 35 and 40 feet. Hansen Road is a 20 foot, two-lane highway extending northerly and southerly, crossing Orangethorpe at right angles. There are no signs limiting speed of vehicular traffic on Orangethorpe. Boulevard stop signs protecting Orangethorpe traffic are located on Hansen Road at the southeast and northwest corners of the intersection, the former being approximately 12 feet south of the south edge of the Orangethorpe pavment. The area was "open country," Orangethorpe being a 55 mile zone. Approximately 80 feet south of Orangethorpe on the west side of Hansen was a house which was set back 20 to 30 feet west of the west edge of Hansen. At the time of the accident there were no obstructions between the two cars involved. The dwelling house did not prevent defendant driver from seeing the other car involved in the accident.

The weather was clear. Defendant White was traveling easterly on Orangethorpe at a speed of approximately 40 to 45 miles an hour. He was on a through highway which he knew was protected at Hansen Road by boulevard stop signs. There was no traffic behind or in front of him, the only vehicles in the vicinity being the two that subsequently collided.

Defendant was driving a two-ton Ford Truck and decedent was a passenger in a Ford Coupe. The only description of the accident was given by defendant White whose evidence was produced by deposition. He testified that he first saw the northbound Ford Coupe as it came past the house on Hansen Road. At that time he was about 300 feet west of Hansen. He looked both ways and saw no other vehicle and turned his attention back to the coupe. When he first saw the latter it appeared to be traveling 15 to 20 miles an hour and slowed down to 5 or 10 miles an hour as it approached the boulevard stop sign. It appeared to White that the coupe would stop and he therefore continued to travel at the same speed and had almost reached the westerly edge of Hansen when the coupe, having failed to stop at the line of Orangethorpe, came into the intersection. White applied his brakes immediately but they did not take hold until just about the instant of the impact, which was east of the center line of Hansen.

Since there is no conflict in the evidence the only question is whether it is sufficient to support the finding of the trial court that defendant White was negligent and that his negligence caused the death of decedent Mary Patricia White. Defendant continued at his speed of 40 to 45 miles an hour until the moment of collision. He did not sound his horn, did not apply his brakes until the instant of the impact and did not turn his car in any direction, the latter fact being confirmed by his statement that the point of impact was ten feet south of the center of Orangethorpe Avenue. The front of defendant's truck struck the left rear wheel of the car in which decedent was riding.

When defendant saw the coupe pass the boulevard sign at a speed of 5 to 10 miles an hour it should have been evident to him that the driver did not intend to make the boulevard stop. Nevertheless, he made no effort to avoid a collision. According to his own statement his truck struck the rear wheel of the coupe at about the center line of the south half of the Orangethorpe pavement. Manifestly by a very slight swerve of his truck he could have passed behind the coupe and avoided the accident. Furthermore, when he observed the coupe passing the boulevard stop sign and approaching the Orangethorpe pavement the application of his brakes would have slowed his truck sufficiently to allow the coupe to pass in front of him. The fact that the driver of the coupe did not make the boulevard stop as required by law, Vehicle Code, §§ 552, 577, did not justify defendant in failing to reduce his speed or change the direction of his car in an effort to avoid the accident.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

99 Cal.App.2d 805

MAYNARD v. BULLIS.

Civ. 17936.

District Court of Appeal, Second District, Division 2, California.

Oct. 11, 1950.

Action by David S. Maynard against Dr. R. O. Bullis. The Superior Court, Los Angeles County, Clarence L. Kincaid, J., issued orders denying plaintiff's motion for a continuance of the trial, dismissing the action, and denying plaintiff's motion to reconsider and vacate the order of dismissal, and plaintiff appealed. The District Court of Appeal, Wilson, J., held that plaintiff was not entitled to a continuance so that his new attorney could make preparations for trial.

Order in accordance with opinion.

1. Appeal and error ⇐966(1)
Continuance ⇐7

The granting or refusing of continuance of trial is matter within sound discretion of court and if not unreasonable or arbitrary it will not be disturbed on appeal.

2. Continuance ⇐7, 17

Where party has had actual knowledge that his case is set for trial for certain time and appears at that time, he is not entitled to continuance in absence of showing that he has not had such knowledge long enough to enable him to properly prepare, and in each such case it is question for discretion of trial court.

3. Continuance ⇐17

Where plaintiff had written and oral notice of trial more than two months prior to trial date, advanced no justification by affidavit or otherwise for postponement of trial, and was present at trial, plaintiff was not entitled to continuance so that new attorney could make preparations, notwithstanding fact that eight attorneys had previously refused to represent plaintiff. Code Civ.Proc. §§ 594a, 595. Rules for Superior Courts, rule 11.

4. Appeal and error ⇐106

Order denying continuance of trial is not appealable.

George Goldman, Los Angeles, for appellant.

Fulcher & Wynn, Los Angeles, for respondent.

WILSON, Justice.

Plaintiff has appealed from an order dismissing the action and from an order denying his motion to reconsider and vacate the order of dismissal. He has purportedly appealed from an order denying his motion for a continuance of the trial.[1]

The complaint in the action was filed on February 11, 1949, and defendant's answer thereto was filed on March 3. The case was set for trial on February 8, 1950. On October 26, 1949, the motion of plaintiff's counsel for leave to withdraw from the case, for the reason that differences had arisen between plaintiff and his counsel relative to the conduct and prosecution of the action, was granted and thereafter plaintiff appeared in propria persona. On December 2, 1949, notice of trial was served upon plaintiff. Shortly thereafter a representative of defendant's counsel called at plaintiff's residence and personally advised him of the date on which the case had been set for trial and inquired whether he would be ready for trial at that time. Plaintiff's answer was both profane and noncommittal. On February 7, 1950, the day immediately preceding the trial date, plaintiff's present attorney, Mr. Goldman, telephoned to defendant's counsel and requested a continuance of the trial in order that he might have time to make preparations therefor. His request was refused.

When the case was called for trial Mr. Goldman stated to the court that plaintiff was personally present in the courtroom and that he, Goldman, held a document executed by plaintiff appointing Goldman as

1. Appellant's brief does not conform with Rule 15(a) of Rules on Appeal, 22 Cal. 2d 12, in that his statements of matters contained in the record are not supported by appropriate references to the record.

plaintiff's attorney but he did not intend to file it unless a continuance of the trial could be had. The court stated that no sufficient showing of grounds for continuance had been made and denied the same. Upon motion of defendant's attorney an order was made dismissing the action.

Thereafter a substitution of Mr. Goldman as attorney of record for plaintiff was served and filed together with a notice of motion to reconsider and vacate the order of dismissal, pursuant to section 473 of the Code of Civil Procedure. The affidavits accompanying the notice of motion do not make any showing of mistake, inadvertence, surprise or excusable neglect. Plaintiff states in his affidavit that after the date on which his former counsel withdrew from the case he consulted numerous attorneys and law firms in regard to the case (in his brief he names eight different attorneys) "but that each of them refused to represent him therein." The other affidavits do not purport to set forth any reason for a continuance of the trial or for the vacation of the order of dismissal.

[1–3] The granting or refusing of a continuance of a trial is a matter within the sound discretion of the court and if not unreasonable or arbitrary it will not be disturbed on appeal. In re Estate of McCarthy, 23 Cal.App.2d 395, 73 P.2d 913. Where a party has had actual knowledge that his case is set for trial for a certain time and appears at that time he is not entitled to a continuance in the absence of a showing that he has not had such knowledge long enough to enable him to properly prepare. In each such case it is a question for the discretion of the trial court. Sheldon v. Landwehr, 159 Cal. 778, 782, 116 P. 44. In the instant case plaintiff had had written and oral notice of trial more than two months prior to the trial date. The fact that eight attorneys had refused to represent him is not a ground for continuance of the trial. No justification was advanced by affidavit or otherwise for the postponement of the trial under section 594a or section 595 of the Code of Civil Procedure or under Rule 11 of the Judicial Council Rules for Superior Courts, 33 Cal.2d 6, nor was any showing made upon which the court would have been justified in granting plaintiff's motion to reconsider and vacate the order of dismissal.

[4] The order denying a continuance of the trial is not appealable. Estate of McCarthy, supra.

The order of dismissal and the order denying plaintiff's motion to reconsider and vacate the order of dismissal are affirmed. The purported appeal from the order denying a continuance of the trial is dismissed.

MOORE, P. J., and McCOMB, J., concur.



99 Cal.App.2d 780

PEOPLE v. COLLINS.
Cr. 4505.

District Court of Appeal, Second District, Division 2, California.
Oct. 9, 1950.

Samuel D. Collins was convicted in Superior Court, Los Angeles County, Clement D. Nye, J., on two counts for separate abortions and one count for second-degree murder, and he was sentenced for terms prescribed by law, the sentences to run consecutively. From an order denying his motion to vacate judgment and sentence and to resentence him so that sentence on all three counts would run concurrently, defendant appealed. The District Court of Appeal, Wilson, J., held that the term of imprisonment of five years to life for second-degree murder was indeterminate and indefinite and not for life, and therefore Superior Court could make sentences run consecutively.

Order affirmed.

1. Criminal law ⇐1216(2)

Where defendant was convicted for two abortions and second-degree murder and he was sentenced for terms prescribed by law, term of imprisonment of five years to life for second-degree murder was in-

determinate and indefinite and not for life, and therefore Superior Court could make sentences run consecutively. Pen.Code, §§ 190, 669.

2. Criminal law ⇐1208(9)

Where defendant was convicted for two abortions and second-degree murder and he was sentenced for terms prescribed by law, and term of imprisonment of five years to life for second-degree murder was indeterminate and not for life until fixed by State Board of Prison Directors, judgments and sentences were not subject to change by reason of any order made by Board which fixed actual term. Pen.Code, §§ 190, 669.

Samuel D. Collins, in pro. per.

Fred N. Howser, Attorney General, Dan Kaufmann, Deputy Attorney General, for respondent.

WILSON, Justice.

By an information filed on August 30, 1945, defendant was charged with felonies in three counts—two separate abortions and murder. He was also charged with having been previously convicted on June 25, 1934, of the crime of abortion. See People v. Collins, 4 Cal.App.2d 86, 40 P.2d 542. He pleaded not guilty to each of the three counts and admitted the prior conviction. The jury found him guilty of all the crimes charged and found the crime of murder to be of the second degree. His motion for a new trial was denied and he was sentenced to the state prison for the term prescribed by law as to each count, the sentences to run consecutively. On his appeal the judgments and orders denying motions for a new trial were affirmed. People v. Collins, 80 Cal.App.2d 526, 182 P.2d 585.

On March 30, 1950, defendant filed a motion to vacate the judgment and sentence and to resentence him so that all three counts would run concurrently. His motion was denied and he has appealed from the order.

Defendant's contention is based on the provisions of section 669 of the Penal Code. He maintains that his sentence on the charge of murder in the second degree is for life and therefore the terms of his imprisonment must run concurrently.

Section 190 of the Penal Code provides that "every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life; * * *." Section 669 provides that when a person is convicted of two or more crimes the second or other subsequent judgment shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently, or whether the imprisonment upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment; "provided, however, if the punishment for any of said crimes is expressly prescribed to be life imprisonment, whether with or without possibility of parole, then the terms of imprisonment on the other convictions, whether prior or subsequent, shall be merged and run concurrently with such life term."

The question has been decided adversely to defendant's contention. In re Quinn, 25 Cal.2d 799, 154 P.2d 875, and People v. Rivas, 85 Cal.App.2d 540, 193 P.2d 151. In the Rivas case it is pointed out that the punishment for second degree murder is not "expressly provided" by section 190 to be life imprisonment but is for the indefinite period of five years to life. In the Quinn case the court held that the fact that the petitioner had been sentenced for robbery of the first degree, an indefinite term without specified maximum. Penal Code, sec. 213, did not require the court to order his sentences on that and other counts to run concurrently since the judgment on the robbery charge was an indeterminate sentence.

[1, 2] The jurisdiction of the court to direct whether sentences shall run concurrently or consecutively is determined by section 669 of the Penal Code. When the sentences were pronounced against defendant the term of imprisonment on his conviction of second degree murder was indeterminate and indefinite, five years to life, Penal Code, sec. 190, and so remained

until fixed by the board which by law has the power to determine the duration of sentences. Hence the court had jurisdiction to make the sentences run consecutively. The judgments and sentences are not subject to change by reason of any order made by the board which fixes the actual term.

Defendant's contention has been previously determined adversely to him by the First Division of this court when, on the authority of the Quinn and Rivas cases, his petition (Crim. No. 4061) to have the judgments vacated and the trial court instructed to impose new sentences to run concurrently was denied by a minute order on July 24, 1950.

Upon the filing of defendant's brief in propria persona he requested that counsel be designated to aid him in the case. We have been favored with a letter from G. William Shea, of the law firm of McCutchen, Thomas, Matthew, Griffiths & Greene, who is a member of the Los Angeles Bar Association's committee on criminal appeals, but he has not presented any authority contrary to the cases above cited.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.



SAN DIEGO COUNTY v. McCLURKEN et al.

Civ. 4207.

District Court of Appeal
Fourth District, California.

Oct. 10, 1950.

Hearing Granted Dec. 7, 1950.*

San Diego County brought an action against J. A. McClurken and others to enjoin the defendants from using or maintaining certain tanks for the storage of gasoline and other liquid fuels in violation of county zoning ordinance. The Superior Court, San Diego County, C. M. Monroe, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that the evidence sustained the trial court's finding that the use of storage tanks placed on a concrete base was not such an extension of the prior use of large tanks placed on heavy skid timbers as would justify injunction for violation of the ordinance.

Affirmed.

1. Injunction ⇐128

In action to enjoin violation of county zoning ordinance by use of certain gasoline storage tanks, evidence sustained trial court's findings of prior nonconforming use of that specific portion of defendant's property in question.

2. Injunction ⇐89

In determining question as to whether extension of pre-existing nonconforming use must be enjoined as violative of county zoning ordinance, each case must be decided upon its own facts and by taking into consideration various circumstances respecting particular property and surrounding area.

3. Injunction ⇐89

In determining whether extension of pre-existing nonconforming use must be enjoined as violative of county zoning ordinances, facts that lot consisting of 20 acres was part of area of about 60 acres without cross streets and that zoning ordinance made no provision for pre-existing nonconforming uses were material considerations.

4. Counties ⇐21½

Zoning ordinance which attempts to exclude and prohibit existing and established uses or businesses that are not nuisances may be held invalid and unreasonable as applied to particular property.

5. Counties ⇐21½

Where zoning ordinance is in fact unreasonable as applied to particular land, it cannot be enforced.

6. Counties ⇐21½

County zoning ordinances will be scanned with more critical eye than those affecting cities.

* Subsequent opinion 234 P.2d 972.

7. Injunction ⇐128

In action to enjoin violation of county zoning ordinance by use of certain fuel storage tanks, evidence sustained trial court's finding that use of storage tanks placed on concrete base was not such an extension of prior use of large tanks placed on heavy skid timbers as would justify injunction.

8. Counties ⇐21½

County zoning ordinance was unreasonable when applied so as to prohibit or restrict uses of land which were not more detrimental to neighborhood than uses made of land prior to adoption of ordinance.

9. Injunction ⇐128

In action to enjoin violation of county zoning ordinance by use of fuel storage tanks, where it appeared that ordinance had made no provision for heavy industrial purposes within area it covered, fact that county had granted other variances to permit heavy industrial uses of land in immediate neighborhood at same time as it denied defendant's request for variance, while not conclusive in itself, would have material bearing on problem before court.

James Don Keller, District Attorney, Bertram McLees, Jr., and Duane J. Carnes, Deputies District Attorney, all of San Diego, for appellant.

Bertrand L. Comparet, San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action to enjoin the defendants from using or maintaining certain tanks, for the storage of gasoline and/or other liquid fuels, which are claimed to constitute a violation of a county zoning ordinance.

The particular property here involved is a part of lot 17 of a subdivision in unincorporated territory, and is about a mile from the main center of a community known as Lemon Grove. In 1937 the defendants bought lot 17, which consists of 20 acres, and about half of lot 16, which consists of 10 acres. These two lots and two similar lots constitute a body of land containing about 60 acres with roads on three sides, but with no cross roads. The defendants immediately commenced the development and use of their entire parcel for heavy industrial purposes, which has been carried on continuously ever since. When this use was begun the area in this vicinity was nearly all undeveloped property and there were few, if any, residences in the neighborhood.

From the beginning, the defendants have used their property, as a unit, for the following purposes: above-ground storage of gasoline and other fuels; storage of paint for industrial painting; wholesale storage and sale of lumber; storage of steel beams and parts of machinery for heavy manufacturing; storage of rock, sand and gravel; storage of junk and old iron; manufacture of acetylene gas and metal bearings; automobile and truck wrecking; building and rebuilding of heavy machinery; boiler repair shop; heavy machine shop; commercial planing mill; sand blasting; welding; heavy manufacturing processes using up to 2000 h. p. to operate the various machines used; and general heavy construction contracting business. In connection with this use, extensive leveling of higher land and filling in of swampy areas was done. A number of buildings were built, some being 50 to 100 feet wide and 200 to 250 feet long. While some operations were carried on in the buildings, a large part of the work, in addition to storage, was done out of doors and over all, or practically all, of the property. Among other things, gasoline and other fuels have been stored above ground in various tanks with capacities as great as 6000 gallons. By the use of heavy moving equipment these tanks have been moved from place to place, practically all over the premises, as demanded by the activities of the time.

In 1942 the county adopted the zoning ordinance in question, covering an area of 12 square miles. By this ordinance defendants' land was divided into three zones; partly "C-1", which permitted retail business only; partly "C-2", which permitted

retail and wholesale merchandising and light manufacturing not to exceed 10 h. p.; and the remainder in "R-2a", which permitted residential use, farming, country clubs and cemeteries. The zone lines were so drawn as to split several of defendants' buildings devoted to manufacturing purposes, as well as their storage and work yards, so that part could be used for general merchandising and light manufacturing while the remainder could be used only for farming, residences, country clubs or cemeteries. No heavy industrial use such as that carried on by the defendants was provided for within the 12 square mile area. This ordinance further provided that any existing lawful use of land, although it did not conform to its provisions, might be continued.

In 1948, the defendants installed a retail service station on a part of their land, zoned as "C-1" and permitting that use. They also installed four storage tanks, each having a capacity of 12,000 gallons, near the permitted service station but about 50 feet within the area zoned for residences and cemeteries. They were installed above ground on a concrete base 10 feet wide and 54 feet long.

The plaintiff then brought this section to enjoin the use of these four tanks and to require their removal. The defendants answered and sought declaratory relief. It was conceded by the plaintiff at the trial that no claim was made that these tanks are a hazard to the neighborhood or constitute a public nuisance, and that "the presence of these tanks in a residence zone is the only issue, as far as we are concerned." The court found that beginning in the year 1938 and continuously thereafter the defendants have used all of said real property, except for a small described parcel which is not material here, for heavy industrial purposes including those above named; that they have made use of all of that land as a unit to be used in its entirety for the convenient operation thereon of the said heavy industrial purposes and uses; and that the portion of this land upon which said tanks are situated is within the portion of said lands which the defendants have continuously, since 1938, used for such heavy industrial purposes. As a conclusion of law, the court found that the provisions of this zoning ordinance, insofar as they purport to prohibit or restrict the use of said lands for heavy industrial purposes, including the use and purposes above mentioned and other heavy industrial uses and purposes which are not more detrimental to the neighborhood than the uses heretofore made of said lands, are unreasonable and are not effective to prohibit or restrict any of said uses or purposes, including the use of said four tanks for the storage of fuels; and that as to said lands, with the exception above noted, the defendants have a vested right to continue to use the same for all heavy industrial uses and purposes which are not more detrimental to the neighborhood than the uses heretofore made of said lands. Judgment was entered accordingly and the plaintiff has appealed.

[1] While the appellant recognizes that the evidence amply discloses such a prior use of most of the respondents' land, it is contended that it is not sufficient to support a finding of such use with respect to a small area at the easterly side of respondents' land, upon which these tanks are located. It is further contended that, in any event, no permanent structures had been erected on this part of the property prior to 1948; that any use of this part of the property prior to 1942 had been merely for the storage of heavy materials and possibly for storage of gasoline and fuels in portable tanks; that the erection of permanent tanks was an extention of the former use which is not permitted by law; and that the court's conclusions of law are, therefore, erroneous and contrary to law. The first of these contentions is based upon a conflict in the evidence and is without merit. The respondents' evidence, which the court accepted, was sufficient not only to show that this entire property was being used as a unit for these purposes, but to show that the specific portion of the property here in question had been so used for the storage of both heavy materials and of fuels in large tanks, these tanks having been moved about from time to time by the use of heavy moving equipment.

[2, 3] The important question here is as to whether an extension of the nonconforming use here appears, as a matter of law, which is sufficient to require a reversal of the judgment. The appellant relies on such cases as Sunny Slope Water Co. v. City of Pasadena, 1 Cal.2d 87, 33 P.2d 672, and O'Rourke v. Teeters, 63 Cal.App. 2d 349, 146 P.2d 983, as having modified the holding in Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14, to the effect that a landowner may continue with an existing business after the adoption of a zoning ordinance. It is argued that under the later decisions a preexisting nonconforming use cannot be extended and must be confined to the existing building, and that it cannot be extended to an adjoining lot. It clearly appears from the decisions, as a whole, that each case must be decided upon its own facts and that various circumstances affecting the particular property and the surrounding area must be taken into consideration. From its inherent nature the business here in question could not be, and was not, confined to a building or buildings. The business was developed as a unit in accordance with the original purpose to use the entire lot, and the particular area here in controversy was a part of that lot and was not an adjoining lot. The fact that this lot consisting of 20 acres is a part of an area of about 60 acres without cross streets, is a material consideration. The fact that a business of this nature was established some years before the zoning ordinance was adopted, and that this ordinance which covers 12 square miles of unincorporated territory made no provision for such a business, except by permitting it to continue where it was, should also be considered.

[4-6] In the case of In re White, 195 Cal. 516, 234 P. 396, a zoning ordinance was held to be unreasonable and void since no adequate provision for a business district was made. In Dobbins v. City of Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169, it was held that a zoning ordinance was ineffective as against a gas works in the course of construction although no actual use had yet been made. In Wilkins v. City of San Bernardino, 29 Cal.2d 332, 175 P.2d 542, 548, it was pointed out that zoning ordinances have been held invalid and unreasonable as applied to particular property "Where the zoning ordinance attempts to exclude and prohibit existing and established uses or businesses that are not nuisances." In Bernstein v. Smutz, 83 Cal. App.2d 108, 188 P.2d 48, it was held that where a zoning ordinance is in fact unreasonable as applied to particular land it cannot be enforced. In Re Smith, 143 Cal. 368, 77 P. 180, it was held that, because different conditions exist, county zoning ordinances will be scanned with a more critical eye than those affecting cities.

[7, 8] Applying these rules to the facts of the instant case it cannot be held, as a matter of law, that the use of storage tanks placed on a concrete base was such an extension of the prior use of large tanks placed on heavy skid timbers as compels a reversal of the judgment, or that the court erred in holding that the zoning ordinance in question was unreasonable if interpreted and applied as contended for by the appellant. This particular land had previously been used for the above-ground storage of fuels, in connection with the use of the tract for various industrial purposes, and there is nothing about the present storage in well-constructed tanks which necessarily affects the neighborhood more adversely than the previous storage in tanks placed on timbers instead of concrete. The question as to any extension of the use was one of fact, and the court's conclusion and holding is sufficiently sustained by the evidence. Moreover, under the circumstances here appearing no error appears in connection with the court's conclusion with respect to the reasonableness of the ordinance, as applied to this land.

[9] A further question with respect to an unreasonable administration of the zoning ordinance here appears. While the ordinance made no provision for heavy industrial purposes within the area it covered, the appellant has subsequently recognized the necessity therefor, and has administered the ordinance accordingly with respect to other lands in the immediate neighborhood. The evidence here discloses that more than 50%

of the property in an area having a radius of about two blocks in every direction from this particular spot is now being used for heavy industrial uses, under variances permitted and granted by the appellant. Among such other surrounding businesses are: a blacksmith shop which was permitted to expand into extensive manufacturing and the building of truck trailers and semi-trailers; a cement-block manufacturing plant; a wholesale and retail lumber yard; an automobile wrecking yard; a planing mill; a butane filling station; a rug cleaning establishment; and a large electrical substation. All of these were prohibited by the ordinance, but were permitted by variances granted. At the same time the respondents' request for a variance was denied. While this matter may not be conclusive in itself, it has a material bearing on the problem before the court.

The facts having been decided adversely to the appellant, and the court's conclusion as to the applicability of the ordinance to the respondents' property being reasonable under the circumstances shown, it cannot be held in this equitable action that the appellant was entitled, as a matter of law, to the drastic relief here sought.

The judgment is affirmed.

GRIFFIN, J., concurs.



99 Cal.App.2d 794

In re SMILIE'S ESTATE.

RAMELOW v. SMILIE et al
Civ. 4214.

District Court of Appeal, Fourth District, California.

Oct. 9, 1950.

Rehearing Denied Nov. 2, 1950.

Hearing Denied Dec. 7, 1950.

Proceeding in the matter of the estate of Leslie B. Smilie, also known as L. B. Smilie, deceased, on partition of Max Ramelow for probate of a letter as decedent's last will and testament, wherein Joe T. Smilie and others appeared as proponents of such will and Jewel Smilie contested the probate of such will and petitioned for probate of an earlier will. The Superior Court of San Diego County, Joe L. Shell, J., entered an order admitting the letter to probate as decedent's last will, denying probate of earlier will and appointing an executor and Jewel Smilie appealed. The District Court of Appeal, Griffin, J., held that letter was properly construed as testamentary in character and admitted to probate as a valid will devising testator's entire estate to a friend and thereby in effect revoking earlier will naming decedent's wife as sole beneficiary.

Order affirmed.

1. Wills ⇐386

Trial court's finding from conflicting evidence that testator was mentally competent was conclusive on appeal.

2. Wills ⇐87

Letter to friend written in testator's handwriting shortly before he committed suicide, referring to difficulties with wife and her daughter by a former marriage and stating "I want you to have all of my after my bill", was properly construed as testamentary in character and admitted to probate as valid will devising testator's entire estate to friend and thereby in effect revoking earlier will naming wife as sole beneficiary. Probate Code, § 72.

3. Wills ⇐462, 463

The court cannot ordinarily supply omissions or insert words in a will, but words of surplusage may be stricken.

4. Wills ⇐470

A will should always be read from its four corners and all parts of the will construed in relation to each other to form one consistent whole.

5. Wills ⇐439, 440

The cardinal principle in construing a will is to ascertain the intention of testator as expressed therein.

6. Wills ⇐439

Testamentary intention may be determined by no definite, fixed rule, but each case must stand upon its own peculiar facts.

7. Wills ⇐69

A "will" is a disposition of property to take effect at death of testator.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Will".

8. Wills ⇐87

In determining whether an instrument was intended to be testamentary, reference will be had to the surrounding circumstances and the language will be construed in the light of such circumstances, and, if it then appears that instrument was intended to be testamentary, court will give effect to the intention if it can be done consistently with the language of the instrument, and the particular form of the instrument is immaterial.

9. Wills ⇐87

To establish testamentary character of instrument, it must appear only that maker intended by it to dispose of property after his death and no particular words are necessary to show testamentary intent.

10. Wills ⇐462

Where a testamentary document clearly discloses on its face that the maker's meaning is not completely expressed by the words used and that words are omitted, such words may be supplied in order to carry out the intention as manifested by the context.

Hillyer & Hillyer and William Hillyer, San Diego and Raymond P. Coady, La Mesa, for contestant and appellant Jewel Smilie.

Donald A. Stewart, San Diego, for petitioner and respondent Max Ramelow.

Harrison G. Sloane, San Diego, for proponents and respondents Joe T. Smilie, William V. Smilie and Margaret Smith (Raycraft).

GRIFFIN, Justice.

In 1940, Jewel Smilie, formerly Jewel Sparks, became the wife of the deceased, Leslie B. Smilie. Mr. Smilie had been previously married and of that issue there were three children, namely, Joe T. Smilie, William V. Smilie and Margaret Smith (Raycraft). At the time of his death Mr. Smilie was paying alimony to this previous wife. His second wife became ill and was being nursed by Mrs. Jewel Sparks, who had also been divorced from her husband. Within one month after the death of the second Mrs. Smilie, Leslie B. Smilie married Jewel Sparks, who had a daughter by her previous marriage named Dot or Dorothy. Dorothy married one Phillip Heaser. About three months after Jewel Sparks married Leslie B. Smilie they went to an attorney and had prepared a last will and testament in which Mr. Smilie nominated his wife executrix of his will, bequeathed to her all of his property of every description, and therein stated that he intentionally made no gift to his three named children. Therein he also authorized his wife, upon his decease, to conduct and operate any business that he might have been operating. Considerable property in the form of ranches, duplexes, and vacant property were acquired during their marriage and title was taken in the name of Mrs. Smilie. Mr. Smilie continued conducting his electrical business and, as evidenced by cancelled checks, considerable sums of money were paid over to Mrs. Smilie by him. Apparently Mrs. Smilie attended to the rentals and the reinvestment of the funds derived from such rentals, as well as the management of the property in general. Mrs. Smilie's daughter and son-in-law operated one of the ranches with Mrs. Smilie, on a share-cropping basis. Some time prior to July 2, 1949, some marital difficulties arose between the Smilies and particularly in relation to the Heasers. Mr. Smilie complained about this over a period of time to his friend Max Ramelow, a half-brother of Jewel Smilie, who resided in El Cajon, California. About July 2, 1949, Mr. Smilie went to the ranch being operated by the Heasers and some dispute arose between them in reference to the operation of the berry-picking activities being conducted thereon. Apparently Phillip Heaser struck Mr. Smilie with his fist and inflicted some injury upon him. The evidence is conflicting as to how the dispute arose and

Heaser and others present testified that Mr. Smilie was in the act of grabbing some instrument just previous to that time in an effort to strike Heaser. After his return home to San Diego that evening Mr. Smilie wrote a letter, all in his own handwriting, as follows:

"July 2—49.

"Dear Max—

"Well Jewel & Dot had me beat up today. I did not ~~think~~ Phip would do that.

"Jewel & Dot have been raising hell for two weeks. So today they had Phip beat me up. I did not think Phip would do thing like that. This was done at the farm today about 2:30 P. M.

"I have asked Jewel a number of times to let us divind up. but she will not do any.

"I want you to see that all my bills are paid and that Dot does not get thing. I want you to have all of my after my bill are.

"I am told Dot is going to move back to Knemore so she can look after thing.

"Love to all

"L. B. Smilie.

"This is all over money Dot wants it all."

[1] This letter was mailed to Mr. Ramelow, and soon thereafter, Mr. Smilie committed suicide. Ramelow presented this letter with a petition to probate it as Mr. Smilie's last will and testament and asked that he be appointed executor thereunder. A few days later, Mrs. Smilie presented the last will and testament of Mr. Smilie dated May 22, 1940, and petitioned for the probate of that will. After a hearing was had the trial court admitted the letter dated July 2, 1949, as the last will and testament of the deceased, appointed Ramelow executor and denied probate of the former will. From this order Jewel Smilie has appealed. At the trial she questioned the mental competency of the deceased to make the will admitted to probate. The court found that he was mentally competent for this purpose. The evidence on the subject was conflicting and in view of the time-honored rule this court is not at liberty to disturb that finding. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301; In re Estate of Wall, 183 Cal. 431, 191 P. 687; In re Estate of Snowball, 157 Cal. 301, 107 P. 598.

The only remaining questions raised by contestant on this appeal are (1) Whether the letter of July 2, 1949, was, as found by the court, intended by deceased to be a will, i. e., was testamentary intent reasonably reflected by the document and by the surrounding circumstances; (2) if so intended, whether it sufficiently refers to any corpus so as to be a devise of *any* property; and (3) whether it entirely revoked the former will of 1940.

As to these questions contestant argues that since deceased went to an attorney's office to make the first will, it is clear that he knew the nature and requirements of a valid will; that decedent made no statement in the document that he wished it to operate as a will or that he was about to die; that he made no mention of his property therein; that he did not discuss therein the disinheritance of his wife or what provision he wished to make for his children by his previous marriage; that the letter, thus written, from the language used, did not clearly show that it was the purpose of the deceased to thereby make a disposition of his property contrary to the previously executed former will, and that the testamentary character of the instrument was not shown "with legal certainty", citing such cases as In re Estate of Wunderle, 30 Cal.2d 274, 280, 181 P.2d 874; In re Estate of Golder, 31 Cal.2d 848, 850, 193 P.2d 465; In re Estate of Spitzer, 196 Cal. 301, 237 P. 739; In re Estate of Branick, 172 Cal. 482, 157 P. 238; In re Estate of Major, 89 Cal.App. 238, 241, 264 P. 542; In re Estate of Meade, 118 Cal. 428, 50 P. 541, 62 Am.St.Rep. 244; In re Estate of Kelleher, 202 Cal. 124, 259 P. 437, 54 A.L.R. 913; In re Estate of Lynch, 142 Cal. 373, 75 P. 1086; and White v. Deering, 38 Cal.App. 433, 437, 177 P. 516.

In appropriate findings the trial court held that the letter was testamentary in character; that by it deceased intended to revoke the former will and intended to devise nothing to his wife or her daughter and did intend thereby to devise his entire estate to Max Ramelow after payment of

his bills. The findings then set forth the interpretation given the instrument by the trial court as follows:

"I have asked Jewel a number of times to let us divide up but she will not do anything.

"I want you to see that all of my bills are paid and that Dot does not get a thing. I want you to have all. * * *

"This is all over money. Dot wants it all."

The main complaint in reference to this construction is that the court has erroneously stricken from the sentence the words italicized as follows: "I want you to have all *of my after my bill are*". Apparently the trial court arrived at this construction on the theory that the words were stricken were mere surplusage. The argument is that the court has, by striking these words, so modified the will as to substitute its own interpretation in the place and stead of the vague meaning therein reflected; that since the deceased did not make it clear whether he wanted Max Ramelow to have all of his personal belongings or all of his money or all of his business property, the court was not authorized to modify this expression to make it include *all* of his property.

[2] The evidence surrounding the making of the will shows that shortly after the marriage of Leslie B. Smilie and contestant, she had the deceased make a will in which she was the sole beneficiary to the exclusion of his natural heirs. She endeavored to account for the subsequent acquisition of the properties, title to which was vested in her, by attempting to show that she furnished the money for the purchase thereof, and accordingly, the entire property was her separate property. On cross-examination she had considerable difficulty in remembering where she had obtained her divorce from her previous husband, and what property she secured by virtue of a property settlement agreement with him. (This agreement, subsequently produced, recites that Mr. Sparks agreed to pay her $960, @ $50 per month.) She endeavored to show that she kept approximately $16,000 in a safe deposit box in her own home and that she spent this money in buying the property which now stands in her name. Checks were received in evidence showing that the deceased had given to her considerable sums of money during their married life. The parties made individual income tax returns during those years. Mr. Smilie's return listed all income from rentals on property standing in his wife's name, as well as all income from his business. He claimed ½ of that income as community property. Mrs. Smilie's return listed ½ of the same income as community property without further itemization. The testimony likewise shows that the deceased was endeavoring to have the contestant divide the property between them, apparently in contemplation of some marital separation and that the contestant failed to accede to his request. The evidence further discloses that the beneficiary under the last purported will was a friend and confident of the deceased and that the deceased disclosed his matrimonial differences to him; that he took a great dislike to the daughter of the contestant and that it was his determination that she receive no part of the estate owned by him and his wife. The deceased apparently recognized that the contestant had a community interest in and to a certain portion of the property owned by them and that in case of his death he had no authority to dispose of her portion of the community property. The previous will indicates that the deceased did not intend to remember his own children in his will. It therefore would not be an unreasonable construction of the document under consideration to hold that the deceased intended that the contestant receive no part of *his* estate, for the reasons expressed, and that his friend, Max Ramelow, receive the portion which she was entitled to receive under the former will. This interpretation, therefore, would in effect completely modify and change the terms of the former will and in effect revoke it. In re Estate of Martin, 31 Cal.App.2d 501, 88 P.2d 234; In re Estate of Mallon, 28 Cal.App.2d 106, 81 P.2d 992; Sec. 72, Probate Code; Neibling v. Methodist Orphans' Home Ass'n, 315 Mo. 578, 286 S.W. 58, 51 A.L.R. 652; In re Es-

tate of Fuller, 135 Cal.App. 781, 28 P.2d 399; In re Estate of Siemers, 202 Cal. 424, 261 P. 298; In re Estate of Dargie, 216 Cal. 667, 15 P.2d 849.

Just what property is or may be shown to be community property and subject to distribution under the will is not a question before us at this time. Whether Max Ramelow will be able to receive any portion of the proceeds of the decedent's estate, in view of the fact that the pretermitted heirs may claim it under the law of succession, is likewise not before us for review. These heirs are appearing as proponents of the will that was admitted to probate and are respondents in the present proceedings.

[3-9] In re Estate of Soulie, 72 Cal. App.2d 332, 164 P.2d 565, was relied upon heavily in support of the trial court's ruling that the words "of my" could be stricken out of the sentence in the will. Although there is a slight factual difference, the general principle applicable to the construction of a will is there stated, i. e., that the court cannot ordinarily supply omissions nor insert words in a will, but words of surplusage may be stricken; that the instrument should always be read "from its four corners" and all parts of the will construed in relation to each other to form one consistent whole, and that the cardinal principle applicable to the construction of a will is to ascertain the intention of the testator as expressed therein, citing cases. There is no definite, fixed rule by which testamentary intention may be gauged, but each case must stand upon its own peculiar facts. A will is a disposition of property to take effect at the death of the testator and in determining whether the instrument propounded was intended to be testamentary, reference will be had to the surrounding circumstances, and the language will be construed in the light of these circumstances. If it shall then appear that the instrument was intended to be testamentary, the court will give effect to the intention, if it can be done consistently with the language of the instrument and the particular form of the instrument is immaterial. No particular words are necessary to show a testamentary intent. It must appear only that the maker intended by it to dispose of property after his death. In re Estate of Spitzer, 196 Cal. 301, 237 P. 739. Many of the cases cited by contestant were decisions upholding findings of the trial court denying admission to probate of a proffered document.

[10] In Re Estate of Blalock, 95 Cal. App.2d 463, 213 P.2d 100, the will in controversy, written upon two sheets of lined paper, apparently torn from a small memorandum book, was before the court for construction, and after reciting many of the rules and cases above cited, the court stated that when it clearly appears on the face of a testamentary document that the maker's meaning is not completely expressed by the words used, and it is also clear what words are omitted, those words may be supplied in order to carry out the intention as manifested by the context. And that in order to learn the intention of the testator the whole will may be scrutinized and words may be interpolated or transposed.

In answer to the argument that it was apparent from the instrument admitted to probate that the decedent did not have his own children in mind, the trial court stated: "We don't know whether he knew that by failing to mention his children he would leave his property in such a condition that they would take under the law of succession. He might have known it. Who knows that he didn't know it, so we leave his will as we found it and simply clarify it in those respects in that it might not clearly express what we believe his intention to have been."

The trial court's construction of the will is not unreasonable and is in accord with the recognized rules of construction and apparently carries out the obvious intent of the testator to dispose of his entire estate.

Order appealed from is affirmed.

BARNARD, P. J., concurs.

99 Cal.App.2d 782

DODGE v. HARBOR BOAT BLDG. CO. et al.

Civ. 17507.

District Court of Appeal, Second District, Division 3, California.

Oct. 9, 1950.

Action by William Wallace Dodge against Harbor Boat Building Company to recover for work, labor and services performed and materials furnished by plaintiff's assignor. The defendant filed a cross-complaint against the plaintiff's assignor, the National Ship Service Company, Inc. The Superior Court of Los Angeles County, Harry H. Archbald, J., entered a judgment for the plaintiff, and the defendant appealed. The District Court of Appeal, Shinn, P. J., held that, where Navy authorized extra work to be done by subcontractor in preservation of vessels for inactivation, and contractor agreed to present subcontractor's extra work claims to Navy and to pay claims when received from Navy, and Navy in settling with contractor considered contractor's inclusion of subcontractor's extra work claims in contractor's own such claims, and segregation of subcontractor's original work from its extra work was impossible, subcontractor's assignee could sue for value of total work performed by contractor instead of suing on contract and also for extra work, and contractor was estopped by manner of handling subcontractor's account in settlement with Navy from questioning value of subcontractor's extra work.

Judgment affirmed.

1. Estoppel ⇐92(1)
Work and labor ⇐13

Where Navy authorized extra work to be done by subcontractor in preservation of vessels for inactivation, and Navy in settling with contractor considered contractor's inclusion of subcontractor's extra work claims in contractor's own claims, and segregation of subcontractor's original work from its extra work was impossible, subcontractor's assignee could sue for value of total work performed by contractor instead of suing on contract and also for extra work, and contractor was estopped by manner of handling subcontractor's account in settlement with Navy from questioning value of subcontractor's extra work.

2. Appeal and error ⇐960(1)
Pleading ⇐329

Trial court has discretion to overrule defendant's objection and to receive evidence of plaintiff's account, notwithstanding plaintiff's failure to furnish bill of particulars within required 10-day period after demand, and such ruling should not be disturbed in absence of showing of clear abuse of discretion. Code Civ.Proc. § 454.

3. Principal and agent ⇐64(1), 78(4)

An agent collecting single amount for extra work performed by both principal and agent could not keep all money collected on theory of impossibility of telling how much was collected for agent and how much was collected for principal, but would become liable for money had and received, and could be required to prove that agent did not collect the entire amount of the principal's charges.

Hansen & Sweeney, Los Angeles, for appellant.

William Wallace Dodge, Sampson & Dryden and McLaughlin & Casey, Los Angeles, for respondent.

SHINN, Presiding Justice.

Defendant, Harbor Boat Building Co., a corporation, appeals from a judgment for $97,459.03 together with costs in favor of the plaintiff, William Wallace Dodge.

Plaintiff, who is the assignee of National Ship Service Co., Inc., a corporation (hereinafter referred to as National Ship), sued to recover for work, labor and services performed, and materials furnished by his assignor.

Plaintiff's amended complaint contained two causes of action: the first sought recovery of $147,782.21 as the reasonable value of work, labor and materials furnished at the request of defendant; the second was a common count based upon an account stated for the same amount; a third count, added by amendment, was

predicated upon the ground that defendant had received $147,782.21 from the Navy for work and materials furnished by National Ship. Defendant Harbor Boat Building Co. (hereinafter referred to as Harbor Boat), denied the material allegations of the first, second and third causes of action, claimed by way of offset and by cross complaint that plaintiff's assignor was indebted to it in the sum of $12,540.97, and sought damages in the sum of $38,250 by reason of the careless and negligent manner in which some of the work had been done. The trial court found that the reasonable value of the services and material furnished by National Ship was $110,000, that Harbor Boat was entitled to an offset of $12,540.97 for services which it had furnished National Ship in connection with the work done by National Ship, and that, as a result, plaintiff, as assignee of National Ship, was entitled to judgment for $97,459.03, together with costs. The sum of money sued for constituted compensation for work done and material furnished in painting, cleaning, refurnishing, repairing and renovating two vessels, the U.S.S. Jaccard [Jacquard] (also known as DE-355) and the U.S.S. Acree (also known as DE-356) which belonged to the U. S. Government. The type of work done and materials furnished by plaintiff's assignor and the defendant is a process of preservation for inactivation, or what is known as "putting the vessels in moth balls." Harbor Boat and National Ship are both engaged in ship building and ship repair work in the Los Angeles Harbor area.

In May, 1946, representatives of National Ship met with representatives of Harbor Boat concerning the proposed preservation work to be done on Navy ships in Los Angeles Harbor. As an outgrowth of this meeting, Harbor Boat, after representatives of both concerns had inspected the work being done by the Navy in San Diego and the two vessels (the subject of this litigation) in Los Angeles Harbor on which such work was to be done, entered its bid on the work to be performed. After the inspection of the ships and prior to the entering of the bid, representatives of Harbor Boat and National Ship went over the specifications for the proposed work, National Ship agreed to do specified portions of the work involved and prepared an estimate of the cost of the work proposed to be done by it. The work to be done by National Ship consisted, in the main, of removing paint and rust, cleaning and painting equipment and the vessels themselves. The estimates prepared by National Ship with reference to the work to be done by it for Harbor Boat in the mothballing process totaled $24,195 for each ship, and were accepted by Harbor Boat in its Purchase Orders of June 12, 1946. Harbor Boat's bid was accepted by the Navy and it was to do the preservation work on the Jaccard for the sum of $73,855 (this was later revised to read $74,284.64) and the work on the Acree for $74,745 (which was later revised to read $75,174.64).

In the Purchase Orders, signed by Harbor Boat and transmitted to National Ship, it was provided that National Ship was to "Accomplish work in accordance with the following U. S. N. Instruction Sheets. All work to be done to the satisfaction of the AIM (Assistant Industrial Manager) Resident Inspector and to be completed by the stipulated availability date: * * *" and that "It is understood that there may be changes in specifications but that no increase in price will be made unless the change is considered of a major nature and a Change Order issued by A.I.M."

The record shows that it became necessary for National Ship to perform a great deal of work in addition to that specified in its estimate to Harbor Boat and in addition to that provided for in the purchase orders signed by Harbor Boat. This additional work was necessitated by several factors: modifications and corrections in the Navy's instruction manual; express request by Harbor Boat and demands of inspectors for work not originally specified; the continuous rusting of surfaces because the ships were not maintained by the Navy and Harbor Boat in the proper state of dehumidification during the progress of the work; lack of facilities and equipment which were to have been furnished by the Navy and Harbor Boat; the necessary, but unprovided for, dismantling of many parts in or-

der that such parts might be cleaned and painted, and misinterpretation of instruction sheets by a subsequent Naval Inspector who required certain work to be redone after its approval by a prior inspector. The record substantiates plaintiff's argument that the preservation of ships for inactivation was something new for the Navy and a process which was, as yet, in the trial and error stage. In other words, it was, at the outset, impossible to ascertain just how much work would have to be done or the method by which it was to be accomplished. It appears that the Navy specifications and instructions were changed from time to time during the course of the work, and that on September 4, 1946, the Navy sent a communication to all companies engaged in the inactivation program in the Los Angeles Harbor which read (with the deletion of the names and addresses of the companies to which it was sent) as follows: "Subj; Change orders for Vessels Undergoing Preservation. 1. Notwithstanding any policy agreements or any phrases in article 5 of the basic job orders, *change orders will be issued for those vessels upon which changes in the work have resulted by virtue of modifications and corrections to the preservation instruction manual issued for bid purposes. Contractors are advised to prepare their estimates, as official change orders will be issued at an early date. /s/ D. L. Carroll, Jr. Asst. Industrial Mgr.*" (Emphasis added.)

On September 6, 1946, the Navy issued change orders covering the work being done on the two ships here involved. The orders, which were identical, read in part as follows: "1. *This Change Order No. 332-A is hereby issued to cover all corrections and modifications to the Preservation Instruction Manual prepared for bid purposes. This includes all corrections and modifications made prior to this date.* (Emphasis added.)

"2. In submitting your estimates of any increase or decrease in cost, it is requested that you enumerate each modification, or correction, with its cost, referencing the page number of the Preservation Instruction Manual * * *. These estimates, broken down by labor, material, overhead, and profit should be submitted in the form of an enclosure to a forwarding letter."

On September 9, 1946, National Ship wrote to Harbor Boat in substantial and pertinent part as follows: "You hold prime contract from United States Navy covering certain work in progress on the above vessels. You entered into sub-contracts with National Ship Service Company, Inc. covering a portion of this work which calls for total compensation to National Ship Service Company, Inc. of $46,270.00.

"From time to time as the work progressed you instructed National Ship Service Company, Inc. to alter the work called for in the specifications and in some instances instructed us to perform certain work which was not mentioned in the specifications. As a consequence a very substantial additional cost has been incurred by National Ship Service Company, Inc. in connection with these jobs, and because of changes and additional work which we have completed and are performing at your instance very substantial further cost will be incurred by us before our work on the vessels is completed.

"We understand that you have given us the foregoing instructions and that the additional work undertaken by us upon instructions from you was occasioned through additional requirements of the United States Navy not contemplated in your original prime contract. Regardless of the reason, however, it is estimated that National Ship Service Company, Inc. has and will incur a total cost of approximately twice as great as that contemplated when we entered into the two sub-contracts with you. National Ship Service Company, Inc. of course looks to you for payment of the extras and additional work which you ordered. We believe, however, that you are entitled to consideration from the United States Navy and that you should for your own protection immediately call these matters to the attention of the proper Naval authorities.

"We have prepared an analysis, *as requested by you on September 5, 1946, which discloses the additional work accomplished* by us and now in the course of completion,

which is different from the original specifications or not specified at all, and which we have been called upon to complete upon your instructions." (Emphasis added.) Following an explanatory paragraph of the breakdown of figures is an analysis of the estimated cost of the additional work performed by National Ship. The letter then reads: "We are aware of the fact that proper methods, materials and workmanship in connection with the preservation of vessels is new to everyone and largely experimental prior to present activities in connection therewith. This handicapped both you and our company in estimating your costs and also made it difficult for the United States Navy to prescribe accurate specifications therefor both as to materials and methods.

"The great additional and unforeseen cost which we have entailed has imposed a serious if not disastrous financial burden upon our company. We believe that this is true of many if not all organizations who have engaged and are now performing the same work. Our cost to date in connection with work performed on these vessels is $66,370. We estimate that our total cost to completion will be approximately $83,370.00. * * *

"Our books of account and records, payroll, insurance, taxes and material costs which will bear out the foregoing are available for inspection by you and the United States Navy at all times." (Emphasis added.)

On September 10, 1946, Harbor Boat replied to National Ship's letter of the 9th, as follows: "We have your letter of September 9, in reference to work as a sub-contractor on vessels DE 355 and 356. We do not agree with the intent of your letter in connection with the extra work you have performed or are performing as you had a definite contract for work to perform on these vessels, our order numbers R–600 and R–601, in which the amount was fixed and the following a provision of the work orders:

" 'It is understood that there may be changes in specifications but that no increase in price will be made unless the change is considered of a major nature and a Change Order issued by A. I. M.' (Assistant Industrial Manager's Office.)

"We are negotiating with the Navy to obtain change orders for any extra work and would like your assistance in obtaining change orders for that portion of the work you consider extra."

National Ship replied on the 12th of September, reaffirming its position that the extra work had been done under instructions from Harbor Boat and that it was entitled to be compensated therefor. On September 18, Harbor Boat wrote National Ship in part as follows: "* * * *we will use every effort possible to obtain proper additional compensation from the Navy for our extra work as well as yours. Payment for your extra work so obtained will be paid to you as soon as received."* (Emphasis added.)

On September 24, 1946, National Ship wrote to Harbor Boat supplementing the letter of the 9th, and itemizing the extra work and material and cost therefor for work done on the two ships. The cost of the *extra* work and material on the Jaccard amounted to $35,962.19 and for the Acree, $43,630.46.

On September 26 and 27, Harbor Boat wrote to the Navy listing the changes made and estimating the increased cost thereof. Harbor Boat's estimate of the cost for additional work done on the Acree was $89,625.36, and on the Jaccard, $83,093.34. On January 29, 1947, Harbor Boat wrote to the Navy in part as follows: "3. *The specifications on which we bid were superceded* [sic] *by changed specifications which were issued from time to time and resulted in a considerable increase in cost.* We also enclose detailed specification changes and application to the various items, enclosure (b)." (Emphasis added.) Payment was requested for additional work done on the Jaccard in the sum of $84,568.84 and on the Acree in the sum of $91,051.71. The detailed estimates which were supposed to have accompanied the two letters were apparently lost in the Navy's files and no copies thereof were produced at the trial. *It should be noted here that the figures pre-*

pared on the cost of the additional work done by National Ship were included in Harbor Boat's estimate to the Navy, although there was no segregation of the entire work as between Harbor Boat and National Ship.

The record shows that Harbor Boat was paid in full the amount of its original bid on the two ships and that it received in addition the sum of $141,622 in full payment for the cost of additional work and materials furnished. National Ship, plaintiff's assignor, has been paid nothing by Harbor Boat.

The contentions of the defendant may be summarized as follows: Plaintiff should have sued on the contract based upon its bids which amounted to $48,390 and for the value of extra work done; there was no evidence that National Ship was authorized to perform the extra work for which it claimed compensation; there was no evidence of the value of the extra work; there was no competent evidence of the value of the total work performed by National Ship; evidence was erroneously admitted as to the value of National Ship's work and, finally, that plaintiff's evidence as to the value of its extra work should have been excluded for the reason that the bills of particulars furnished by National Ship were insufficient and were not timely filed. We are of the opinion that none of these grounds of appeal is sustainable.

[1] There is implicit in the findings, conclusions, and judgment, a determination by the trial court that the value of the work done by National Ship provided a proper basis for a judgment in its favor and that it was unnecessary to sue on the original contract. This determination was one of fact and has ample support in the record. It is true that National Ship agreed with Harbor Boat to do specific work for an agreed price of $48,390 and that Harbor Boat agreed with the Navy to do the complete job for $149,459.28, but when the work had been completed National Ship had done extra work of the claimed value of $79,592.65 and Harbor Boat had done extra work (including that done by National Ship) of the claimed value of $172,718.70. As we have mentioned, Harbor Boat was paid $141,622 for work over and above its original bid. When it is understood that the entire purpose of the work was to prepare the ships for an inactive status and that the completed job accomplished no more than this, the figures we have quoted are sufficient to demonstrate that the original specifications were incomplete and wholly inadequate to call for the work that was done. Harbor Boat was finally paid almost twice the amount of its bid to the Navy, while National Ship's extra work was largely in excess of the work upon which its bid was predicated. Harbor Boat, as we shall point out, has never claimed, and cannot be heard to claim now, that the Navy did not authorize this extra work. We have examined the record, including numerous exhibits, and are satisfied that the original specifications and directions with respect to the work were altered and supplemented so extensively and in so many material particulars as to render it impossible for the trial court to segregate the work originally agreed to be done by National Ship from the total work that was required to complete the jobs to the satisfaction of the Navy. Harbor Boat's statement of the items which constituted its own and National Ship's increased and decreased costs due to changes in specifications were more than one hundred in number. Changes from the original specifications were given in great detail in the statements of Harbor Boat and National Ship and many witnesses testified with relation to the departures from the original specifications. An analysis of their testimony, found in some 2500 pages of the reporter's transcript, would be an interminable task, and it will suffice to say that we are bound by the implied finding that there was a sufficient departure from the original specifications to render it appropriate to use the value of National Ship's entire work as a proper basis for fixing its compensation.

As far as we can determine from the record a different result would not have been reached if plaintiff had sued upon the contract, and also for the extra work. It is clear that defendant suffered no prejudice in being confronted with the claim for the value of National Ship's total work. A

fact which we think is decisive of all the contentions made by defendant is that Harbor Boat accepted National Ship's figures as to the extent and value of National Ship's extra work and incorporated them in its own demands upon the Navy. This was after Harbor Boat had been offered the opportunity to verify the claims of National Ship by an inspection of its records, and not only failed to do so, but accepted them as correct. Having received National Ship's figures Harbor Boat did not present them separately to the Navy but included them in its own claims for extra work. It undertook and agreed with National Ship to present the latter's claims to the Navy with its own and was alone responsible for the failure to segregate the claims of the two companies. It agreed to pay National Ship the amount of the latter's claims when received from the Navy. The record discloses that the responsible officers of the Navy took into consideration, in reaching an agreement with Harbor Boat, the claims of National Ship which were included in Harbor Boat's statement of the total extra work done. Also, that after the settlement was made, it was impossible to determine the amount that had been paid for National Ship's work as distinguished from that of Harbor Boat. Defendant is in no position to claim that the Navy did not make an allowance on account of the work done by National Ship in an amount sufficient to justify the judgment that was given in National Ship's favor. Moreover, if the award of the judgment be examined by deducting National Ship's bid of $48,390 from the total value of its work as found by the court it will be seen that the judgment represents only an allowance for extra work in the sum of $61,610 as against National Ship's claim for extra work of something over $79,000. Harbor Boat, under the judgment, will retain from the amount collected from the Navy $80,012, as compensation for its own extra work of the claimed value of $93,126.05. Under the judgment, National will receive 77 per cent of the amount of its claim for extra work, while Harbor will retain 85.9 per cent of its claim for extra work. The solution of the controversy reached by the learned trial judge is eminently fair and just and gives Harbor Boat no just cause for complaint.

For the reasons we have stated defendants' other claims of error must fail. There was testimony given by Daniel Ogden, president and manager of National Ship, that the reasonable value of all work and materials furnished by National Ship was between $165,000 and $170,000. His testimony is criticized by defendant as being an unsupported conclusion but we think he was shown to be a witness well qualified and informed to testify on the subject. We find in his testimony sufficient support for the court's finding that the value of the labor and materials was $110,000. But, as previously mentioned, even under defendant's theory, National Ship earned the contract price, and upon the facts we have related defendant cannot be heard to assert that the authorized extra work was worth less than the difference between the contract price and the total value of $110,000 as found by the court. From the entire evidence it is impossible to determine whether defendant received from the Navy on account of work performed by National Ship more or less than the value of National's extra work for which plaintiff has been compensated by the judgment. The manner in which the account was handled in the settlement with the Navy clearly estops defendant from questioning the value of National Ship's extra work. It would be difficult to imagine stronger circumstances for the application of the doctrine of estoppel to bar a contractor from questioning the account of his subcontractor.

[2] At the outset of the trial defendant objected to the introduction of any evidence upon the ground that the bills of particulars furnished by plaintiff were insufficient, and that they were not furnished within the ten day period after demand was made as specified in section 454, Code of Civil Procedure. Defendant demanded a bill of particulars May 19, 1948, and one was furnished July 3, 1948. A demand for a further bill was made July 9, 1948, and it was furnished July 27, 1948. On August 4, 1948, defendant filed an objection to the second bill. The trial was had January 27, 1949

Defendant's objection to the introduction of evidence was overruled and this ruling is assigned as error. We have examined the bills of particulars, which comprise 31 pages of the clerk's transcript, and are in agreement with the trial court that they were as complete as could reasonably be expected. Although they were not furnished within ten days after the demand, it was within the discretion of the trial court to overrule defendant's objection and to receive evidence of the account. The ruling is one which should not be disturbed in the absence of a showing of clear abuse of discretion and there was, in our opinion, no abuse of discretion. Cromer v. Strieby, 54 Cal.App.2d 405, 409, 410, 128 P.2d 916; McCarthy v. Mt. Tecarte Land & Water Co., 110 Cal. 687, 43 P. 391.

[3] Even if we had found ourselves in agreement with defendant as to claimed irregularities of pleading or procedure reversal of the judgment would not have been justified. The issues were fully tried and the judgment is not for an excessive amount. National Ship completed its contract. Defendant, while acting as National Ship's agent, collected from the Navy a single amount for the extra work of the two companies. It would say now that because it buried National Ship's claim in its own it may keep all the money collected, since it is impossible to tell how much it collected for itself and how much for its principal. The reverse is true. It became liable for money had and received, Wagner v. Wedell, 3 Cal.App. 274, 85 P. 126, and could reasonably have been required to prove that it did not collect the entire amount of National Ship's charges.

Defendant filed a cross complaint seeking money and damages in the amount of $50,790.97. The findings on the cross complaint were adverse to defendant except as to a credit of $12,540.97, which was allowed. The findings on the cross complaint are not claimed to be unsupported by the evidence.

The judgment is affirmed.

We concur.

PARKER, WOOD and VALLÉE, JJ., concur.

36 Cal.2d 155

TURNER v. STATE BAR.
L. A. 21404.

Supreme Court of California, in Bank.
Oct. 17, 1950.

Proceeding by Maurice Turner to review the recommendation of Board of Governors of the State Bar of California that petitioner be suspended from the practice of law for three months. The Supreme Court, Per Curiam, held that communication by former attorney for judgment debtors with judgment creditors in consummating oral compromise agreement between the parties in absence and without consent of counsel of record for judgment creditors constituted improper communication upon a subject of controversy in violation of Rules of Professional Conduct and that suspension for three months was not too harsh.

Order in accordance with opinion.

1. Attorney and client ⇐32

Negotiations between former attorney of record for judgment debtors and judgment creditors in consummating oral compromise agreement between the parties, in absence and without consent of attorneys representing judgment creditors under contingent fee contract, involved questions as to form and terms of documents, particularly indemnity agreement to be executed by judgment creditors, and questions of what was necessary to protect rights of respective parties and hence constituted improper "communication upon a subject of controversy" in violation of Rules of Professional Conduct. Rules of Professional Conduct for State Bar, rule 12.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Communication Upon a Subject of Controversy".

2. Attorney and client ⇐32

Improper conduct of former attorney of record for judgment debtors acting at request of their counsel of record in communicating with judgment creditors in consummating oral compromise agreement between the parties in absence and without consent of counsel of record for judgment creditors was not excusable on ground that attorney was not then the attorney of record for judgment debtors and was acting in ministerial capacity. Rules of Professional Conduct for State Bar, rule 12.

3. Attorney and client ⇐32

Any right of judgment creditors to make a compromise settlement with judgment debtors in absence and without consent of creditors' counsel and regardless of contingent fee contract could not justify or excuse conduct of former attorney for judgment debtors in communicating with judgment creditors concerning a subject of controversy in consummating such agreement, knowing that judgment creditors had counsel of record who had not consented to settlement. Rules of Professional Conduct for State Bar, rule 12.

4. Attorney and client ⇐58

Suspension of attorney from practice of law for three months because he improperly communicated with a party represented by counsel upon a subject of controversy in absence and without consent of such counsel in violation of Rules of Professional Conduct was not too harsh under all the circumstances. Rules of Professional Conduct for State Bar, rule 12.

Walter S. Hilborn, Byron C. Hanna, Los Angeles, for petitioner.

Jerold E. Weil, San Francisco, for respondent.

PER CURIAM.

Petitioner seeks a review of the recommendation of the Board of Governors of the State Bar that he be suspended from the practice of law for a period of three months.

In 1947, after practicing in Illinois, petitioner was admitted to the bar in California. In 1948 he was charged with and found guilty of violating Rule 12 of the Rules of the California State Bar, 26 Cal.2d 35. This rule provides that a member of the State Bar "shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel. * * *"

The charge grew out of the following situation: In an action brought in Los

Angeles County by George W. Davis, his wife, and their copartner, Lebus, of Chicago, petitioner was one of the counsel of record for defendants, whom he had known in Chicago. Attorneys Dasteel and Dottenheim represented plaintiffs under a contingent fee contract whereby they were to receive 50% of "any amount recovered by suit, settlement, or otherwise," payment of which was secured by an assignment of "an undivided fifty percent (50%) interest in the proceeds of said claim and in any judgment recovered thereon."

In November, 1947, judgment was rendered in plaintiffs' favor in the sum of $95,000. Thereafter an appeal was taken by new counsel who were substituted in place of defendant and his associates. In January, 1948, execution was returned unsatisfied, and suit on the judgment was then started in Chicago to secure a levy on defendants' assets in Illinois. Both parties secured Chicago counsel to represent them in those proceedings. Petitioner and all attorneys representing the parties, both in Chicago and Los Angeles, knew of Dasteel and Dottenheim's contract for one-half the recovery.

While the appeal in Los Angeles and the Chicago action were pending the Davises requested Dasteel and Dottenheim to effect a settlement of the case. Although some discussions were had, no agreement resulted, and the Davises then began to negotiate directly with defendants in Chicago by long distance telephone. A few days prior to May 14 defendants made an offer to settle for $25,000, which the Davises accepted. Defendants then told the Davises to contact petitioner in Los Angeles, who would make out the closing papers. One of defendants' Chicago attorneys also telephoned petitioner and requested him to draw up a satisfaction of judgment, general release and indemnity agreement, giving him a general outline of the contents of these papers. Petitioner agreed to consummate the settlement as requested and in addition agreed to advance the $25,000 pending arrival of defendants' check in that amount. When Dasteel and Dottenheim were told by the Davises about defendants' offer, they objected to the settlement, declaring that their interest in the case was worth $25,000. Defendants' Los Angeles attorneys also learned of the proposed settlement and promptly informed petitioner they intended to withdraw from the case because the arrangements were being made in the absence and without the consent of Dasteel and Dottenheim.

On May 14, pursuant to a telephone call from petitioner, the Davises went to his office to effect the settlement. They told petitioner it was their understanding with defendants that they were to receive $20,000 and that $5,000 was to be set aside for Dasteel and Dottenheim who, they stated, had refused to agree to the settlement. The record shows that prior to the Davises' arrival petitioner had two checks made out—one for $20,000 and another for $5,000. They also told petitioner that later on they intended to make a settlement with Dasteel and Dottenheim and that they would credit the $5,000 toward that settlement. While the Davises remained at his office, petitioner had three telephone conversations with Dasteel, during which he told Dasteel that the Davises were in his office and were going to settle for $25,000, and that if Dasteel and Dottenheim would come over they would receive half that sum, but that if they did not do so he would retain $5,000 to protect defendants against their claim for attorneys' fees. Dasteel testified that he told petitioner that he could not take any steps in the matter without consulting Dottenheim, who was not then available, that petitioner's conduct was unethical and that he and Dottenheim would not agree to the settlement.

Various papers, including satisfaction of judgment, release and indemnity agreement, were then prepared by petitioner and executed by the Davises, who held a power of attorney from plaintiff Lebus. Whereupon petitioner gave the Davises a check for $20,000 and a memorandum stating that he was holding the other $5,000 on behalf of Dasteel and Dottenheim. During that afternoon petitioner tried unsuccessfully to place the $5,000 in escrow in a bank on behalf of Dasteel and Dottenheim. The $25,000 was advanced by petitioner, who did

not receive reimbursement thereof until two or three days after the settlement had been consummated.

The satisfaction of judgment was filed on May 27, 1948, but was subsequently set aside on motion of Dasteel and Dottenheim, who refused to accept the $5,000 held by petitioner. Thereafter they negotiated a settlement of their fees in the sum of $16,250, which included the money held by petitioner and additional funds contributed by both plaintiffs and defendants.

Petitioner urges the following points: (1) That there was no "subject of controversy" within the meaning of Rule 12 at the time petitioner dealt with the Davises because the action had already proceeded to judgment and the parties had orally agreed upon the terms of the settlement; (2) that petitioner acted only in a ministerial capacity in arranging consummation of the settlement; and (3) that plaintiffs were entitled to make a settlement with defendants in the absence and without the consent of their counsel and regardless of the contingent fee contract.

[1] The only real question is whether petitioner has violated Rule 12 as charged, and there seems little room for argument on that point. It is to be noted that the rule prohibits communication "upon a subject of controversy" with a party represented by counsel "in the absence and without the consent of such counsel." Petitioner not only "communicated" with the Davises, after inviting them to his office, but he drew up papers and had the Davises sign them, knowing that their counsel of record had specifically disapproved of the proposed settlement and had refused to participate therein. Although there had been an oral agreement to compromise for part of the amount of the judgment, this agreement did not include all the terms of the settlement, and there were several matters which were undecided such as the form and terms of the documents, particularly the indemnity agreement to be executed by the Davises, and questions as to what was necessary to protect the respective interests of the parties. These were all matters on which differences of opinion might have arisen. Until determination of these questions and consummation of the compromise, the interests of the parties were adverse. It is apparent, therefore, that petitioner's communication with the Davises regarding these matters pending consummation of the compromise was an improper communication "upon a subject of controversy" within the scope and meaning of Rule 12. See Carpenter v. The State Bar, 210 Cal. 520, 523, 292 P. 450; American Bar Association, Canons of Professional and Judicial Ethics [1947], pp. 8, 179–180, 229–230, 260–262; In re Atwell, 232 Mo.App. 186, 115 S.W.2d 527, 528; In re Maltby, 68 Ariz. 153, 202 P.2d 902, 903; Pirsig, Cases on Legal Ethics, p. 105.

[2] It cannot be said that petitioner's conduct was excusable on the ground that he was not then attorney of record for defendants or that he was acting in a ministerial capacity. He had previously been defendants' attorney of record, he was acting at the request of their counsel of record, and to all intents and purposes he was still acting for them and looking after their interests in the pending litigation. Although there is evidence that defendants' Chicago attorneys instructed petitioner as to the contents of the papers to be drawn by him, it is obvious that his activities were not limited to those of a mere scrivener and that, particularly in connection with the matters of indemnity and protection against the claims of Dasteel and Dottenheim, he was communicating with the Davises upon a subject of controversy.

[3] Petitioner relies strongly on his claim that plaintiffs were entitled to make a settlement with defendants in the absence and without the consent of their counsel and regardless of the contingent fee contract. The existence of such a right on the part of plaintiffs, however, could not justify or excuse petitioner's conduct in communicating with the opposing parties concerning a subject of controversy, contrary to Rule 12, when he knew that they had counsel of record who had not consented thereto.

[4] In view of all the circumstances, it cannot be said that a suspension of three months is too harsh. It is therefore ordered

that petitioner be suspended from the practice of the law in this state for a period of three months, effective thirty days after the filing of this order.



36 Cal.2d 196

CITY & COUNTY OF SAN FRANCISCO v. SAN MATEO COUNTY.

S. F. 17777.

Supreme Court of California, in Bank.

Oct. 20, 1950.

The City and County of San Francisco, a municipal corporation, brought an action against the County of San Mateo to recover real property taxes paid under protest. The Superior Court, Marin County, Edward I. Butler, J., rendered a judgment for defendant, and plaintiff appealed. The Supreme Court, Shenk, J., held that under constitutional provision that assessments upon property of another county of property lying without its jurisdiction shall be subject to review, equalization and adjustment by the State Board of Equalization, the City and County of San Francisco was required to exhaust its administrative remedy before the State Board of Equalization before instituting an action against the County of San Mateo to recover alleged illegal taxes levied against San Francisco's airport located in San Mateo County.

Affirmed.

Prior opinion 213 P.2d 505.

1. Taxation ⇐204(2)

The taxing power may not be extended to cover property under an exception to an exemption clause beyond that expressly included.

2. Taxation ⇐217

Under provision of Constitution that lands and improvements which are located outside of municipality and which are taxable at time of acquisition by a municipality should not be exempt except that no "improvements" of any character constructed by a purchasing municipality shall be taxed, quoted word included dirt fill placed on marsh land by City and County of San Francisco at its airport located in San Mateo County. Revenue and Taxation Code, § 105(a); Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Improvements".

3. Administrative law and procedure ⇐229 Taxation ⇐251, 451

Generally, a taxpayer seeking judicial relief from an erroneous assessment must have exhausted his remedies before administrative body empowered initially to correct, except where attempted assessment is a nullity because property is either tax exempt or outside jurisdiction, but resort to Board of Equalization is not rendered unnecessary by that fact alone.

4. Administrative law and procedure ⇐229 Taxation ⇐251

Under constitutional provision that all assessments of property belonging to a municipality without its jurisdiction shall be subject to review, equalization and adjustment by State Board of Equalization, where City and County of San Francisco paid taxes under protest to County of San Mateo for San Francisco's airport in San Mateo County, City and County of San Francisco should have pursued their administrative remedy before State Board of Equalization before instituting an action to recover alleged illegal tax. Revenue and Taxation Code, § 105(a); Const. art. 13, § 1.

Dion R. Holm, City Attorney, A Dal Thomson, Public Utilities Counsel, San Francisco, for appellant.

Gilbert D. Ferrell, Dist. Atty., San Mateo County, Louis B. Dematteis, John A. Bruning, Asst. Dist. Attys., Keith Sorensen, Civil Deputy, and A. S. Whitmore, Associate Counsel, all of Redwood City, for appellees.

Harold W. Kennedy, County Counsel, John D. Maharg, Deputy County Counsel, Los Angeles, Fred N. Howser, Atty. Gen., James E. Sabine, Deputy Atty. Gen., Dixwell L. Pierce, F. S. Wahrhaftig, Sacramento, amici curiae.

SHENK, Justice.

The plaintiff brought this action against the county of San Mateo to recover an alleged illegal proportion of the 1946–1947 taxes levied against the city's airport in San Mateo county claimed as exempt under Article XIII, section 1, of the state constitution. The county's demurrer to the complaint was sustained without leave to amend. Judgment for the defendant followed. The city has appealed.

The complaint alleges in substance that beginning in 1930 the city acquired large tracts of marsh, tide and submerged lands in San Mateo county for the purpose of utilizing the site as an airport; that the city expended $6,753,529 in raising the level of the land by dredging and filling operations, and making provision for drainage and drainage control; that these operations were completed before the first Monday of March 1946; that prior thereto the county had assessed the land on the basis of its condition when acquired and at the sum of $100,785.00; that in 1946 the land was assessed at $684,625.00 on the basis of its value prepared for use as an airport; and that the city paid the full tax under protest claiming an exemption as to the portion representing the increase in the assessment. The complaint alleges illegality as to that portion because, it is claimed, the fill constitutes an "improvement" and is therefore exempt under the constitutional provision. No proceeding was taken before the state board of equalization. The appeal presents two questions: (1) whether the raising of the level of the land by the filling operations was an improvement within the meaning of the constitution, and (2) whether the city should first have pursued the administrative remedy.

The first question presents a problem of public importance in the field of taxation under the constitutional amendment of 1914, and a decision thereon will serve as a guide generally to the taxing authorities of the state. Prior to 1914 section 1 of Article XIII of the constitution provided that property belonging to "the United States, this state, or to any county or municipal corporation within this state shall be exempt from taxation." In November 1914 the following was added to the exemption clause: "* * * except such lands and the improvements thereon located outside of the county, city and county, or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same * * * *provided,* that *no improvements of any character whatever* constructed by any county, city and county or municipal corporation shall be subject to taxation. All lands or improvements thereon, belonging to any county, city and county, or municipal corporation, not exempt from taxation, shall be assessed by the assessor of the county, city and county, or municipal corporation in which said lands or improvements are located, and said assessment shall be subject to review, equalization and adjustment by the state board of equalization." (Emphasis added.)

The question of the taxability of the portion of the land designated as the fill is resolved by the language of the 1914 amendment. Thereunder the county has power to assess only those municipally owned lands or improvements that are not exempt from taxation. If the fill constitutes an improvement as contemplated by the constitutional amendment, it is to that extent exempt, and the county had no power to take it into consideration in making the assessment. In arguing the taxability of all portions of the land including the fill, the county refers to section 105(a) of the Revenue and Taxation Code. That section states that the term "improvements" includes "All buildings, structures, fixtures, and fences erected on or affixed to the land, except telephone and telegraph lines." The county seeks to rest on the proposition that since land is land an addition thereto in the nature of a fill cannot be deemed to be an improvement in any sense. Reliance is placed on San Pedro etc., R. R. Co. v. City of Los Angeles, 180 Cal. 18, 179 P. 393. That case involved the taxability of a private leasehold of tidelands. Filled land between the shore line and the breakwater was on tideland. It was non-taxable as against the United States; and this court said it would be absurd to consider it as an improvement under a lease providing for

the removal of improvements at the expiration of the lease. The court was there concerned with the meaning of the term "improvements" under the code definition dealing with the taxation of private property interests. Such declarations are not controlling in the present case where the taxability of the city-owned property is dependent upon a special provision in the constitution. The sense in which words are used in that provision creating an exception to the general exemption from taxation of municipally owned property depends on the objective sought to be achieved. Rock Creek etc. Dist. v. County of Calaveras, 29 Cal.2d 7, 9, 172 P.2d 863.

[1] The history and purpose of the amendment have heretofore been considered by this court. Pasadena v. County of Los Angeles, 182 Cal. 171, 187 P. 418; Turlock Irr. Dist. v. White, 186 Cal. 183, 198 P. 1060; City and County of San Francisco v. County of Alameda, 5 Cal.2d 243, 54 P.2d 462; City and County of San Francisco v. San Mateo County, 17 Cal.2d 814, 112 P.2d 595; Rock Creek etc. Dist. v. County of Calaveras, supra, 29 Cal.2d 7, 172 P.2d 863. Prior to the amendment property acquired by outside municipalities had no place on the tax rolls of the county in which it was situated. It was readily appreciated that a continuation of the policy of complete exemption might impoverish counties extensively invaded by outside municipalities seeking acquisition of property for public use. A partial retention of the taxing power of the county as to such acquired property was therefore devised. The county was empowered to assess "such lands and the improvements thereon" "as were subject to taxation at the time of the acquisition" of the same by the city. Retained within the exemption provision were "improvements of any character whatever constructed" by the city. "Construction" or "constructed" means the creation of something that did not exist before as distinguished from replacement or repair. City and County of San Francisco v. San Mateo, supra, 17 Cal.2d at 819, 112 P.2d at page 596, citing cases. The obvious purpose was to permit the assessment of the property which was in existence at the time it was acquired by the city. The assessment in successive years of that much of the municipally owned property was made subject to review, equalization and adjustment. The phrase "improvements of any character whatever" must be held to include any addition (i. e. excluding matters of repair and replacement) to the property as it was when acquired. The amendment does not define "improvements" beyond the descriptive language "improvements of any character whatever". It is difficult to perceive what more inclusive language could have been employed to express the intent to preserve to the county a continuation of the property on the tax rolls as a source of revenue restricted, however, in each successive year to an equalized valuation of the property before the addition of any construction. The manifest intention in adopting the amendment was that if any such addition or improvement was not there at the time of acquisition, it was not taxable thereafter. To restrict the meaning of "improvements" to that defined elsewhere than in the constitution would be to defeat that purpose. If the invoked restricted meaning was intended the broader language of inclusion need not have been employed. The taxing power may not be extended to cover property under the exception to the exemption clause beyond that expressly included. City of Pasadena v. County of Los Angeles, supra, 182 Cal. at 174, 187 P. 418. It is clear that the fill was a constructed addition to land and not merely repair or replacement. A contrary holding would permit a county to tax an outside municipality for substantial construction confined to raising the land level by fill and other means at a cost of millions of dollars, a result which, if language means anything, was intended to be avoided by the 1914 amendment.

[2] It therefore appears from the facts alleged in the complaint that the fill which raised the level of the land for use as an airport was not "such lands" and "improvements" as were "subject to taxation at the time of the acquisition", but was an im-

provement "constructed" by the city and therefore exempt from taxation under the constitutional amendment.

The fact that the first question is decided in accordance with the plaintiff's contentions does not, however, justify a reversal of the judgment in this particular case, for the reason that the second question must be resolved in favor of the defendant.

[3, 4] Section 1 of Article XIII of the Constitution provides that the assessment of city owned lands "shall be subject to review, equalization and adjustment by the state board of equalization." An administrative remedy is thus provided. One ground of the demurrer is that the complaint is insufficient because it fails to allege that the administrative remedy has been pursued. In the recent case of Security-First National Bank v. County of Los Angeles, 1950, 35 Cal.2d 319, 320, 217 P.2d 946, 947, this court stated: "It is the general rule that a taxpayer seeking judicial relief from an erroneous assessment must have exhausted his remedies before the administrative body empowered initially to correct the error. * * * An exception is made when the attempted assessment is a nullity because the property is either tax exempt or outside the jurisdiction. * * * But resort to the board of equalization is not rendered unnecessary by the fact that, as in the present case, the error is one in the classification of property" and the tax is assailed on the ground that it is in violation of constitutional mandates. The omissions in the above quotation are the citations of numerous authorities in support of each statement made. The state board of equalization has the power "initially" to make a correction of the error alleged in this case, and the facts do not bring it within any exception noted in the authorities cited. It is not claimed that the assessment is a nullity in toto. An adjustment is sought by virtue of an erroneous inclusion of exempt improvements with taxable lands. If the city was dissatisfied with the assessment as an accumulated increase in the value of the taxable property, it was necessary to apply to the state board for review and adjustment prior to pursuing the remedy for refund of taxes paid under protest. Luce v. City of San Diego, 198 Cal. 405, 245 P. 196; Los Angeles etc., Corp. v. Los Angeles, 22 Cal.App.2d 418, 71 P.2d 282. We therefore have a problem of "equalization and adjustment" confided by the constitution to the state board of equalization. It is the province of the board to "adjust" the assessment so that the exempt and the non-exempt portions of the property be properly segregated.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.



36 Cal.2d 202

THORSBY et al. v. BABCOCK.
S. F. 18192.

Supreme Court of California, in Bank.
Oct. 20, 1950.

As Modified Oct. 23, 1950.

Alice Jean Thorsby and Carl E. Thorsby brought action against Williston A. Babcock, wherein the plaintiffs obtained a judgment against the defendant. The defendant claimed that proceeds from sale of defendant's homestead were exempt from execution because of homestead statutes, and the plaintiffs moved for a determination of the validity of the claim for exemption. The Superior Court of Contra Costa County, Harold Jacoby, J., denied the exemption, and the defendant appealed. The Supreme Court, Edmonds, J., held that defendant's exemption was not lost by lapse of time because the proceeds of the sale had been tied up in litigation for more than the statutory period of six months because of no fault of the defendant.

Order reversed with directions.

Prior opinion 217 P.2d 696.

1. Statutes ⇐184

The purpose of a law must be considered in determining the legislative intention.

2. Homestead ⇐5

A homestead statute, being of a remedial and humane character, should be given a liberal construction in favor of the exemptions created. Civ. Code, §§ 1242, 1243, 1265, 1265a; Probate Code, §§ 1435.1–1435.3, 1435.9; Const. art. 17, § 1.

3. Homestead ⇐5

The object of all homestead legislation is to provide a place for a family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the importunity of their creditors. Civ. Code, §§ 1242, 1243, 1265, 1265a; Probate Code, §§ 1435.1–1435.3, 1435.9; Const. art. 17, § 1.

4. Homestead ⇐5

The benign object of homestead statutes is to protect the home of the owner from forced sale, and not to withdraw from the reach of creditors property of the debtor as a source of revenue for support of himself or family. Civ. Code, §§ 1242, 1243, 1265, 1265a; Probate Code, §§ 1435.1–1435.3, 1435.9; Const. art. 17, § 1.

5. Homestead ⇐56

The owner of a homestead is authorized to substitute one family home for another without losing his homestead exemption. Civ. Code, §§ 1242, 1243, 1265, 1265a; Probate Code, §§ 1435.1–1435.3, 1435.9; Const. art. 17, § 1.

6. Homestead ⇐15

Where vendor of homestead filed suit within three weeks after sale to quiet title to proceeds of sale which title company, as escrow holder, refused to pay over to vendor because of a judgment against vendor in favor of judgment creditors and because of attachment which bank had levied against homestead, and vendor, through no fault of his own, secured a judgment for the proceeds of the sale only eight months after sale, homestead rights of vendor in proceeds of sale where not lost because of lapse of time under statute exempting proceeds of sale of homestead for only six months after sale. Civ. Code, §§ 1242, 1243, 1265, 1265a; Probate Code, §§ 1435.1–1435.3, 1435.9; Const. art. 17, § 1.

Phillips, Munck & Niemand and Carl B. Munck, all of Oakland, for appellant.

St. Sure & Moore and Richard B. McDonough, all of Oakland, for respondents.

EDMONDS, Justice.

Williston A. Babcock is the judgment debtor in an action brought by Carl E. Thorsby and his wife. After the entry of judgment, Babcock sold real property upon which he had placed a homestead. The Thorsbys are endeavoring to obtain the proceeds of the sale in satisfaction of the judgment, and the appeal is from an order determining that the money is not exempt from execution.

The facts are in dispute. It appears that at the time of the sale, in addition to the Thorsby judgment a writ of attachment had been levied by the Bank of America against the property. The sale was consummated through an escrow and, because of the judgment and attachment, the title company which was acting as escrow holder refused to pay over the proceeds to Babcock.

Babcock then filed suit to quiet title to the fund, claiming the exemption provided by section 1265 of the Civil Code. The Thorsbys, Bank of America and the title company were named as defendants.

Approximately eight months after the property was sold, judgment was entered in favor of Babcock. It was determined that the liens of the Thorsbys and the Bank of America were subject to the homestead filed by Babcock.

Before the decision in the suit to quiet title, but more than six months after the sale of the realty, the Thorsbys levied execution on the money held by the title company. On the day after judgment was rendered in that suit, Babcock demanded from the sheriff the proceeds from the sale upon

the ground that they are exempt from execution. The Thorsbys promptly moved for a determination of the validity of the claim for exemption. The court denied the exemption and the appeal is from that order.

Babcock contends that the ruling was erroneous because the money represents the amount received from the sale of a valid homestead, Civ. Code, sec. 1265. He argues that "A creditor should not be permitted, by delaying payment of proceeds to a homestead claimant through litigation for more than six months, to destroy the exemption of such proceeds." Relying upon section 1265 of the Civil Code which exempts the proceeds from sale of a homestead for the period of six months, he reasons that "the time during which he cannot obtain the proceeds because they are under the control of a court looking into the validity of the exemption should be no part of such period." The respondent asserts that "The clear meaning of the homestead statute should not be circumvented by any transaction between the judgment debtor and third parties."

[1, 2] Section 1265 of the Civil Code provides, in part, that "* * * should the homestead be sold by the owner, the proceeds arising from such sale to the extent of the value allowed for a homestead exemption as provided in this title shall be exempt to the owner of the homestead for a period of six months next following such sale." The facts shown by the present record do not bring Babcock within the express terms of this section. However, the purpose of a law must be considered in determining the legislative intention, and a homestead statute, being of a remedial and humane character, should be given a liberal construction in favor of the exemptions created. Greenlee v. Greenlee, 7 Cal. 2d 579, 61 P.2d 1157; Yager v. Yager, 7 Cal.2d 213, 60 P.2d 422; Warner v. Warner, 144 Cal. 615, 78 P. 24.

[3] By the Constitution, the legislature is directed to "protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families." Cal. Const., Art. XVII, section 1. "The object of all homestead legislation is to provide a place for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the importunity of their creditors." In re Estate of Fath, 132 Cal. 609, 613, 64 P. 995, 997.

[4] To effectuate the protection of the family unit through a homestead exemption the owner's freedom of disposition is limited, Civ. Code, sections 1242, 1243; Prob. Code, sections 1435.1–1435.3, 1435.9, and the use of the property after his death is regulated for the benefit of his family. Civ. Code, section 1265. "The benign object of the statute was to protect *the home* of the owner from forced sale, and not to withdraw from the reach of creditors property of the debtor as a source of revenue for the support of himself or family." Maloney v. Hefer, 75 Cal. 422, 424-425, 17 P. 539, 540.

[5] However, in addition to exempting "the home", the legislature has included protection of the proceeds arising from the sale of the homestead by the owner "* * to the extent of the value allowed for a homestead exemption * * * for a period of six months next following such sale." Civ.Code, section 1265. The obvious purpose of that exemption is stated in section 1265a which provides: "If the proceeds arising from the sale of property selected as a homestead are used for the purchase of real property within the period of six months following such sale, the property purchased may be selected as a homestead in the manner provided in this title within the period of six months following such sale, and such selection, when the declaration has been filed for record, shall have the same effect as if it had been created at the time the prior declaration of homestead was filed for record." Read together, the two sections allow the owner of the homestead to substitute one family home for another without losing his exemption.

Although most of the states have legislative provisions commonly referred to as

homestead laws, only a few of them extend the exemption to the proceeds from a voluntary sale. E. g., Ill.Stat.Ann. c. 52, § 6; Miss. Code Ann. § 329; Va. Code Ann. § 6546. In some states the proceeds retain the exemption only if reinvested in other real property to be used as a home. Similarly, statutes relating to proceeds from the forced sale of property subject to a homestead, usually exempt the proceeds to an amount equal to the maximum value permitted to be claimed for homestead purposes. But in many jurisdictions such exemption is allowed only if the proceeds are reinvested in other property within a reasonable or specified period of time. Mo. Rev.Stat.Ann. § 619; N.J.Rev.Stat. 2.26–121, N.J.S.A.; and see cases collected in Notes, 1 A.L.R. 483; 46 A.L.R. 814; 83 A.L.R. 54. Statutes not requiring a reinvestment of proceeds from the sale as a condition to their exemption have been severely criticized because, in the absence of such restriction, the debtor may use the the proceeds to the detriment of his creditor and without the benefit to his family which the statute was designed to protect. Haskins, Homestead Exemptions (1950) 63 Harv.L.Rev. 1289.

Although, in granting an exemption to the proceeds of a voluntary sale of the homestead for a period of six months, Civ. Code, section 1265, the legislature has imposed no requirement of reinvestment, obviously the true purpose of giving the owner that time is to permit him to move his family to another home with the retention of protection from forced sale. Statutes not granting such exemption tend to immobilize the debtor to the detriment of his entire family, for whom the homestead provisions were intended to be a benefit. See Gray v. Deal, 50 Okl. 89, 95, 151 P. 205. In clarification and furtherance of this policy, section 1265a of the Civil Code permits the filing of a declaration of homestead on the newly selected property. If done within six months of the sale of the old home, and with the proceeds from the sale of it, the declaration "* * * shall have the same effect as if it had been created at the time the prior declaration of homestead was filed for record."

Clearly, the Legislature has not required a purchase of other property immediately. Rather it has given the seller the reasonable time of six months within which to complete the transaction. However, the legislative purpose is thwarted if the proceeds from the sale of the homestead cannot be obtained by the owner, through no fault of his own, during the six months period.

In the present case, Babcock had no control over or use of the money derived from the sale of his homestead until approximately eight months after the sale. During that time it was impossible for him to reinvest in a new home for his family and obtain exemption of it. In effect, he did not have the statutory right to hold the proceeds of the voluntary sale of his homestead for six months, free from levy by his creditors, and the opportunity to have the exemption continue by investing the money in a new home. He was not responsible for the circumstances which prevented him from obtaining the proceeds from the sale of his homestead. Within three weeks after the sale he filed suit to quiet title to the money and there is no suggestion that he, in any way, hindered or delayed the progress of the litigation. However final determination of the matter required the not unusual time of eight months.

[6] Giving full effect to the purposes of sections 1265 and 1265a of the Civil Code, it would be unreasonable to hold that Babcock should be penalized because litigation required by the escrow holder's refusal to recognize his rights has consumed more than six months. Under the circumstances shown by this record, his homestead rights have not been concluded by this lapse of time.

The order is reversed with directions to the trial court to make an order directing the Sheriff of Contra Costa County to pay to Williston A. Babcock the proceeds from the sale of his homestead property.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

KEY SYSTEM TRANSIT LINES v. SUPERIOR COURT OF STATE, IN AND FOR ALAMEDA COUNTY.

S. F. 17922.

Supreme Court of California, in Bank.

Oct. 18, 1950.

Rehearing Denied Nov. 16, 1950.

The Key System Transit Lines, a corporation, filed a petition to secure a writ of prohibition to prevent the exercise of jurisdiction by the Superior Court of the State in and for the County of Alameda in the trial of an action to recover damages for personal injury brought by Grace M. and Collis P. Joseph against petitioner. The Supreme Court, Shenk, J., held that where trial court, in entering its order of dismissal on ground that action was not brought to trial within two years from filing time, overlooked fact that parties had entered into a stipulation setting case for trial, and that there was a congested trial calendar at that time, same trial court had jurisdiction to entertain a motion to vacate order of dismissal.

Peremptory writ denied.

Traynor, Edmonds and Spence, JJ., dissented.

1. Judgment ⇐345

The policy requiring finality of judgments and orders, where a judgment or order is entered after a trial on merits of litigation is not deemed controlling where judgment or order set aside was in exercise of a discretionary power not based on merits of action.

2. Judgment ⇐137

A trial court has power independently of statute to set aside a default judgment entered through court's inadvertence.

3. Judgment ⇐363

Where court is deceived or is laboring under a mistake or misapprehension as to state of record or as to existence of extrinsic facts upon which its action is predicated, it has inherent power to vacate a judgment which would not otherwise have been rendered.

4. Judgment ⇐363

Where parties entered into a stipulation setting case for trial, more than two years from filing of complaint, and it was within trial court's judicial knowledge that trial calendar was in a congested state, but both matters were inadvertently overlooked by trial court in granting a motion to dismiss action for failure to bring it to trial within two years from filing of complaint, same trial court had jurisdiction to entertain a motion to vacate order of dismissal. Code Civ.Proc. §§ 473, 583.

Donahue, Richards, Rowell & Gallagher, and Bryant M. Bennett, Oakland, for petitioners.

Emmet R. Burns, William C. Burns, Fred Rosser, San Francisco, F. E. Kilpatrick, Oakland, for real Parties in Interest.

SHENK, Justice.

The petitioner seeks the writ of prohibition to prevent the exercise of jurisdiction by the respondent court in the trial of an action to recover damages for personal injuries brought by Grace M. and Collis P. Joseph.

The action against the petitioner was commenced on November 15, 1945. Summons was served on November 29, 1946, concurrently with a substitution of attorneys. The defendant's answer was filed on January 7, 1947. On January 8, 1948, the petitioner noticed a motion to dismiss the action for failure to bring it to trial within two years from the time of filing, section 583, Code Civ.Proc. On January 15th the motion was granted. On January 31st the plaintiffs filed a notice of motion to vacate the order of dismissal. The motion was granted by the same judge who made the former order and subsequently the plaintiffs sought to set the cause for trial. The defendant, petitioner herein, thereupon filed the present petition alleging that the respondent court had no jurisdiction to vacate the prior order of dismissal.

No appeal was taken from either order. It is the theory of the petitioner that the court exceeded its jurisdiction in vacating the order of dismissal; that the order was appealable, Southern Pacific R. R. Co. v. Willett, 216 Cal. 387, 14 P.2d 526, and was subject to be set aside only on appeal or by

a motion pursuant to section 473 of the Code of Civil Procedure; that neither the motion to vacate nor the order granting the motion was expressly or otherwise based on any ground permitted by section 473, and that both the motion and the order were merely reagitation and involved a determination of the same issues presented on the hearing of the motion to dismiss. The respondent contends that although section 473 was not expressly mentioned on the motion to vacate, the facts as shown by the record indicate that the court's jurisdiction could properly be deemed to have been exercised under that section or pursuant to its inherent power, and that this court should conclude that it was so exercised.

The order granting the motion to dismiss was based on the court's findings that more than two years had expired since the commencement of the action; that the delay in bringing the action to trial had been inexcusable; that the defendant's rights had been greatly prejudiced, and that during the period since the filing of the complaint the defendant had an attorney maintaining offices in the city of Oakland.

The record shows that the following additional matters were considered on the motion to vacate the order: On January 9, 1947, and after the filing of the defendant's answer, a memorandum to set the case for trial was filed. On December 22, 1947, a stipulation was signed by the attorneys for both parties selecting January 12, 1948, as the trial date, and the case was set for trial accordingly. The defendant's motion to dismiss was made four days before the trial date agreed upon and the case was put off calendar because of the pendency of the motion. Because of the congested state of the trial calendar an earlier date for the trial court could not be procured.

In the vacating order the court recited the additional matters and "upon a more complete presentation of the facts" concluded that there was no unnecessary delay in bringing the action to trial, nor any fault on the part of the plaintiffs, nor any prejudice to the rights of the defendant, and that to dismiss the action without a hearing on the merits would work an injustice upon the plaintiffs.

Section 583 of the Code of Civil Procedure vests in the court the discretionary power to dismiss an action for want of prosecution on motion of the defendant, after due notice to the plaintiff, whenever the latter has failed to bring the action to trial for two years after the complaint was filed.

A consideration of the jurisdictional issue will determine the outcome without the necessity of considering other questions. A stipulation of the parties setting the case for trial, entered into after the expiration of two years from the filing of the complaint, was a matter of record in the respondent court. It must be assumed that the congested state of the trial calendar was within the court's judicial knowledge. It is also shown by the record that both matters of fact had been inadvertently overlooked by the court in making the first order. The petitioner contends that such inadvertence and mistake were not available to set aside that order under section 473 as action taken against a party through his mistake, inadvertence, surprise or excusable neglect nor to support the subsequent order as an exercise of the court's inherent power to correct action taken through its own inadvertence or mistake of fact. The petitioner urges that any inadvertence or mistake here appearing is a matter solely of judicial error reviewable on appeal from the first order.

[1] The arguments of the petitioner invoke application of the policy requiring finality of judgments and orders. That policy generally controls where a judgment or order is entered after a trial on the merits of the litigation. Drinkhouse v. Van Ness, 202 Cal. 359, 369, 260 P. 869; Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988. But the policy has not been deemed controlling where the judgment or order set aside was in the exercise of a discretionary power not based on the merits of the action. The recognized policy in such cases is that which requires a trial on the merits wherever possible. The latter policy has been said

to be the basis for the enactment of the provisions of section 473. Bowman v. Bowman, 29 Cal.2d 808, 813, 178 P.2d 751, 170 A.L.R. 246; Riskin v. Towers, 24 Cal.2d 274, 279, 148 P.2d 611, 153 A.L.R. 442. In giving effect to that policy appellate courts have generally refrained from interfering on jurisdictional grounds with the trial court's reconsideration of a discretionary order not based on the merits of the litigation. See Kenney v. Kelleher, 63 Cal. 442; De la Beckwith v. Superior Court, 146 Cal. 496, 80 P. 717; Glougie v. Superior Court, 169 Cal. 675, 147 P. 972; Harth v. Ten Eyck, 16 Cal.2d 829, 108 P.2d 675; McDonald v. Severy, 6 Cal.2d 629, 631, 59 P.2d 98; Watkins v. McCartney, 70 Cal.App. 137, 232 P. 982.

[2, 3] This court has also recognized the power of the trial court independently of statute to set aside a default judgment entered through the court's inadvertence. Phillips v. Trusheim, 25 Cal.2d 913, 916, 156 P.2d 25. In 1 Freeman on Judgments (5th Ed.) p. 432, it is said that where the court is deceived or is laboring under a mistake or misapprehension as to the state of the record or as to the existence of extrinsic facts upon which its action is predicated, it has inherent power to vacate a judgment which would not otherwise have been rendered. That principle was applied by this court in setting aside one of its own judgments almost three years after it was rendered because the first order was made on the theory that the defendant had not moved for a new trial when in fact he had done so. In re Rothrock, 14 Cal.2d 34, 92 P.2d 634.

[4] Here the later order was in effect based on the inadvertence and mistake of the court in overlooking matters of record and facts within the court's judicial knowledge. On its face the record does not disclose invalidity for lack of jurisdiction. The order was within the court's general jurisdiction. It was made in the exercise of its inherent power under that jurisdiction. Factual sufficiency to support the exercise of the power is not controverted by the record. The intendments which govern are controlling to support the propriety of the exercise of jurisdiction. Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951.

The peremptory writ is denied.

CARTER, J., concurs.

GIBSON, Chief Justice (concurring).

Ordinarily, if there is a right to an immediate review by appeal that remedy is considered adequate, and prohibition will not lie unless the petitioner can show some special reason why the remedy of appeal is rendered inadequate by the particular circumstances of his case. See Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951. The order under attack, from which no appeal was taken, is a special order after final judgment which petitioner claims was in excess of jurisdiction and void. It was held in the Phelan case, which was decided after petitioner applied for the writ herein, that such an order is appealable, but prior thereto its appealability was uncertain. Although it has now been established that petitioner had an adequate remedy by appeal, the availability of that remedy was not clear at the time the order of vacation was made and, accordingly, we should permit the writ to be used to test the question of jurisdiction. Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951.

The court's jurisdiction to proceed with the trial depends on whether it had power to vacate the prior judgment of dismissal. In addition to the authority given by Code of Civil Procedure section 473 to set aside judgments or orders which are void, or are the result of clerical mistake or of a party's mistake, inadvertence, surprise or excusable neglect, a trial court has inherent power under some circumstances to set aside judgments and orders which it has made inadvertently and which are not actually the result of the exercise of judgment. Bastajian v. Brown, 19 Cal.2d 209, 214–216, 120 P.2d 9; Carpenter v. Pacific Mut. Life Ins. Co., 14 Cal.2d 704, 708–710, 96 P.2d 796; In re Estate of Goldberg, 10 Cal.2d 709, 713–716, 76 P.2d 508; Carter v. J. W. Silver Trucking Co., 4 Cal.2d 198, 203–205, 47 P.2d 733; Lauchere v. Lambert, 210 Cal. 274, 276–278,

291 P. 412; Robson v. Superior Court, 171 Cal. 588, 590–593, 154 P. 8; Wiggin v. Superior Court, 68 Cal. 398, 400–403, 9 P. 646. Error which is essentially judicial, however, rather than clerical or inadvertent, may not be corrected under the court's inherent power but only under appropriate statutory procedure, and a court may not vacate a judgment or order merely because it failed to consider or give the proper weight or effect to some evidence before it. Phillips v. Trusheim, 25 Cal.2d 913, 916, 156 P.2d 25; Bastajian v. Brown, 19 Cal.2d 209, 214–216, 120 P.2d 9; In re Estate of Burnett, 11 Cal. 2d 259, 262, 79 P.2d 89; Stevens v. Superior Court, 7 Cal.2d 110, 112–114, 59 P.2d 988; Dyerville Mfg. Co. v. Heller, 102 Cal. 615, 617, 36 P. 928; Egan v. Egan, 90 Cal. 15, 20–22, 27 P. 22; see Drinkhouse v. Van Ness, 202 Cal. 359, 369, 260 P. 869.

Here the order of vacation does not affirmatively show that it was made on grounds recognized by section 473 or on the ground that there had been some judicial inadvertence. However, since petitioner is making a collateral attack upon the order, we must indulge in every presumption in support of the order, and any condition of facts consistent with its validity and not affirmatively contradicted by the judgment roll will be presumed to have existed. Phelan v. Superior Court, 35 Cal.2d 363, 217 P. 2d 951; Wells Fargo & Co. v. City etc., of S. F., 25 Cal.2d 37, 40, 152 P.2d 625; Borenstein v. Borenstein, 20 Cal.2d 379, 381, 125 P.2d 465. It is, of course, true that where the trial court's order shows without question the basis for the action, it will be deemed to speak the truth on that point. See Hahn v. Kelly, 34 Cal. 391, 405 et seq., 94 Am.Dec. 742; Kaufmann v. California Mining etc. Syn., 16 Cal.2d 90, 93–94, 104 P. 2d 1038; Grinbaum v. Superior Court, 192 Cal. 528, 546–550, 221 P. 635; Barber Asphalt Paving Co. v. Costa, 171 Cal. 138, 140, 152 P. 296; Johnston v. Southern Pacific Co., 150 Cal. 535, 537, 89 P. 348, 11 Ann.Cas. 841.

Under the general rule on collateral attack, there can be no question that, if the trial judge had merely ordered vacation of the judgment, without making any recitals or statements that might be construed as reasons for his action, the presumption in favor of validity would prevail, and the order of vacation would stand. There is language, however, in Treat v. Superior Court, 7 Cal.2d 636, 641, 62 P.2d 147, to the effect that an order made on the ground of judicial inadvertence should so specify, "and that in the absence of any such statement, the action of the trial court cannot be upheld on such a hypothesis." No authority was cited and no reason was given for this holding, and it is clearly in conflict with the long recognized general principle relating to collateral attack, that in the absence of contrary statements in the record we must presume any condition of facts consistent with the validity of a judgment or order of a court of general jurisdiction. The requirement of an express recital of the ground of judicial inadvertence constitutes an unwarranted refinement of the general rule, cf. Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951, and this portion of the Treat case should not be followed.

The principal question in this case, therefore, is whether the recitals in the order of vacation preclude application of the presumption in favor of validity.

The order recites that it appeared to the court "upon further consideration and a more complete presentation of the facts" that there was no unnecessary or inexcusable delay on the part of plaintiffs, and that it further appeared "after full consideration of the facts and personal knowledge of the Court of the time required to bring such an action to trial" that the rights of defendant had not been prejudiced through any fault of the plaintiffs. We cannot tell what facts were presented or considered on the second hearing, and for all that appears in the record a showing may have been made which justified vacation of the order under section 473 or on the ground of judicial inadvertence. We are not required to speculate as to what showing was made or as to what grounds were relied upon by the court in support of its action. There is nothing in the recitals of the order of vacation or elsewhere in the record which would foreclose the presumption of any state of facts necessary to support the order as a proper exercise of the court's statutory or inherent pow-

ers, and we must assume that such facts were before the trial court as would justify it in vacating the judgment of dismissal.

For these reasons I concur in the denial of the peremptory writ.

SCHAUER, J., concurs.

TRAYNOR, Justice.

I dissent.

On January 8, 1948, petitioner, defendant in an action for damages, noticed a motion to dismiss the action under section 583 of the Code of Civil Procedure for failure to bring it to trial within two years from the time of filing. On January 15th, after a hearing at which both parties were represented by counsel, it was ordered that the action be dismissed. The judgment of dismissal was appealable. Southern Pacific R. R. Co. v. Willett, 216 Cal. 387, 14 P.2d 526; Neustadt v. Skernswell, 99 Cal. App.2d 293, 221 P.2d 694; Code Civ.Proc. § 581d. Instead of appealing, however, plaintiffs filed a notice of motion to vacate the judgment. On March 8, 1948 the trial court granted the motion to vacate. No appeal was taken from the order vacating the judgment of dismissal. Petitioner contends that the order was in excess of jurisdiction and seeks a writ of prohibition to prevent the trial of the action. It is now settled that the order was appealable whether or not it was void, Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951, but it was uncertain at the time the order was entered whether petitioner had a remedy by appeal. Petitioner is therefore permitted to challenge the jurisdiction of the court in this proceeding. Phelan v. Superior Court, supra.

Section 473 of the Code of Civil Procedure specifies the grounds upon which the trial court may relieve a party from a previously entered judgment or order. "The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken.

"The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order."

In addition to its powers under Section 473, the trial court may correct an inadvertent mistake within a reasonable time after entry of the judgment or order. "If the judgment was entered * * * through the inadvertence or improvidence of the trial court, it had the power independently of statute to correct the mistake by amending or setting aside the judgment [citations], as this presents no question of judicial review upon the merits. However, judicial error which occurs in the rendition of orders or judgments which are the fault of an exercise of judicial discretion may not be corrected except by statutory procedure. Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988, 990." Phillips v. Trusheim, 25 Cal.2d 913, 916, 156 P.2d 25, 26.

The basic question in this case, therefore, is whether the order vacating the judgment of dismissal was authorized under Section 473 or on the ground of judicial inadvertence. Neither the motion nor the order of vacation was based on any ground mentioned in Section 473. This case is not one in which a judgment was taken against a party "through his mistake, inadvertence, surprise or excusable neglect", or in which there were "clerical mistakes," or in which there was a void order that could be set aside under the last paragraph of the section.

Nor does it appear that the court was deceived or that it acted under any mistake as to the state of the record. The judgment of dismissal was entered after a contested hearing at which counsel for both parties were present. If plaintiffs were not at fault in failing to bring the action to

trial, it was their duty to present evidence to show the facts. If they failed to do so, or if the court failed to give due weight to their evidence, they cannot claim that the court acted inadvertently. Plaintiffs' sole contention in their motion to vacate and supporting affidavit was that the court failed to take into account the crowded trial calendar and the consequent impossibility of bringing the action to trial sooner. The crowded calendar, however, was clearly within the knowledge of both the court and counsel. There is no claim that the first order was not the one intended by the court or that it was made irregularly. The court changed its earlier ruling because it had failed to give due weight to the crowded trial calendar, a matter clearly before it when it made its first ruling. That failure was judicial error not subject to correction on a motion to vacate.

It is suggested that the failure of a trial court to specify the grounds upon which it vacated an earlier order prevents this court from affirming the later order. Treat v. Superior Court, 7 Cal.2d 636, 641, 62 P.2d 147. We have recently reiterated, however, that an order attacked collaterally, as here by prohibition, may be supported by a presumption of facts consistent with its validity. Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951; Wells Fargo v. San Francisco, 25 Cal.2d 37, 40, 152 P.2d 625. It cannot reasonably be contended, however, that this presumption will prevail over contrary statements in the record. Phelan v. Superior Court, supra, 35 Cal.2d at page 373, 217 P.2d 951. The record in this case shows beyond the protective reach of any presumption of validity that the order of March 8, 1948 was an attempt to re-examine the issues decided on January 15, 1948. The order of dismissal of that date was made because it appeared to the trial court after a proper hearing that "the delay in bringing said action to trial has been inexcusable and has not been caused by the defendant Key System, Inc., * * * that the rights of the defendant * * * have been greatly prejudiced * * *" Plaintiffs' sole ground for the motion to vacate was that the original order was an abuse of discretion resulting in injustice. The motion was supported by an affidavit explaining plaintiffs' failure to prosecute the action. The affidavit relied upon the crowded trial calendar and emphasized that the trial court had discretion to deny the motion to dismiss. Nothing was brought before the trial court in the notice of motion to vacate or the supporting affidavit that would justify an order under Section 473, so that it can only be inferred that the trial court was asked to reverse its earlier order because of judicial error in that ruling, namely, failure to give due weight to the congested trial calendar.

The order itself sets forth the grounds therefor and negatives the presumption that it was based on grounds specified by Section 473 or other proper grounds. It recites: "It Now Appearing to the Court upon further consideration and a more complete presentation of the facts that there was no unnecessary delay on the part of plaintiffs in bringing this action to trial or any delay on the part of plaintiffs that was inexcusable, and the Court being further of the opinion that to dismiss said action without any hearing on the merits would work an injustice upon plaintiffs through no fault of their own; and It Further Appearing to the Court after full consideration of the facts and personal knowledge of the Court of the time required to bring such an action to trial in this County that the rights of the defendant have not been prejudiced through any fault of the plaintiffs in this action." Thus, the trial court did not rely upon "[a party's] mistake, inadvertence, surprise or excusable neglect", or mention that the order was a "clerical mistake" or that it was void or that it was entered by inadvertence. The court speaks of "further consideration" and "a more complete presentation of the facts," "full consideration of the facts" and "personal knowledge of the Court of the time required to bring such an action to trial." Yet the crowded condition of the trial calendar must have been within the "personal knowledge of the Court" on January 15th, when the order of dismissal was granted. In the light of the grounds urged in the notice of motion to vacate

and the supporting affidavit, the quoted language of the order compels the conclusion that the court granted the motion to rectify an earlier decision, made after a full hearing and argument, but later deemed erroneous because of the court's failure to give due weight to the crowded trial calendar. It cannot be presumed, therefore, that the court was acting under section 473 or on the ground of judicial inadvertence. If the presumption is controlling in this case, where the grounds on which the order was based are so clear, it will preclude collateral attack on virtually any order vacating a judgment.

It is nevertheless suggested that the "policy requiring finality of judgments and orders," which generally controls when a judgment or order is entered after a trial on the merits, "has not been deemed controlling where the judgment or order set aside was in the exercise of a discretionary power not based on the merits of the action. The required policy in such cases is that which requires a trial on the merits wherever possible." It is true that there is a policy favoring disposition of cases on their merits. That policy finds expression in the provisions of the Code of Civil Procedure section 473, which grants relief within a prescribed time limit to parties defeated by their "mistake, inadvertence, surprise or excusable neglect." Bowman v. Bowman, 29 Cal.2d 808, 813, 178 P.2d 751, 754, 170 A.L.R. 246.

It does not follow, however, that "in giving effect to that policy appellate courts have generally refrained from interfering on jurisdictional grounds with the trial courts' reconsideration of a discretionary order not based on the merits of the litigation." In Phillips v. Trusheim, 25 Cal.2d 913, 156 P.2d 25; Wells Fargo v. City and County of San Francisco, 25 Cal.2d 37, 152 P.2d 625; and Bowman v. Bowman, 29 Cal.2d 808, 178 P.2d 751, 170 A.L.R. 246, this court did not hesitate to interfere with the trial court's reconsideration of discretionary orders not based on the merits of the litigation. See also, Barlow v. City Council of Inglewood, 32 Cal.2d 688, 197 P.2d 721 (error for trial court to vacate judgment on demurrer based on statute of limitations). Heretofore, there has been no attempt to distinguish the correction of judicial error in orders not based on the merits of the litigation from the correction of judicial error in other types of judgments or orders. Such a distinction would have the undesirable effect of creating classes of appealable judgments—some of indeterminate finality, which the trial court has power to vacate at its whim outside the statutory procedure, and some that it cannot vacate after entry of judgment, except as provided by statute.

The trial court has no power to correct judicial error in a final judgment or an appealable special order after final judgment except as provided by statute. Coombs v. Hibberd, 43 Cal. 452; Lang v. Superior Court, 71 Cal. 491, 12 P. 306, 416; Carpenter v. Superior Court, 75 Cal. 596, 19 P. 174; Holtum v. Greif, 144 Cal. 521, 78 P. 11; Drinkhouse v. Van Ness, 202 Cal. 359, 260 P. 869; Lankton v. Superior Court, 5 Cal.2d 694, 55 P.2d 1170. Disapproved on another issue in Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951; Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988; Phillips v. Trusheim, 25 Cal.2d 913, 156 P.2d 25; Wells Fargo v. San Francisco, 25 Cal.2d 37, 152 P.2d 625; Bowman v. Bowman, 29 Cal.2d 808, 178 P.2d 751, 170 A.L.R. 246; Barlow v. City Council of Inglewood, 32 Cal.2d 688, 197 P.2d 721; cf. Belser v. Hoffschneider, 104 Cal. 455, 38 P. 312; see In re Estate of Burnett, 11 Cal.2d 259, 262, 79 P.2d 89; Bastajian v. Brown, 19 Cal.2d 209, 214, 120 P.2d 9; 30 Cal.L.Rev. 75. Even if the trial court acted hastily and ill-advisedly in making its first order, it is not for this court to disregard settled rules of procedure and practice. Such disregard can result only in confusion. As this court said in one of its earliest cases on this subject, "There must be some point where litigation in the lower Court terminates, and the losing party is turned over to the appellate Court for redress." Coombs v. Hibberd, 43 Cal. 452, 454.

The writ should issue as prayed.

EDMONDS and SPENCE, JJ., concur.

Rehearing denied; EDMONDS, TRAYNOR, and SPENCE, JJ., dissenting.

KRAMER et al. v. SUPERIOR COURT OF STATE, IN AND FOR LOS ANGELES COUNTY.

L. A. 21455.

Supreme Court of California, in Bank.

Oct. 17, 1950.

Rehearing Denied Nov. 13, 1950.

Original proceeding in certiorari by Ernst Kramer and others against the Superior Court of the State of California, in and for the County of Los Angeles, to annul an order denying a motion to set aside decree of probate court ordering that portion of residuary estate devised to nationals and residents of Germany be distributed to heirs of testator's deceased wife and the state. The Supreme Court, Shenk, J., held that certiorari would not lie since probate court, on the evidence before it, had jurisdiction to make the order denying motion to set aside decree of distribution.

Order affirmed.

Carter and Schauer, JJ., dissented.

1. Courts ⇐202(5)

Order of probate court denying a motion to set aside a decree of distribution was not appealable and hence certiorari would lie to review such order. Probate Code §§ 1233, 1240; Code Civ.Proc. § 473.

2. Courts ⇐202(5)

Order of probate court denying a motion to set aside a decree of distribution could be annulled by Supreme Court on certiorari only upon a showing that probate court in denying motion exceeded its jurisdiction. Probate Code, §§ 1233, 1240; Code Civ.Proc. §§ 473, 1068.

3. Executors and administrators ⇐315(4)

Probate court had jurisdiction to entertain motion to set aside a decree of distribution and to grant or deny such application in the exercise of its discretionary power. Probate Code, § 1233; Code Civ.Proc. § 473.

4. Appeal and error ⇐957(1)

Appellate courts are favorably disposed toward such action of trial courts as will relieve from default and permit, rather than prevent, adjudication of controversies on their merits. Code Civ.Proc. § 473.

5. Appeal and error ⇐957(1)

An order setting aside a default judgment will be reversed only for an abuse of discretion. Code Civ.Proc. § 473.

6. Certiorari ⇐28(2)

Certiorari will not lie to annul an order refusing to set aside a default where the only excess of jurisdiction alleged relates to insufficiency of the evidence. Code Civ. Proc. § 473.

7. Courts ⇐202(5)

Where nationals and residents of Germany moved to set aside decree of probate court ordering that portion of residuary estate devised to them be distributed to heirs of testator's deceased wife and to the state on ground that decree was taken against them through their mistake, inadvertence, surprise or excusable neglect, without showing that notices required by law were not given, or were not received in time to participate in probate proceeding or appeal from decree of distribution, certiorari would not lie to annul order denying the motion, since probate court had jurisdiction to make the order based on the evidence before it. Probate Code, §§ 259–259.2, 1233, 1240; Code Civ.Proc. §§ 473, 1068.

Emmet B. Hayes, San Francisco, for petitioners.

Fred N. Howser, Attorney General, William J. Power, Deputy Attorney General, for respondent.

SHENK, Justice.

This is a proceeding in certiorari to annul an order denying a motion to set aside the decree of distribution in the matter of the estate of Bruno M. Kramer, deceased. The petitioners are nationals and residents of Germany.

The decedent died in Los Angeles County on March 12, 1948. The estate consisted entirely of community real and personal property. It was converted to liquid assets, and the residue after specific bequests and charges of administration amounted to approximately $60,000. By

his will admitted to probate on April 20, 1948, the decedent left one-half of the residue to his deceased wife and the other half to his own named relatives residing in Eastern Germany.

The rights of the petitioners to take under the will are governed by the following provisions of section 259 of the Probate Code:

"The right of aliens not residing within the United States * * * to take real property in this State, by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States * * * to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents."

Section 259.1 provides that the burden is upon the non-resident aliens to establish the fact of existence of the reciprocal rights. Section 259.2 states that if such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take the property, it shall be disposed of as escheated property.

The constitutional validity of the foregoing provisions, applicable as of the date of the decedent's death, has been upheld. Clark v. Allen, 331 U.S. 503 67 S.Ct. 1431, 91 L.Ed. 1633; Estate of Knutzen, 31 Cal. 2d 573, 191 P.2d 747; Estate of Bevilacqua, 31 Cal.2d 580, 191 P.2d 752. These cases also establish that it is proper in a probate proceeding to determine the rights of non-resident aliens to take under the testamentary disposition.

None of the German legatees appeared in the probate proceeding. In the petition for distribution filed on January 18, 1949, the executor alleged that no "reciprocal agreement" existed between the United States and Germany, and distribution was requested pursuant to section 259.2 of the Probate Code. On March 10, 1949, the court found in accordance with the executor's allegations and ordered distribution to the wife's heirs of one-half of the portion of the residue left to the German legatees and the other one-half to the State of California.

There was no appeal from the decree. Within six months after entry, on September 2, 1949, the petitioners moved pursuant to section 473 of the Code of Civil Procedure to set aside the decree as having been taken against them through their mistake, inadvertance, surprise or excusable neglect. The factors bearing on these elements were averred to be lack of knowledge by the petitioners other than that they were residuary legatees, and of surprise that the executor would take a position contrary to their interests; also lack of knowledge that they would be required to prove the reciprocal rights of German citizens residing abroad which the state's representative admits, at least as to realty, were incorporated in an existing treaty between the United States and Germany. See Clark v. Allen, supra, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633. There was no averment that the notices required by law were not given, or were not received in sufficient time to make an appearance, or to participate in the probate proceeding, or to take an appeal from the decree of distribution. The statement of fact in that respect is that the notices required by law were not sent to the addresses specified in the will, nor to the actual addresses of the residuary legatees, but to addresses supplied from some unknown and unauthorized source. In regard to the time element, distance was also relied on.

[1-3] Since the order denying the motion was non-appealable, the petitioners were in position to invoke the remedy

afforded by the present proceeding. Prob. Code, § 1240; Howard v. Superior Court, 25 Cal.2d 784, 787, 154 P.2d 849; Linstead v. Superior Court, 17 Cal.App.2d 9, 11, 61 P.2d 355. But the relief sought could be granted only if it be shown that the probate court in denying the motion to set aside the decree exceeded its jurisdiction. Section 1068, Code of Civ.Proc.; and cases hereinafter cited. Under the authorities herein cited the probate court has jurisdiction to entertain the motion and to grant or deny the application in the exercise of its discretionary power. Sec. 1233, Prob.Code; Sec. 473, Code Civ.Proc.

[4-7] It has been pointed out that on appeals from orders under section 473 the courts have been favorably disposed toward action on the part of the trial courts which would relieve from default and permit, rather than prevent, the adjudication of controversies on their merits; and that orders granting relief have rarely been reversed and then only for an abuse of discretion. Benjamin v. Dalmo Mfg. Co., 31 Cal.2d 523, 525, and 190 P.2d 593 and cases cited; see also Reidy v. Scott, 53 Cal. 69; Mitchell v. California & O.C.S.S. Co., 156 Cal. 576, 105 P. 590 and Brasher v. White, 53 Cal.App. 545, 200 P. 657, where on appeal orders denying relief were reversed. In addition it is well-settled that certiorari will not lie where the only excess of jurisdiction alleged relates to insufficiency of the evidence. Estate of Kay, 30 Cal.2d 215, 218, 181 P.2d 1; Howard v. Superior Court, supra, 25 Cal.2d at 789, 154 P.2d at 852. Here the probate court acted on the motion in the light of the facts stated in the affidavits claimed to constitute mistake, inadvertance, surprise or excusable neglect. Those statements comprised the evidence upon which the court based its order denying the motion. What the result might be on an appeal from such an order, or whether the decree of distribution might have been reversed on appeal if one had been taken, or what might be the equitable considerations in a proper action attacking the decree on available grounds, or what might be the result in an escheat proceeding, are not questions properly presented in this proceeding. The determinative factor here is that no reviewable basis is presented in the attack upon the probate court's exercise of its judicial power. It cannot be said that the court lacked jurisdiction to make the order based on the evidence before it and there is no contention that the court's action was on a ground not authorized by statute.

The order is affirmed.

GIBSON, C. J., and EDMONDS and SPENCE, JJ., concur.

TRAYNOR, Justice.

I concur in the conclusion that certiorari does not lie to review the propriety of the order denying the motion to set aside the decree of distribution. A motion to set aside a judgment under section 473 is addressed to the sound discretion of the trial court and "it need hardly be added that on certiorari we do not review matters within the discretion of the lower court." Estate of Kay, 30 Cal.2d 215, 226, 181 P.2d 1, 7; Howard v. Superior Court, 25 Cal.2d 784, 789, 154 P.2d 849; Spanach v. Superior Court, 4 Cal.2d 447, 450, 50 P.2d 444.

It is contended, however, that the decree of distribution must be set aside regardless of the adequacy of petitioners' showing of mistake, inadvertence, or surprise, for the reason that the probate court had no jurisdiction to enter such a decree. Thus, petitioners do not attack merely the order denying their motion under section 473; they invoke the writ of certiorari to support a collateral attack upon the decree of distribution. Certiorari will not lie for that purpose, for the probate court had jurisdiction to enter the decree and petitioners had a remedy by appeal.

The decree of distribution erroneously excluded petitioners from obtaining the real property under the will of decedent. The decree was appealable, however, and petitioners could have secured its reversal had they taken a timely appeal. Estate of Knutzen, 31 Cal.2d 573, 577, 191 P.2d 747; Estate of Bevilacqua, 31 Cal.2d 580, 582, 191 P.2d 752. Certiorari will not lie when a remedy by appeal has been lost by the failure of the aggrieved party to avail himself

of the remedy within the time permitted. Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951.

Moreover, certiorari will not lie to annul a decree of a court of competent jurisdiction for errors of fact or law in the entry of that decree. If the trial court has jurisdiction to determine a particular issue, it is not deprived of jurisdiction by an erroneous determination. The error must be asserted on appeal and not by petition for certiorari. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 287, 109 P.2d 942; Brock v. Superior Court, 29 Cal.2d 629, 637, 177 P.2d 273; Estate of Kay, 30 Cal.2d 215, 219, 220, 181 P.2d 1. In the present case, the probate court had jurisdiction with respect to its decree of distribution to determine the persons entitled to decedent's property under the will and the laws of this state. Its decree was erroneous because of its failure to take judicial notice of the 1923 Treaty between Germany and the United States, 44 Stat. 2135, which created the reciprocal rights of inheritance required by Probate Code, section 259. Failure to take judicial notice is error that may be asserted on appeal, but it is not jurisdictional. Certiorari is not a substitute for appeal. Howard v. Superior Court, 25 Cal.2d 784, 787, 154 P.2d 849. It will not lie "where the only excess of power complained of is the entering of an order unsupported by evidence" or based on an error of law. Estate of Kay, 30 Cal.2d 215, 219, 181 P.2d 1, 3; Abelleira v. District Court of Appeal, supra; Howard v. Superior Court, supra, 25 Cal.2d 784, 789, 154 P.2d 849; Brock v. Superior Court, supra.

The result of the decree of distribution is that petitioners are deprived of a share in the estate of decedent to which they were clearly entitled. The decree has become final, however, and is *res judicata*. Petitioners in effect contend that the doctrine of *res judicata* must be disregarded because of what they consider to be inequities arising out of the erroneous decree of distribution. Such a departure from *res judicata* throws into question the finality of any judgment and thus is bound to cause infinitely more injustice in the long run than it can conceivably avert in this case. I therefore concur in the affirmance of the order.

CARTER, Justice.

I dissent.

In this case a resident and citizen of this country died testate leaving property situated in this state to German nationals. The estate consisted in part of real property. The decree of distribution did not distribute any of the property to the alien devisees. They sought relief from that decree by motion under section 473 of the Code of Civil Procedure. Such relief was denied. As no appeal lies from the order of denial it can be reviewed as to "jurisdictional" questions by certiorari, and that is the present proceeding.

The majority hold that the denial order cannot be annulled because the court had jurisdiction under section 473 to consider and determine *factual* matters such as surprise, inadvertence, and excusable neglect. At least as to the real property there were *no factual* matters to be determined. The status of the aliens as such, and as devisees, is not disputed; nor is it disputed that a portion of the estate consisted of real property. If there existed an applicable treaty between Germany and this country it is controlling, regardless of section 259 of the Probate Code. There did exist such a treaty covering real property, and, as said in Estate of Knutzen, 31 Cal.2d 573, 577, 191 P.2d 747, 750, when declaring the law as announced by the United States Supreme Court in Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633; "The nonresident alien heirs were entitled *under the treaty* to sell the realty and withdraw the proceeds, and it is immaterial that the property was sold by the administrator, apparently to get funds to pay debts and expenses, instead of by those heirs. In either event, *they were entitled to share in the proceeds of the realty*, and the Alien Property Custodian was entitled to claim their shares by reason of the vesting order." (Emphasis added.)

The existence and terms of the treaty *need not be proven*. The probate court was

bound to take judicial notice thereof. Our statute provides: "Courts take judicial notice of the following facts: * * * 3. Public and private *official acts* of the *legislative, executive* and judicial departments of this state and *of the United States,* and the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states", (Emphasis added) Code of Civil Procedure, sec. 1875 (3), and the authorities hold that courts take judicial notice of treaties. See cases collected, Wigmore on Evidence, (3rd Ed.) Vol. IX, sec. 2573, p. 556. It is clear, therefore, that the court had no discretion but to grant relief, for it had rendered a decree of distribution contrary to the treaty—the supreme law of the land. A treaty is on a par with the constitution as being the supreme law of the land.

The question is, therefore, whether an order may be annulled on certiorari which, on undisputed facts, is squarely contrary to constitutional mandate. In my opinion there can be no doubt about it. It is said in Rescue Army v. Municipal Court, 28 Cal. 2d 460, 462, 171 P.2d 8, 10: "The constitutionality of a statute or ordinance may be tested by prohibition on the ground that invalidity of the legislation goes to the jurisdiction of the court to proceed to try the case. See Whitney v. Superior Court, 182 Cal. 114, 187 P. 12; Levy v. Superior Court, 105 Cal. 600, 38 P. 965, 29 L.R.A. 811; Arfsten v. Superior Court, 20 Cal.App. 269, 275, 128 P. 949; cf. Broady v. Jennings, 70 Cal.App. 647, 234 P. 120. This rule is supported by the great weight of authority in other states. See cases collected in 113 A. L.R. 796, 800; 42 Am.Jur. 168. The same principle has been applied in cases where habeas corpus has been used to test the constitutionality of an ordinance. * * * The fact that a trial court has no jurisdiction within the meaning of the term as used in *certiorari* and prohibition proceedings does not mean that a judgment based upon an unconstitutional statute is open to collateral attack. * * * In certiorari and prohibition proceedings the term jurisdiction has a very broad meaning, and a writ may be granted where the court has no jurisdiction to act except in a particular manner, even though it has jurisdiction, in the fundamental sense, over the subject matter and the parties. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 287 et seq., 109 P.2d 942, 132 A.L.R. 715; Hill v. Superior Court, 16 Cal.2d 527, 106 P.2d 876; Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411." Here the decree of distribution clearly ignored and failed to follow the treaty and the constitution makes such treaty the supreme law of the land. Therefore, the decree is in violation of such supreme law. On the motion under section 473 the only permissible action by the trial court was to vacate the decree and order distribution in accordance with the treaty.

I would, therefore, grant the writ prayed for.

SCHAUER, Justice (dissenting).

I concur in the conclusion reached by Justice Carter. Under the circumstances shown here I think that the court had "defined power" to decide the crucial question in only one way. For a clear example and adequate discussion of the circumstances under which a probate court should properly be held to have exceeded its jurisdiction ("defined power") see dissenting opinion in Estate of Kay (1947), 30 Cal.2d 215, 230, et seq., 181 P.2d 1.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

FOX BAKERSFIELD THEATRE CORPORATION et al. v. CITY OF BAKERSFIELD.

L. A. 21399.

Supreme Court of California, in Bank.

Oct. 6, 1950.

Rehearing Denied Nov. 2, 1950.

The Fox Bakersfield Theatre Corporation, a corporation, and the Fox Paradise Theatre Corporation, a corporation, brought action against the City of Bakersfield, a municipal corporation, for declaratory relief, injunction and recovery of taxes paid under protest by plaintiffs, under ordinance imposing license tax on places of amusement. The Superior Court of Kern County, Frederick E. Stone, J., rendered a judgment for the defendant, and the plaintiffs appealed. The Supreme Court, Carter, J., held that the ordinance was not invalid.

Judgment affirmed.

1. Theaters and shows ⇐3

The fact that operators of moving picture theatres bore and paid a large portion of the business license taxes levied and collected by the city and a major share of the amusement business taxes, standing alone was not a ground for invalidating the tax, at least unless it reached a confiscatory or prohibitory point or completely refuted any basis for classification.

2. Taxation ⇐47(1)

Taxation, other than taxation of property, on the same activity or incident for the same purpose by the same taxing agency, more than once in the same period, standing alone, is not forbidden by the constitutions, state or federal.

3. Theaters and shows ⇐3

City ordinance imposing a tax of 1 cent for each 10 cents or fraction of 10 cents over and above the first 15 cents of amount charged and paid for admission to places of amusement or entertainment and 1 cent for each 10 cents or fraction of 10 cents over and above the first 15 cents of all sums received from fees and charges after payment of admission fee, for use of facilities within a place of amusement or entertainment, is not invalid because of the fact that city also imposed a license fee in a flat sum on certain businesses including theaters based on number of seats.

4. Constitutional law ⇐208(1), 230(1) Theaters and shows ⇐3

City ordinance imposing a tax of 1 cent for each 10 cents or fraction of 10 cents over and above the first 15 cents of amount charged and paid for admission to places of amusement or entertainment and 1 cent for each 10 cents or fraction of 10 cents over and above the first 15 cents of all sums received from fees and charges after payment of admission fee, for use of facilities within a place of amusement or entertainment, is not invalid on ground that there is an improper classification of businesses taxed or a violation of the uniformity and equal protection requirements of federal and state Constitutions because exemptions are made of pool halls and arcades where admissions are not charged and certain religious, charitable, and educational affairs where music alone is furnished without admission charge. U.S.C.A.Const. Amend. 14; Const. art. 1, §§ 11, 21; art. 4, § 25, subds. 19, 20, 33.

5. Taxation ⇐42(1)

The power of the states to make classifications of persons or property for purpose of taxation is very broad.

6. Constitutional law ⇐48

A statute is presumed to be constitutional until the contrary appears.

7. Constitutional law ⇐38

An act may not be held to be unconstitutional merely because it may contain provisions which seem to be unjust or oppressive, or because it may be deemed to violate the natural, social, or political rights of the citizens, unless it appears that those features of the act contravene rights which are guaranteed by the constitution.

8. Taxation ⇐42(1)

If a classification of persons or occupations made for purpose of imposing taxes if founded on natural, intrinsic or fundamental distinctions which are reasonable in their relation to the object of the legislation and otherwise, they will be deemed to be valid and binding, and though the classification should be reasonable, natural and just,

in absence of a showing to the contrary, it will be assumed that there are good grounds for the classification, and the act will be upheld.

9. Constitutional law ⇐48

Where an enactment imposing taxes is attacked on ground of unauthorized classification, all presumptions and intendments are in favor of the reasonableness and fairness of the legislative action, and the decision to warrant the classification will not be overthrown unless palpably arbitrary.

10. Constitutional law ⇐230(1)
Licenses ⇐7(2)

Occupations and businesses may be classified and sub-divided for purposes of taxation, and it is within the discretion of legislature to exact different license taxes from different classes or sub-classes of businesses, subject only to the limitations of the state and federal Constitutions in regard to equal protection of the laws, and no constitutional rights are violated if the burden of the license tax falls equally upon all members of a class, though other classes have lighter burdens or are wholly exempt, provided that the classification is reasonable, based on substantial differences between pursuits separately grouped, and is not arbitrary.

11. Theaters and shows ⇐3

Legislation separately classifying places of amusement for purpose of imposing license taxes on owners or operators of them as a group, is valid.

12. Municipal corporations ⇐108.3

In testing the sufficiency of the summary in petitions for an initiative measure where city charter requires a title and summary of the chief purpose and points of the measure, substantial compliance is sufficient. Const. art. 4, § 1.

13. Municipal corporations ⇐108.3

City ordinance imposing a license tax on admission to places of amusement or entertainment and also on all sums received from fees and charges for use of facilities within such places in addition to admission charges, was not invalid on ground that ballot used in election was misleading because only the admission tax was referred to in the ballot, since there was substantial compliance. Const. art. 4, § 1.

Borton, Petrini & Conron, James Petrini, Bakersfield, O'Melveny & Myers, Jackson W. Chance and William W. Alsup, Los Angeles, for appellants.

West, Vizzard, Howden & Baker, James Vizzard and Kelly Steele, City Attorney, Bakersfield, for respondent.

CARTER, Justice.

In an action for declaratory relief, injunction and recovery of taxes paid under protest by plaintiffs, operators of motion picture theatres, the trial court determined that a business license tax levied by defendant city and affecting them was valid. The attack on defendant's tax ordinance includes the charges of discrimination, double taxation, and defective enactment.

The city has had for many years a basic business license tax ordinance, No. 681, which levies a tax for the purpose of revenue rather than regulation. It reaches practically every kind of business conducted in the city. Detailed classifications are made of various kinds of business. In some the license fee is a flat sum and in others is graduated according to the income from the business, or on some other basis. Among those businesses are theatres taxed by section 56 (the same section also includes other things, such as amusement games). The tax on theatres is $104 per annum for 300 seats or less, and $8 for each 100 seats or fraction thereof over 300. Plaintiffs do not question the validity of that tax.

In 1946, an ordinance was adopted which imposed one cent per admission tax on theatres. That ordinance was repealed, and in 1947, an initiative ordinance was adopted, as No. 754, the one here questioned. It is a license tax ordinance for revenue requiring that a license shall be obtained "by all persons maintaining places of or furnishing amusement or entertainment in the City. Places of amusement or entertainment shall include thea-

tres, shows, games, carnivals, spectacles, exhibitions, dances, and other performances furnished or provided at any place or by any person as to which a charge, admission fee, or other sum is required to be paid, whether wholly or partially, for the privilege of seeing, witnessing, being present at, engaging or participating in singly or with another person, or for otherwise being diverted, amused, or entertained." The tax imposed is one cent "for each 10 cents or fraction of 10 cents over and above the first 15 cents of the amounts charged and paid for admission to any place, including admission by season ticket or subscription; and 1 cent for each ten cents or fraction of 10 cents over and above the first 15 cents of all sums received from fees and charges after the payment of an admission fee, for the use of property, equipment or facilities within, upon or about any place of amusement or entertainment which is charged and collected by the operator of such place over or above, or as a part of the amount charged for admission to such place;

"(b) 1 cent for each 10 cents or fraction of 10 cents over and above the first 15 cents of amounts charged and received by the operator of any place of amusement, where no admission fee is charged, for the use or operation of property, equipment and/or facilities, and/or the privilege of being in or upon such place of amusement * * *." The tax is on the privilege of conducting such places of business but shall be collected from the customer. The tax imposed is expressly made in addition to, rather than in lieu of, any other taxes. Hence it is in addition to the general business tax license ordinance No. 681 above mentioned. Where refreshments, food or services are dispensed at any roof garden, cabaret, cafe, restaurant or hotel, or the like, and there is furnished public performance, floor show, dance floor, or other amusement, then it is deemed that 20% of the amount paid by the customer is for entertainment and a tax of 1 cent on each 15 cents of such 20% is levied (sec. 8(c)). Billiard tables, pool tables and arcades where no admission fees are charged, are exempted from the tax. (Sec. 8(b)). Also exempted are admission fees for entertainment charged by charitable, religious and educational organizations, and those producing nonprofit symphony concert programs (sec. 9(a)); the furnishing of music alone by musicians or mechanically without an admission charge (sec. 9(c)); and, in the sale of alcoholic beverages and such beverages as are not included in the refreshments covered by section 8(c) unless the charge therefor is included without segregation in the customer's bill.

Invoking the United States Constitution equal protection mandate, U. S. Constitution, Fourteenth Amendment, and similar guarantees under the State Constitution, such as uniformity and equality of operation of laws, see Cal.Const., art. I, sec. 11, 21; art IV, sec. 25(19, 20, 33), plaintiffs assert that the tax levied by ordinance No. 754 is discriminatory and not based upon any proper classification.

[1] Preliminarily, it should be observed, in connection with plaintiffs' assertion that as a result of ordinance No. 754, they bear and pay a large proportion of the business license taxes levied and collected by the city and major share of the amusement business taxes, that the amount of taxes paid by them standing alone is not a ground for invalidating the tax, at least unless it reaches the confiscatory or prohibitory point or completely refutes any basis for a classification. Plainly there is discrimination in the taxes imposed by ordinance No. 754 for it does not apply to all businesses operated in the city. That premise also embraces the fact that plaintiffs bear a greater burden of the taxes than other businesses. The issue is one of whether the classification made by ordinance No. 754 is proper. The law is not, as plaintiffs suggest, that there is a requirement of reasonableness of amount of excise taxes levied for revenue by a municipal corporation in addition to the restrictions imposed by the uniformity and equal protection provisions of the Constitution. Assuming there is power to impose the tax (such power is not questioned here) under the charter, if it is a

charter city, or under the statutes, if it is not, the only restrictions on the exercise of that power are the constitution, charter, or statutes, as the case may be, or as expressed in Rancho Santa Anita v. City of Arcadia, 20 Cal.2d 319, 322, 125 P.2d 475, 477, dealing with a non-charter city: "The taxing power of the city and all limitations thereon are derived from the Constitution and statutes." It follows, therefore, that short of being confiscatory or prohibitory, there is no rule of law that requires that a tax be reasonable in amount, for the power of taxation is a vital legislative function, Watchtower B & T Soc. v. County of Los Angeles, 30 Cal.2d 426, 182 P.2d 178 and there can be no basis for a court to invalidate an exercise of that power other than the constitutions, state or federal. It has been so held. See Fox v. Standard Oil, 294 U.S. 87, 55 S.Ct. 333, 79 L.Ed. 780; Patton v. Brady, 184 U.S. 608, 22 S.Ct. 493, 46 L.Ed. 713; F. Couthoui, Inc., v. U. S., 54 F.2d 158, 73 Ct.Cl. 363, certiorari denied 285 U.S. 548, 52 S.Ct. 396, 76 L.Ed. 939; Alexander Theater Ticket Office v. U. S., 2 Cir., 23 F.2d 44; Cooley on Taxation (4th Ed.) sec. 72, p. 181; Sunset Nut Shelling Co. v. Johnson, 49 Cal.App.2d 354, 357, 121 P.2d 849; City of Cresent City v. Moran, 25 Cal.App.2d 133, 136, 77 P.2d 281; Roth Drug, Inc., v. Johnson, 13 Cal. App.2d 720, 57 P.2d 1022.

Correctly interpreted, cases such as Hansen v. Town of Antioch, 18 Cal.2d 110, 114 P.2d 329, and the cases there cited, involving a different license tax for itinerant peddlers than that for persons with a fixed place of business, are not to the contrary. In the Hansen case, the court stated that a distinction may be drawn between such merchants, and that the rate of the tax must be reasonable, but what is meant is, that such tax must not be unconstitutionally prohibitory, confiscatory, or discriminatory, and it cannot be upheld under the taxing power, when it is, in reality, merely an exercise of the police power to exclude such peddlers. That is to say, if the constitution forbids the prohibition of such merchants, then that result cannot be achieved indirectly by imposing a destructive tax upon them.

[2, 3] Plaintiff's contention that a double tax has been laid upon them should be first disposed of. As seen from the ordinance, they pay the tax that is levied on all businesses and, in addition, that levied by ordinance No. 754. It is conceded that both taxes are excise rather than property taxes. Taxation, other than of property, upon the same activity or incident for the same purpose by the same taxing agency, more than once in the same period, sometimes called double taxation, standing alone, is not forbidden by the constitutions, state or federal. Ingels v. Riley, 5 Cal.2d 154, 53 P.2d 939, 103 A.L.R. 1; see, Douglas Aircraft Co. v. Johnson, 13 Cal.2d 545, 90 P.2d 572; Flynn v. City and County of S. F., 18 Cal. 2d 210, 115 P.2d 3; Illinois C. R. Co. v. State of Minnesota, 309 U.S. 157, 60 S.Ct. 419, 84 L.Ed. 670; Baker v. Druesedow, 263 U.S. 137, 44 S.Ct. 40, 68 L.Ed. 212. It is a factor in determining whether the tax is invalidly discriminatory when it is levied upon some activities but not others, or it may pose a question of substantive due process if its imposition assumes confiscatory or prohibitory characteristics.

Section 102 of the Revenue & Taxation Code, formerly Pol. Code, sec. 3607, states that nothing in that "division" shall be construed to permit double taxation but that "division" deals solely with property taxes. Our constitution provides that "all property" in the state except as otherwise provided "shall be taxed in proportion to its value". Cal.Const., art. XIII, sec. 1. And under that provision it has been held that there could be no double taxation of *property*. See Germania Trust Co. v. City & County of San Francisco, 128 Cal. 589, 61 P. 178; People ex rel. Burke v. Badlam, 57 Cal. 594; San Francisco v. Anderson, 103 Cal. 69, 36 P. 1034, 42 Am.St.Rep. 98; In re Estate of Fair, 128 Cal. 607, 61 P. 184; Morgan Adams, Inc., v. Los Angeles, 209 Cal. 696, 289 P. 811; Flynn v. San Francisco, 18 Cal.2d 210, 115 P.2d 3; Redwood Theatres

v. City of Modesto, 86 Cal.App.2d 907, 196 P.2d 119; Bank of California, Nat. Ass'n v. Roberts, 173 Cal. 398, 160 P. 225; Spring Valley Water Co. v. County of Alameda, 24 Cal.App. 278, 141 P. 38; Napa Sav. Bank v. Napa County, 17 Cal. App. 545, 120 P. 449; cf. Weber v. County of Santa Barbara, 15 Cal.2d 82, 98 P.2d 492; 8 S.Cal.L.Rev. 79. The distinction between property and other taxes with relation to double taxation is clearly stated in Ingels v. Riley, supra, 5 Cal.2d 154, 164, 53 P.2d 939, 944: "It is also urged that the tax is unconstitutional, for the reason that, when read with the provisions of the Vehicle Code, supra, double taxation is imposed by the same taxing agency on the same privilege. It is contended that this violates the Constitution, although no provision of either the Federal or State Constitution is specifically referred to. This argument is based on the fact that the Vehicle Code, supra, section 370, imposes upon all motor vehicle operators, as defined in the act, an annual fee of $3. There is no merit in this contention. The mere fact that the state has imposed one excise under one act does not prevent the state from imposing another excise upon the same privilege for the same period. Article XIII, section 1, of the State Constitution, has no application, because that section applies only to property taxes." See also, Redwood Theatres v. City of Modesto, supra; City of Los Angeles v. Riley, 6 Cal.2d 621, 59 P.2d 137, 106 A.L.R. 903; Douglas Aircraft Co. v. Johnson, 13 Cal.2d 545, 90 P.2d 572.

This brings us, therefore, to the question that, inasmuch as the tax imposed is not on all businesses in the city, has there been made a proper constitutional classification of the businesses taxed, or is there a violation of the uniformity and equal protection requirements of the Constitutions.

Plaintiffs assert that the classification is improper because it does not include all amusement businesses in the city and that they bear a major share of the taxes assessed against amusements. It will be remembered that exemptions are made of pool halls and arcades where admissions are not charged, certain religious, charitable, and educational affairs, where music alone is furnished without admission charge.

[4-9] We do not think the city overstepped constitutional limitations in its classification. It must be remembered that, as aptly expressed in speaking of the state sales tax, by the court in Roth Drug, Inc., v. Johnson, 13 Cal.App.2d 720, 733, 57 P.2d 1022, 1027: "the power of the states to make classifications of persons or property for the purpose of taxation is very broad. * * * A statute is presumed to be constitutional until the contrary appears. It has been said that an act may not be held to be unconstitutional merely because it may contain provisions which seem to be unjust or oppressive, or because it may be deemed to violate the natural, social, or political rights of citizens, unless it appears that those features of the act contravene rights which are guaranteed by the Constitution. 1 Cooley's Constitutional Limitations (8th Ed.) p. 341. If a classification of persons or occupations made for the purpose of imposing taxes is founded on natural, intrinsic, or fundamental distinctions which are reasonable in their relation to the object of the legislation and otherwise, they will be deemed to be valid and binding. 5 Cal.Jur., p. 824, § 188. * * * While the classification should be reasonable, natural and just, in the absence of a showing to the contrary, it will be assumed there is good grounds for the classification and the act will be upheld. 6 R.C.L., p. 378, §§ 369-376. In the case of People v. Monterey Fish Products Co., 195 Cal. 548, 556, 234 P. 398, 401, 38 A.L.R. 1186, it is said in that regard: 'When a legislative enactment is attacked upon this ground [of an unauthorized classification], all presumptions and intendments are in favor of the reasonableness and fairness of the legislative action (5 Cal.Jur., § 628 et seq., and cases cited), and the decision * * * to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary.'"

[10] It is well settled that occupations and businesses may be classified and subdivided for purposes of taxation, and it is within the discretion of the legislature to exact different license taxes from different classes or sub-classes of businesses, subject only to the limitations of the State and Federal Constitutions in regard to equal protection of the laws. No constitutional rights are violated if the burden of the license tax falls equally upon all members of a class, though other classes have lighter burdens or are wholly exempt, provided that the classification is reasonable, based on substantial differences between the pursuits separately grouped, and is not arbitrary. 1 Cooley, Taxation 4th Ed., pp. 746-751; 53 C.J.S. Licenses, § 22, pages 532-538; 33 Am.Jur., pp. 353-363; Quong Wing v. Kirkendall, 223 U.S. 59, 32 S.Ct. 192, 56 L.Ed. 350; Northwestern Mutual Life Ins. Co. v. State of Wisconsin, 247 U.S. 132, 38 S.Ct. 444, 62 L.Ed. 1025; State Board of Tax Commissioners v. Jackson, 283 U.S. 527, 51 S.Ct. 540, 75 L.Ed. 1248, 73 A.L.R. 1464, 75 A.L.A. 1536; Liggett Co. v. Lee, 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed. 929, 85 A.L.R. 699; Fox v. Standard Oil Co., 294 U.S. 87, 55 S.Ct. 333, 79 L.Ed. 780; Ex parte Haskell, 112 Cal. 412, 417, 44 P. 725, 32 L.R.A. 527; Ex parte Lemon, 143 Cal. 558, 562, 77 P. 455, 65 L.R.A. 946; Bramman v. City of Alameda, 162 Cal. 648, 653, 124 P. 243; Los Angeles, etc., Co. v. City of Los Angeles, 163 Cal. 621, 627, 126 P. 594. The general rule has been recognized in cases where the particular ordinance or statute was held invalid. See Matter of Application of Richardson, 170 Cal. 68, 148 P. 213; Town of St. Helena v. Butterworth, 198 Cal. 230, 244 P. 357; Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 411, 65 P.2d 884, 109 A.L.R. 895; Barker Bros., Inc., v. City of Los Angeles, 10 Cal.2d 603, 607, 76 P.2d 97.

[11] Following these principles, it has been generally held or stated that legislation separately classifying places of amusement for the purpose of imposing license taxes on the owners or operators of them as a group, is valid. See Hale v. State, 217 Ala. 403, 116 So. 369, 58 A.L.R. 1333; Nachman v. State Tax Commission, 233 Ala. 628, 173 So. 25; City of Bessemer v. Bessemer Theatres, 252 Ala. 117, 39 So.2d 658; Pellicer v. Sweat, 131 Fla. 60, 179 So. 423; City of Miami v. Kayfetz, 158 Fla. 758, 30 So.2d 521; Veterans' Foreign Wars v. Hull, 51 N.M. 478, 188 P.2d 334; Curdts v. South Carolina Tax Commission, 131 S.C. 362, 127 S.E. 438, affirmed in memo. opinion, 273 U.S. 669, 47 S.Ct. 471, 71 L.Ed. 831; Knoxtenn Theatres v. Dance, 186 Tenn. 114, 208 S.W.2d 536; Ringling Bros.-Barnum & Bailey C. Shows v. Sheppard, 5 Cir., 1941, 123 F.2d 773.

Similarly, it has usually been held that the amusement industry might be further subdivided, so that moving picture theatres could be taxed as a separate sub-class. Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 33 S.Ct. 441, 57 L.Ed. 730; Brandenburg v. City of Covington, 153 Ga. 92, 111 S.E. 574; City of Metropolis v. Gibbons, 334 Ill. 431, 166 N.E. 115; State v. Greene, 104 Mont. 460, 67 P.2d 995, 111 A.L.R. 770; City of Drumright v. Strand Amusement Co., 139 Okl. 162, 282 P. 128; Bijou Amusement Co. v. Toupin, 63 R.I. 503, 9 A.2d 852; Wingfield v. South Carolina Tax Commission, 147 S.C. 116, 144 S.E. 846; Davis v. White, Tex.Civ.App., 1924, 260 S.W. 138; North Fort Worth Amusement Co. v. Card, Tex.Civ.App., 1930, 23 S.W. 2d 778. While the question does not appear to have been authoritatively decided in this state, it was said by way of dictum in Redwood Theatres v. City of Modesto, 86 Cal. App.2d 907, 918, 196 P.2d 119, that there was no doubt of the propriety of separately classifying places of amusement for the purpose of taxation. The case was actually disposed of on a point of pleading, but the statement appears to be sound and in accord with the weight of authority elsewhere.

Whether the tax statute may make a valid exemption presents the same problem as that of classification; if the exempted persons or businesses may be included in a distinct class then the equal protection of the laws is not denied to those taxed. (33

Am.Jur. 363). Provisions excluding entertainments given for charitable purposes from theatre license taxes have generally been upheld. Pellicer v. Sweat, supra; Curdts v. South Carolina Tax Commission, supra; Ringling Bros.-Barnum & Bailey C. Shows v. Sheppard, supra.

Those principles compel the conclusion that the instant classification is proper. We cannot substitute our judgment for that of the city's legislative power and conclude that there was no conceivable basis for the classification such as the nature and character of the amusement business and of those in that business taxed as distinguished from those exempted. Among other things, one of the main features of the tax is that it is imposed on those amusement businesses charging admission, and those taxed are the ones where larger groups of people are likely to gather, with the accompanying effects on the functioning and activities of the government.

[12, 13] Finally it is urged that the proposition stated on the ballot used in the election at which initiative ordinance No. 754 was adopted was "so misleading, as to invalidate" the ordinance; that the ordinance levied two taxes, one of one cent for each ten cents admission over the first fifteen cents admission charge and the other of one cent on each fifteen cents of 20% of amounts charged for food refreshment, etc., with entertainment, but only the first was mentioned in the ballot. The proposition on the ballot reads: "Proposition No. 1: Shall an ordinance entitled An Ordinance Licensing the Carrying On Of Certain Businesses, Occupations, and Callings and Conduction, Operating, Providing And Maintaining Places of Amusement and Entertainment in The City of Bakersfield for The Purpose of Raising Municipal Revenue and Providing Penalties For the Violation Of The Provisions Hereof which imposes a license tax of one cent for each 10 cents or fraction of 10 cents over and above the first 15 cents of amounts paid by the patrons of places of amusement or entertainment, for the privilege of conducting such places of amusement or entertainment, and which provides that such tax shall be collected by the operators of such places from the persons patronizing such places, be adopted?" The city charter provides: "The ballots used when voting upon such [initiative petition] ordinances shall give the title in full and * * *" (Charter of Bakersfield, sec. 28) but it also provides: "No informalities in conducting elections shall invalidate the same, if they have been conducted fairly and in substantial conformity to the requirements of this charter and the ordinances relating thereto," (Charter, sec. 85) which means that substantial compliance is all that is required. It has been repeatedly and recently held that in testing the sufficiency of the summary in petitions for an initiative measure where the law requires "a title, and summary of the chief purpose and points" of the measure (Cal.Const. art. IV, sec. 1), substantial compliance is sufficient. Perry v. Jordan, 34 Cal.2d 87, 207 P.2d 47; Brown v. Jordan, 12 Cal.2d 75, 82 P.2d 450; Epperson v. Jordan, 12 Cal.2d 61, 82 P.2d 445; California Teachers Ass'n v. Collins, 1 Cal.2d 202, 34 P.2d 134; Boyd v. Jordan, 1 Cal.2d 468, 35 P.2d 533. We consider the rule announced in the last cited cases controlling here.

Here the main and general purpose of the initiative was the imposition of a tax on amusement businesses. That is adequately covered in the title of the ordinance stated on the ballot. The mention of the method of computing the tax as to some businesses but not others was merely incidental or auxiliary and may be disregarded. As said in Brown v. Jordan, supra, 12 Cal.2d 84, 82 P.2d 455: "If it be conceded that after disclosing the chief purpose and points of the proposal, the title contains references to some provisions of the proposal no more important than some to which reference was omitted, this does not render the title fatally defective. The title need not contain a summary or index of all of the measure's provisions. Within certain limits what is and what is not an important provision is a question of opinion. Within those limits the opinion of the attorney-general should be accepted by this court." There was substantial compliance here. People v. City of Los Angeles, 187 Cal. 56, 200 P. 947, is readily distinguishable. There

the very important feature of whether by annexation the annexed property would assume the annexing city's debts was omitted.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.



36 Cal.2d 879

CITY OF STOCKTON et al. v. WEST COAST THEATRES, Inc., OF NORTHERN CALIFORNIA et al.

Sac. 6102.

Supreme Court of California, In Bank.

Oct. 6, 1950.

Rehearing Denied Nov. 2, 1950.

Action by the City of Stockton, a municipal corporation, and others against West Coast Theatres, Inc., of Northern California for a judgment declaring valid a city ordinance levying for revenue only a tax of two cents for each ticket sold for admission to specified athletic contests and places of amusement and entertainment, including theatres. The Superior Court, San Joaquin County, J. A. Smith, J., assigned by Chairman of Judicial Council, entered a judgment declaring the ordinance valid and defendant appealed. The Supreme Court, Carter, J., held that the ordinance is not invalid merely because city also imposes a license tax on theatre business measured by seating capacity or on ground of improper classification of businesses taxed or violation of uniformity and equal protection requirements of federal and state constitutions.

Judgment affirmed.

Constitutional law ⇐208(1), 230(1)
Theaters and shows ⇐3

A city ordinance imposing for revenue only a tax of two cents for each ticket sold for admission to specified athletic contests and places of amusement and entertainment, including theatres, is not invalid merely because city also imposes a license tax for revenue purposes on theatres business measured by seating capacity or on ground of improper classification of businesses taxed or violation of uniformity and equal protection requirements of federal and state Constitutions.

Neumiller, Ditz, Beardslee & Sheppard and Dudley Sheppard, Stockton, O'Melveny & Myers, Jackson W. Chance and William W. Alsup, Los Angeles, for appellants.

Bill L. Dozier, City Attorney, and Taubner G. Hamma, Assistant City Attorney, Stockton, for respondents.

CARTER, Justice.

Here we have a city ordinance levying a tax for revenue similar to that involved in Fox Bakersfield Theatre Corp. v. City of Bakersfield, Cal., 222 P.2d 879.

Like in the Bakersfield case, the City of Stockton, plaintiff has a basic business license ordinance No. 985 which classifies the businesses conducted in Stockton and levies a license tax for revenue purposes on them based on various standards. Section 97, imposes a tax on the theatre business of $32 per 100 seats per annum where there are less than 300 seats and a graduated scale on seating capacity over that number. That section of the ordinance was amended in 1947, by ordinance 1972 increasing the tax on theatre but still measuring the tax by seating capacity. Between those two ordinances, ordinance No. 1743 was enacted and approved by referendum. It is that ordinance whose validity is questioned.

It provides that it is enacted "solely to raise revenue" and is "in addition" to the taxes levied under ordinance No. 985; that persons carrying on basketball, football, softball, or baseball games where an admission is charged shall pay a tax of two cents for each ticket sold (Sec. 20). Also included are boxing and wrestling exhibitions (Sec. 21), circus or similar exhibitions (Sec. 22), public dance halls (Sec. 23), ice or rollerskating rinks (Sec. 24), museum, store show, theatrical or vaudeville

performances (Sec. 25), concert halls (Sec. 26) and theatres (Sec. 27). Exceptions are made for admission paid by persons in military service (Sec. 29) and children under 12 (Sec. 29½).

The same constitutional objections are made to this ordinance as were made in the Bakersfield case and on the authority of the latter case, the judgment declaring such ordinance valid is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.



99 Cal.App.2d 874

ADAMS v. ALLEN et al.

Civ. 17854.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1950.

As Modified on Denial of Rehearing Nov. 1, 1950.

Action by Beulah Clark Adams against R. E. Allen and others to compel a declaration of respective rights and duties of parties and for an accounting of the partnership of which plaintiff was a member and for judgment for plaintiff's share of undistributed royalties. The Superior Court, Los Angeles County, Vernon W. Hunt, J., entered an interlocutory decree dissolving partnership and denying plaintiff relief as prayed for and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that where receiver had determined the amount of royalty payable to plaintiff, and plaintiff had been paid the royalty in accordance with the receivership of estate with no objection from plaintiff, and the division was in accordance with plaintiff's contention on appeal and provisions of interlocutory judgment, judgment of trial court dissolving partnership would be affirmed.

Affirmed.

Appeal and error ⇐1135

In action for an accounting of a partnership, where it appeared on appeal that receiver had determined the amount of royalty payable to appellant, that appellant had been paid, in accordance with receivership of estate, and appellant had made no objection and the division of property was in accordance with appellant's contention on appeal and with provisions of the interlocutory judgment, judgment of trial court dissolving partnership would be affirmed.

Manuel Ruiz, Jr., Los Angeles, for appellant.

Meserve, Mumper & Hughes and Hewlings Mumper, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

Appellant as one of several lessors brought this action to compel a declaration of the respective rights and duties of the parties for an accounting of the partnership of which she is a member and for judgment for her share of undistributed royalties. Allen subsequently dissolved the partnership and filed his cross-complaint for a decree of dissolution on the ground of appellant's baseless charge of fraud on the part of Allen. An interlocutory decree was entered dissolving the partnership, denying appellant relief as prayed and adjudging that she is not entitled to compel distribution of the partnership assets except such as may be available for distribution to her after payment of debts and costs of administration and liquidation.

A receiver was appointed to take over the assets, to make an inventory and a complete report with respect thereto, to sell such assets and after payment of all costs and liabilities including the debt due appellant he was to distribute the cash remaining in his possession to the partners in the percentages of their several interests.

From such judgment the matter came here on appeal.

When the court's calendar was called, appellant did not appear, but counsel for respondent stated: "The superior court has had a hearing on the matter; the receiver has determined the amount of royalty payable to the appellant, and the appellant has been paid, all in accordance with the receivership estate, and appellant making no objection, and, indeed, the division being in

accordance with his contention here and the provisions of the interlocutory judgment."

In view of such statement, further discussion of the controversy would be fruitless.

Judgment affirmed.

McCOMB, J., concurs.



99 Cal.App.2d 860

EBNER et ux. v. SHEEHAN et al.

Civ. 17662.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1950.

Rehearing Denied Nov. 6, 1950.

Hearing Denied Dec. 14, 1950.

Action by Frederick A. Ebner and Ada L. Ebner against Milton S. Sheehan and Mary L. Sheehan and others, to cancel a note and a trust deed. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered judgment for the plaintiffs and named defendants appealed. The District Court of Appeal, Moore, P. J., held that plaintiffs were estopped to demand a cancellation of the note and trust deed given as security for advancement of certain money by defendants on a building contract.

Judgment reversed.

1. Mortgages ⇐25(5)

Where defendant agreed to lend $5,500 to plaintiffs on note accepting deed of trust upon their home under construction as security, and plaintiffs specified no limitation as to manner of disbursing money, and money was deposited to bank account of building contractor who drew thereon for labor and materials, even though house was never completely constructed nor made ready for occupancy, consideration for note and trust deed did not fail.

2. Principal and agent ⇐136(2)

Where employee of building contractor loaned prospective purchasers of house under construction, $5,500 secured by deed of trust, and building contractor left without completing house, whatever agency relationship existed between employee and contractor would not oblige employee to make good contractor's non-performance of contract.

3. Contracts ⇐175(3)

In action to cancel a note and trust deed, finding that loan to prospective purchasers of house under construction was part of building contract, was without support in evidence.

4. Mortgages ⇐25(6)

In action to cancel note and trust deed, finding that plaintiffs did not pay prospective purchasers of house under construction any part of $5,500 loan was without support.

5. Cancellation of instruments ⇐24(2)

Where employee of building contractor loaned $5,500 to purchasers of house under construction on note secured by trust deed, and contractor left without completing house, purchasers were under a duty to restore money advanced for their account for building materials and labor, and on failure to do so were estopped to demand a cancellation of note and trust deed. Civ.Code, § 1691.

W. C. Schaper and Glenn Simpson, Los Angeles, for appellants, W. C. Schaper, Los Angeles.

John K. Blanche and Charles M. Fueller, Pasadena, for respondents.

MOORE, Presiding Justice.

The judgment herein cancels (1) respondents' promissory note in favor of appellants in the sum of $5,500 and (2) the lien of their deed of trust upon their home as security for such note, and it quiets their title against the lien. Appellants have brought the matter to this court demanding a reversal of the judgment on the grounds of the insufficiency of the evidence and errors of law occurring at the trial.

The controversy originated in the abrupt conduct of one Frank C. Lewis who having set up as a builder in the community of Pasadena had agreed to build for respondent a home to cost $8,300 including the

cost of the lot. About March 15, 1948, Mr. Sheehan, herein referred to as "Sheehan," read an advertisement of Lewis for a man to work in the building industry. As a result the two men met. Two weeks later Lewis employed Sheehan to serve as timekeeper on construction work. At the same time he induced Mr. and Mrs. Sheehan to make a building loan to respondents. To effect such transaction, on April 3 Lewis accompanied Sheehan to their home where he met Mrs. Ebner. Lewis explained to the lady that appellants had agreed to put up the $5,500 for their home. On April 5 appellants met Lewis and one Rutledge, the lot owner, at the bank and opened an escrow for the loan. Appellants agreed to loan $5,500 on the note of respondents secured by a trust deed on the home—such loan to be discharged with the funds of a new loan "as soon as the house was finished." On April 6 appellants withdrew $1,500 from a savings and loan association and deposited the check in the escrow. On April 15 they withdrew $1,500 and deposited $1,300 in the bank to the account of "Frank C. Lewis, building contract account," and paid $200 thereof directly to Lewis. On May 4 they withdrew another $1,500 and deposited it in the same account. On June 4 they withdrew $2,000 from the same savings account and deposited it in the same building account. Fifty five hundred dollars of such money were deposited for the note and trust deed.

From the same Frank C. Lewis building account checks were drawn in payment for materials and labor used on the Ebner house in the total sum of $5,912.92. Such checks were drawn by Sheehan as an employee of Lewis. Before the house had been completed, Lewis took his departure; was never served with process in this action and made no appearance. The house was so far from completion as to render its occupancy perilous.

In their brief respondents say that they "under the terms of the building contract were to pay $2800 in cash to Mr. Lewis and $5500 by promisory note secured by deed of trust and were to receive in return a completed house, the house and lot to be delivered for the total price of $8300."

[1] The findings are that (1) appellants agreed to lend and deliver to respondents the $5,500; (2) such sum was never paid; (3) the consideration for the note and trust deed failed; (4) Sheehan was at all times mentioned the agent of Lewis; (5) appellants' loan and the building contract were parts of the same transaction; (6) appellants did not pay respondents $5,500 or any part thereof. Basing their contentions upon such findings respondents assert that affirmance of the judgment is a simple matter. Their confidence has not wholly permeated the conscience of the court. The basis for the finding that the money was never paid to respondents lies in the fact that the money was deposited in the bank account of Lewis instead of in the account of respondents. The building contract obligated Lewis to finish the construction for $8,300. Respondents paid him $2,400. When the parties conferred concerning the loan no limitations were specified by the Ebners as to the manner of disbursing the money. Respondents made their payments to Lewis or to his bank account, suggested no other person to receive appellants' money, and made no objection to their paying the loaned amount to Lewis directly or to its being deposited in his bank account. For over 90 days all bills for materials and labor were paid from that account. Surely respondents knew that they had not paid any of them and when they contracted for the loan they did not require appellants to pay the $5,500 to themselves or that they place it in escrow for disbursement in progressive payments. Indeed, Mr. Ebner testified that at the time he signed the note and trust deed he did not expect to receive the $5,500 in cash to be disbursed by himself, but did expect it to be used in the erection of the building, and that as long as this was done it was immaterial as to how it was disbursed. Appellants, being unschooled in the art of money lending for building purposes acted in the light of the congenial behavior of Lewis and respondents and placed the money where it could be used for paying bills as necessity required. Their act in depositing the funds in the Lewis account against which Sheehan would draw checks to pay bills was in effect identical with the

method of direct payment by respondents of the money on the cost of construction. Sheehan was under contract to loan the money; he advanced it. Therefore there was no failure of consideration.

[2] There is no evidence that Sheehan was an agent of Lewis. If he had been, such agency would not oblige him to make good Lewis' nonperformance of his contract. He was a lowly employee to do menial tasks for Lewis, to keep time on the workmen and to apply the moneys he had deposited to the payment of labor and materials. The relationship of principal and agent works the other way—the principal is bound by the acts of the agent, if the agency covers the act in question.

[3, 4] The finding that the loan was a part of the building contract is utterly without support other than that they were contemporaneous. Lewis told Mrs. Ebner that appellants "had put up the $5500 for their home." Relying upon their agreement with respondents to give them a note and trust deed for his money, Sheehan placed it in a bank from which it was used for the account of respondents. Sheehan's employment to perform the tasks of timekeeper was not related to his agreement to make the loan of his savings to respondents. He was to get no part of the profits to be earned by Lewis' construction of the house; no compensation save only his wages as an employee. The finding that appellants did not pay respondents any part of the $5,500 it utterly without support. On the contrary, the evidence already recited proves that they paid more to respondents than the amount of the loan, and Lewis was not forbidden to disburse the money with his own hand or by an employee.

From the foregoing it follows that the conclusion that the note and trust deed are void is without evidential foundation. Neither is there any basis in fact for the judgment that appellants surrender the note and trust deed or that they have no interest in the property described in the latter instrument. They parted in good faith with their substance on respondents' agreement to return it according to the terms of the note. The sudden departure of Lewis without completing the structure he had undertaken for respondents is not a reason for attaching his obligation to an unfortunate couple who had supplied the sinews wherewith to provide shelter for respondents at 6 per cent per annum with the privilege of obtaining another loan on better terms.

[5] Having contracted with appellants it was respondents' duty to offer to do equity as a basis for rescinding the agreement. Civ.Code, sec. 1691. Having failed to offer to restore the moneys advanced for their account, they are estopped to demand a cancellation of the note and trust deed. Lanktree v. Spring Mountain Acres, 213 Cal. 362, 366, 2 P.2d 338. No such act seems to have been entertained by respondents. They would keep the house and lot for which nearly $8,000 had been expended, of which they had advanced only $2,400. They would cancel their debt to appellants without even an offer to repay a portion of the fund advanced. They would condemn the conduct of Lewis yet use it as a sword to enrich themselves at the expense of appellants. Where appellants have loaned their money to respondents to enable them to build their home, the latter cannot defeat their obligation by asserting that the loan to them was "a part of Lewis' contract to build the house." The facts that after Lewis' failure to perform his agreement to complete the house respondents paid out $600 to make the house tenantable and discharged a mechanic's lien for $228.83 are in no sense related to their duty to discharge their obligations to appellants.

In view of the foregoing it is unnecessary to discuss the rulings of the court at the trial.

The judgment is reversed with instructions to make findings and enter judgment for appellants in accordance with this opinion.

McCOMB and WILSON, JJ., concur.

100 Cal.App.2d 46

CHRISTIANA v. ROSE.

Civ. 14313.

District Court of Appeal, First District, Division 1, California.

Oct. 20, 1950.

Antone T. Christiana brought an action against Julia Rose, formerly Julia Christiana, to recover half of the amount of the judgment which the defendant had obtained in a wrongful death action against third person for the death of a child of the parties after defendant had obtained a divorce decree. The Superior Court in and for Contra Costa County, C. C. McDonald, J., rendered a judgment for the defendant, and the plaintiff appealed. The District Court of Appeal, Peters, P. J., held that plaintiff was estopped from claiming any interest in the judgment obtained by the defendant in the wrongful death action, that District Court of Appeal could take judicial notice of prior appeal in wrongful death action, that plaintiff had no interest in the judgment obtained in the wrongful death action, and that the judgment was the separate property of the defendant and not community property.

Affirmed.

1. Divorce ⇐160

Where defendant is personally served in a divorce action and defaults, the default admits all of the allegations of the complaint, and he is estopped from thereafter challenging them.

2. Divorce ⇐255

Where complaint and decree for divorce are silent as to property issues, and the judgment is based on a default, the judgment cannot be res judicata on any property issue.

3. Divorce ⇐255

Where wife filed suit for divorce, alleging that there was no community property, and husband was personally served, but he defaulted, and divorce decree giving wife custody of children, was silent as to disposition of community property, and thereafter wife recovered a judgment for the wrongful death of one of the children, husband was estopped from claiming any portion of the judgment on ground that it was community property.

4. Evidence ⇐43(3)

Where divorced husband brought action against divorced wife to recover half of judgment which wife had procured from third person in action for death of a child of the parties, on ground that the judgment was community property, and divorced husband in his complaint referred to the wrongful death action and specifically alleged the date of the case, its file number in clerk's office and date that appellate court affirmed, District Court of Appeal on appeal by divorced husband from adverse judgment would take judicial notice of the prior appeal in the wrongful death action.

5. Divorce ⇐313

Where divorced wife sued for and recovered only for damage suffered her in action for wrongful death of son, and she did not ask for or receive one cent for the damage, if any, suffered by divorced husband, and complaint alleged and prayed for her damages, and jury was instructed that jury might award her amount that reasonably and fairly compensate her for loss which she had sustained, divorced husband was not entitled to recover any portion of the judgment from divorced wife.

6. Courts ⇐91(1)

The District Court of Appeal is bound by decisions of the Supreme Court.

7. Husband and wife ⇐260

The rule that damages for injuries sustained by a wife living with her husband are community property should not be blindly extended in view of statute providing that earnings and accumulations of wife and of her minor children living with her in her custody, while she is living separate from her husband, are her separate property. Civ. Code, § 169.

8. Husband and wife ⇐249

A judgment obtained by divorced wife in action for wrongful death of son while she was divorced and was separated from

divorced husband and had custody of their children, was an "accumulation" within meaning of statute providing that earnings and "accumulations" of wife and of her minor children living with her in her custody, while she is living separate from her husband, are the separate property of the wife, and such judgment was not "community property" so as to entitle husband to a half of the amount of the judgment. Civ. Code, § 169.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Accumulation" and "Community Property".

Taft, Wright & Hopkins and Millard Smith, all of Vallejo, for appellants.

David D. Oliphant, Jr., Oakland, for respondent.

PETERS, Presiding Justice.

May a husband, living separate from his wife, the latter having custody of their children, where one of the children is killed by the negligence of a third person, and where the wife sues for and recovers her damages caused by such death, successfully maintain an action against the wife for one-half of her judgment on the theory that such recovery is community property? That is the main question involved on this appeal. The trial court, while holding that the recovery by the wife was community property, held that, under the facts of the case, the husband was estopped from claiming any portion of the judgment. The husband appeals. It is our view that the judgment should be affirmed not only on the theory that if the recovery was community property the husband was estopped from claiming any portion of the judgment, but also because, in our opinion, under the facts, the judgment recovered by the wife was her separate property.

The following time chart presents the key facts:

March 17, 1940—appellant and respondent were married, and subsequently had three children, one of whom was named Robert.

March, 1944—the parties separated, the respondent wife taking custody of the three children. From the separation until December of 1945, the appellant contributed to the support of the children. Thereafter, he contributed nothing.

August 9, 1945—Robert Christiana, the son of the parties, was killed in an automobile accident.

January 18, 1946—the respondent filed an action in Alameda County for divorce, alleging, among other things, that there was no community property. There was no prayer for a declaration of the property rights of the parties.

March 11, 1946—interlocutory decree of divorce granted to respondent on default of appellant, the decree being silent as to the disposition of the community property of the parties.

April 20, 1946—the respondent, after an ineffectual attempt to notify appellant of the action, instituted, in her own name, an action in the Superior Court of Contra Costa County to recover her damages for the wrongful death of Robert. There can be no doubt, and appellant concedes, that a wife, living separate from her husband, and having custody of their child, may maintain such an action in her own name. §§ 376, 377, Code Civ. Proc.

September 18, 1946—respondent recovered a judgment. This judgment was affirmed by the appellate court on September 26, 1947, Christiana v. Rattaro, 81 Cal.App.2d 597, 184 P.2d 682, and the remittitur issued November 26, 1947. The respondent collected $11,642.12 gross on this judgment, and $6,755.84 net.

June 5, 1947—final decree of divorce granted to respondent, the decree containing no express reference to the property rights of the parties. Thereafter, respondent remarried, her last name now being Rose.

July 26, 1948—the present action was instituted by appellant to recover one-half of the judgment secured by respondent.

The complaint is framed on the theory that the judgment recovered by respondent is community property, and, on that theory, seeks to impose a trust on one-half of the proceeds. The answer alleges two major defenses, first, that the complaint in the divorce action averred that there was no community property of the parties; that the husband was served and defaulted, and thereby admitted the allegations of the complaint; that under such circumstances the husband is estopped to claim there is now community property; and secondly, that the recovery was not community property.

The evidence shows that the husband, after the separation, contributed something to the support of his three children, and after the death of Robert, to the support of the other two, until December of 1945, when all contributions ceased; that although the respondent wife was awarded support for the children and attorney fees in the divorce action, not a cent has been paid thereon; that after the separation, except for a period of about a year and a half during which the children lived with respondent's mother, the children have lived with respondent; that from the date of the separation until Robert's death, Robert lived with respondent and was in her exclusive control and custody, and appellant exercised no control over him; that respondent paid the funeral expenses of Robert.

The trial court found that when the cause of action arose for the wrongful death of Robert, such cause of action was community property, but that from the time appellant defaulted in the divorce action, all of appellant's rights in the community property, including his rights in the wrongful death action, ceased and terminated. Thus, the theory of the trial court was that the cause of action for the wrongful death of Robert was community property, but that because the respondent in her divorce complaint alleged that there was no community property, and the appellant defaulted, he thereby admitted that there was no community property, and is forever estopped from so claiming, and in particular is estopped from claiming that the proceeds of the wrongful death action are community property.

If it be assumed that the cause of action for the wrongful death of Robert and the proceeds of the judgment were community property, this theory of the trial court would be in accord with the law, and the judgment of the trial court should be affirmed. The divorce complaint, filed in Alameda County on January 18, 1946, alleged "That there is no community property of the parties." The prayer asked for dissolution of the marriage, for the care, custody and support of the children, for attorney's fees, and "for such other and further judgment in the premises as is meet and proper." The interlocutory decree has no specific reference to the property rights of the parties, but it does recite that: "The above entitled action coming on regularly to be heard this day on the complaint of the above named plaintiff, taken as confessed by the above named defendant * * * and it appearing to the Court that the said defendant was duly served with process herein, and that the default of said defendant for failure to appear or answer herein within the time allowed by law has been duly and regularly entered * * *." There is no direct evidence in the present record as to whether appellant was personally served or served by publication in the divorce action, but the interlocutory not only awards respondent the care and custody of the children, but also a fixed sum for their support and maintenance. In addition, on the same day the interlocutory was entered (March 11, 1946), the trial court made an order for attorney's fees against appellant. These orders could not lawfully have been made without personal service on appellant, and he does not attack them in this proceeding. Therefore, under the circum-

stances here existing, it may reasonably be inferred that appellant was personally served in the divorce action.

[1] Under the decided cases, it is the law of this state, at least where a defendant is personally served in a divorce action and defaults, that, by such default, he admits all of the allegations of the complaint, and is estopped from thereafter challenging them. This is the direct holding of Brown v. Brown, 170 Cal. 1, 147 P. 1168. In that case the wife claimed an interest in property acquired by her husband after she had secured an interlocutory, but before the final decree was entered. In the divorce action the wife, as here, alleged that there was no community property. Neither the interlocutory nor the final decrees mentioned property rights of the parties. The Supreme Court held that this amounted to a final adjudication that, as of the date the complaint was filed, there was no community property of the parties and both parties were bound thereby, but that such adjudication did not affect property acquired by either after the date of the interlocutory. In so holding the court stated, 170 Cal. at page 5, 147 P. at page 1170: "Where a defendant is served with a summons and complaint stating the facts upon which he is required to act, and he makes default, he is presumed to admit all the facts which are well pleaded in the complaint. The judgment which follows upon this sort of admission is, in contemplation of law, a complete adjudication of all the rights of the parties embraced in the prayer for relief and arising from the facts stated in the complaint, including the facts in his favor as well as those against him. The defendant here is presumed to have acceded to the proposition embraced in the complaint and to have consented that plaintiff should obtain the relief therein prayed for, upon the conditions and facts set forth in the complaint. The proceeding is equivalent to a statement by Brown to plaintiff that he did not object to a divorce for the cause alleged, based upon the theory that there was no community property existing at the time the action was begun. When judgment is rendered upon such a complaint and default, it becomes, in effect, a contract between the parties that the judgment shall be final with respect to everything properly embraced within the allegations of the complaint and in the prayer for relief. [Citations omitted.] Although the final decree is silent as to property, it nevertheless operates as an adjudication that at the time the action was begun there was no community property."

The above case involved property acquired by the husband after the interlocutory and before the final decree, and the specific holding was that the estoppel did not apply to such property, but in the companion case of Brown v. Brown, 170 Cal. 8, 9, 147 P. 1171, 1172, the court considered an insurance policy acquired by the husband before the divorce action had been commenced. As to it, the court held that the estoppel applied. In so holding, the court referred to the first case and the principles contained in the above quotation, and held that, under that rule of law, "the judgment of divorce, based upon the complaint declaring that there was no community property, is a conclusive determination against the plaintiff that this property is not community property, and by such judgment she is estopped from claiming any interest whatever in this part of the estate of Brown." See, also, Maxwell v. Maxwell, 66 Cal. App.2d 549, 152 P.2d 530; Fitzgerald v. Herzer, 78 Cal.App.2d 127, 177 P.2d 364; Horton v. Horton, 18 Cal.2d 579, 116 P.2d 605.

It should be mentioned that we have examined the record in the Brown cases. It appears that the divorce complaint there, as in the instant case, alleged that there was no community property. The prayer of the divorce complaint in the Brown case, as in the instant case, *asked for no relief as to property rights.* The interlocutory and final decrees in the Brown case, as in the instant case, *made no reference to property rights.* Therefore, the Brown cases are on all fours with the instant one.

[2] Appellant correctly points out that the interlocutory and final decrees do not mention the property rights of the parties, and contends that, in spite of the rules of law announced in the Brown cases, before there can be an estoppel there must be an express finding on the subject of community property. The cases cited by appellant in support of this contention are all cases where *both* the complaint and the decrees were silent as to community property. De Godey v. Godey, 39 Cal. 157; Kirschner v. Dietrich, 110 Cal. 502, 42 P. 1064; Minium v. Minium, 53 Cal.App. 55, 199 P. 1104. These cases deal with an entirely different problem. Of course, where the complaint and decree are silent as to property issues, and the judgment is based upon a default, such judgment cannot be *res judicata* on any property issue.

Appellant places considerable reliance on Burtnett v. King, 33 Cal.2d 805, 205 P.2d 657. There the complaint in a divorce action had alleged that there was certain specified community property, but the prayer of the complaint asked for no relief in reference to such property. Defendant defaulted. The decree awarded the property to plaintiff. The Supreme Court properly reversed, holding that the trial court, in a default case, cannot award a plaintiff greater relief than that demanded in the complaint. See § 580, Code of Civ. Proc.

That case involved a different problem than that here involved. In the instant case, the court did not, as in the Burtnett case, give the plaintiff in the divorce action relief not prayed for. Here, the divorce decree gave the plaintiff relief that was in exact accord with the prayer of the complaint. The Burtnett case did not discuss or cite the Brown cases, and certainly did not purport to overrule them.

[3] Thus, it must be held, if the cause of action for the wrongful death was community property, that the appellant is estopped from claiming any interest therein. This is in accord with the theory of the trial court.

There are other, alternative, and independent reasons why the result reached by the trial court—denying the appellant any portion of the judgment—is correct.

[4] Under the facts here involved, we are permitted to take judicial notice of the prior appeal in the wrongful death action, that is, of the case of Christiana v. Rattaro, 81 Cal.App.2d 597, 184 P.2d 682. While it has been stated, on occasion, that the courts will not take judicial notice of other actions, Johnston v. Ota, 43 Cal. App.2d 94, 96, 110 P.2d 507; Wolfsen v. Hathaway, 32 Cal.2d 632, 638, 198 P.2d 1, that rule has many exceptions. It has been held that, in the interests of justice, the court may take judicial notice of proceedings in other cases in the same court. Willson v. Security-First Nat. Bk., 21 Cal. 2d 705, 711, 134 P.2d 800; Calhoun v. Calhoun, 81 Cal.App.2d 297, 302, 183 P.2d 922. In the instant case the appellant in his complaint referred to the wrongful death action and specifically alleged the date of the case, its file number in the clerk's office, and the date the appellate court affirmed. Under such circumstances, there can be no doubt but that this court may look at and consider the records in the wrongful death action See Popcorn Equipment Co. v. Page, 92 Cal. App.2d 448, 453, 207 P.2d 647.

An examination of those records discloses that the then plaintiff sued for and recovered only for the damage suffered by *her*, and that she did not ask for or receive one cent for the damage, if any, suffered by her husband. The complaint alleged and prayed for *her* damages, and the jury was instructed that they might award her the amount that would "reasonably and fairly compensate *her*" for the loss which *she* had sustained. Thus in that action the present respondent recovered *her* damages and recovered nothing for the community.

Actions for wrongful death are purely statutory. The governing statutes are sections 376 and 377 of the Code of Civil Procedure. Those sections create a cause of action in the *heirs* of the deceased, Earley v. Pacific Electric Ry. Co., 176 Cal. 79, 81, 167 P. 513, and such cause of action is "a joint one, a single one and

an indivisible one." Gilmore v. Los Angeles Ry. Corp., 211 Cal. 192, 199, 295 P. 41, 45; see, also, Robinson v. Western States Gas, etc. Co., 184 Cal. 401, 410, 194 P. 39; Watkins v. Nutting, 17 Cal.2d 490, 498, 110 P.2d 384; Daubert v. Western Meat Co., 139 Cal. 480, 482, 69 P. 297, 73 P. 244.

[5] The record here shows that before the respondent commenced the wrongful death action she tried to inform appellant, but was unsuccessful in locating him. She recovered in that action, as already pointed out, only the loss which she had suffered. She did not sue for or recover any damages that may have been suffered by appellant. Under such circumstances, under settled principles, another heir is not entitled to any portion of the award given to compensate one heir on the theory that he was also an heir. He could, and perhaps should, have been joined as a plaintiff or defendant in the wrongful death action. The omitted heir, however, cannot recover any portion of the judgment awarded the suing heir. The omitted heir's cause of action, if any, is against the suing heir for fraud, if such exists, in knowingly excluding him from the wrongful death action. These principles are well settled.

In Roach v. Drew, 72 Cal.App. 45, 48, 236 P. 568, 569, an illegitimate child of a deceased mother brought an action to have the surviving husband declared a trustee as to a portion of the damages recovered by him for the wrongful death of the wife and mother. In the wrongful death action the husband had recovered only for the damages suffered by him. The appellate court affirmed a judgment for the husband based on an order sustaining a demurrer to the complaint. The court stated: "Since the damages recovered were those only which the defendant herein suffered, and did not include those sustained by plaintiff herein, it is not perceived upon what principle of law the defendant can be deprived of any part of the amount recovered, in the absence of a showing of wrongful conduct on his part. If the defendant knew of the existence of plaintiff during the prosecution of his action for damages, he might be subject to an action for fraud in omitting her as an heir in his suit."

The same conclusion was reached in Watkins v. Nutting, 17 Cal.2d 490, 499, 110 P.2d 384. There the wrongful death action was brought by some of the children of a deceased father. His children by a former marriage were named as defendants upon their refusal to join as plaintiffs. These defendant heirs defaulted. The plaintiffs recovered a judgment, and, a month later, the defaulting children petitioned to reopen the case for the purpose of taking testimony to establish their pecuniary loss occasioned by the death of their father in order to secure a portion of the judgment entered in favor of the suing children. A motion to strike this motion was granted, and the defaulting children appealed. The court affirmed, holding that the defaulting heirs were entitled to no portion of the award of the suing heirs.

In the instant case respondent's recovery in the wrongful death action was for her damages as the heir of the child Robert. She made no recovery on behalf of the possible other heir—her husband—and made no recovery on behalf of the community. Appellant's remedy, if any, is an action for fraud, if fraud existed, not an action to impose a trust on any portion of the judgment.

There is a third independent, alternative, and conclusive answer to this case, and that is that the recovery by respondent in the wrongful death action, as a matter of law, in our opinion, was not community property, but was the separate property of the wife.

Appellant's argument that the cause of action for wrongful death and the proceeds of the judgment in such action are community property, is based primarily on the rule announced in Keena v. United Railroads of S. F., 57 Cal.App. 124, 130, 207 P. 35, 38. In that case a father brought an action for the wrongful death

of a minor child. It was held that the mother's contributory negligence barred any recovery by the father because "The proceeds of a favorable judgment in such an action become community property." That rule is based upon, and is a refinement of, the rule that damages suffered by a wife, even though recovered in an action brought by her alone, are, in this state, community property. Zaragosa v. Craven, 33 Cal.2d 315, 320, 202 P.2d 73; Duncan v. Duncan, 6 Cal.App. 404, 406, 92 P. 310. But in the Keena case, and in the many cases in which it was held that damages for personal injuries to the wife are community property, the wife was living with the husband. We have found no case in this state where it has been held that damages to a wife living separate and apart from her husband are community property, or holding that damages in a wrongful death action recovered by a wife living separate from her husband and having custody of their child, is community property. Cogent reasons exist why the recovery in such cases should be considered the separate property of the wife.

[6, 7] The rule that damages to a wife living with her husband for her injuries are community property has been criticized, 33 Cal.L.Rev. p. 627, particularly fn. 29, on p. 632, but it is the law, and this court as an intermediate appellate court, is bound by the Supreme Court decisions. But that rule should not be blindly extended, particularly in view of section 169 of the Civil Code. That section provides: "The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife." Although there seems to be no case in this state dealing with the question as to whether damages for personal injuries suffered by a wife living separate from her husband are "earnings" or "accumulations" of the wife within the meaning of this section, other community property states having a statute copied from section 169 have held such damages to be the separate property of the wife. Thus in City of Phoenix v. Dickson, 40 Ariz. 403, 12 P.2d 618, a separated wife brought an action for her personal injuries. The record did not indicate which party was responsible for the separation. If the recovery was community property, the wife could not, in Arizona, maintain the action. She could maintain the action only if the recovery would be her separate property. The court held that the recovery in such an action was the separate property of the wife, basing its conclusion on its statute similar to section 169 which it stated was copied from California. The court held that damages to a wife separated from her husband were not "earnings" of the wife, but held that they were "accumulations." In defining that term the court relied upon a definition of it found in Union Oil Company v. Stewart, 158 Cal. 149, 110 P. 313, specifically holding that property acquired by a wife by adverse possession when living separate from her husband was an "accumulation" and therefore her separate property, as follows, 12 P.2d at page 620: "When one speaks generally of accumulation of property, he is understood to refer to any property which a person acquires and retains, without regard to the means by which it is obtained."

The same result was reached by the Supreme Court of Idaho in Lorang v. Hays, 69 Idaho 440, 209 P.2d 733, 735. There, in reference to a similar problem, the court stated: "that a cause of action for damages to the person or character of a married woman, which accrue while she is living separate and apart from her husband, is 'an accumulation', [and] is her separate property * * * [and] the husband is not a necessary party plaintiff and is not entitled to any of the recovery."

[8] The rule of these cases certainly should apply where, as here, a wife separated from her husband and having custody of their children sues for and recovers damages for *her* loss caused by the wrongful death of their child. In such event the recovery is certainly an

"accumulation" within the meaning of section 169, and therefore is the separate property of the wife.

For any and all of these reasons the judgment must be and is affirmed.

We concur: BRAY, (FRED B.) WOOD, JJ.



99 Cal.App.2d 841

MARANVILLE v. STATE BOARD OF EQUALIZATION.

Civ. 17511.

District Court of Appeal, Second District, Division 1, California.

Oct. 17, 1950.

As Modified Oct. 19, 1950.

Hearing Denied Dec. 14, 1950.

S. C. Maranville brought action against the State Board of Equalization to recover sales and use taxes paid under protest. From a judgment of the Superior Court of Los Angeles, Charles S. Burnell, J., in favor of plaintiff and from an order denying new trial, defendant appealed. The District Court of Appeal, Drapeau, J., held that where a sales tax was imposed only on gross receipts of X-ray film sold to X-ray laboratories and hospitals furnishing diagnoses, sales tax imposed on the charges for X-rays furnished by lay laboratories, was discriminatory as to lay laboratories since neither hospitals nor any X-ray laboratory may make diagnoses.

Judgment affirmed.

1. Licenses ⇐34

In action by lay X-ray laboratory operator to recover sales tax on charges for radiographs, paid under protest, finding that radiographs belonged to laboratory operator was not supported by the evidence. Revenue and Taxation Code, § 1 et seq.

2. Physicians and surgeons ⇐6(1)

"Diagnosis" is recognition of disease from its symptoms and may only be made by proficient persons authorized by state.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Diagnosis".

3. Constitutional law ⇐230(1)

Where sales tax was imposed only on gross receipts of X-ray film sold to X-ray laboratories and hospitals furnishing diagnoses, regulation imposing sales tax on the charges for X-rays furnished by lay laboratories was discriminatory, since neither hospitals nor any X-ray laboratories may make diagnoses. U.S.C.A.Const. Amend. 14.

4. Taxation ⇐42(1)

While state may classify broadly the subjects of taxation, it must do so on a rational basis so that all persons similarly circumstanced shall be treated alike. U.S.C.A.Const. Amend. 14.

5. Administrative law and procedure ⇐390
Taxation ⇐40(8)

Rules of agency empowered to enforce tax which result in illegal discrimination are invalid. U.S.C.A.Const. Amend. 14.

Fred N. Howser, Attorney General, James E. Sabine and Edward Sumner, Deputy Attorneys General, for appellant.

Parker, Milliken & Kohlmeier, and Harrison Harkins, all of Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff made x-ray pictures of parts of anatomies of patients, for the use of doctors and dentists. These pictures are called radiographs. Plaintiff took and developed radiographs, and made reports analyzing their meaning. He was what is termed a lay technician. He made no diagnoses from the radiographs. But he did advise the professional men of his conclusions of conditions of anatomies as they appeared to him in the pictures. He "interpreted light shadows." His reports were oral over the telephone, or in writing. He testified that he did not base his charges at the rate of so much per radiograph; that his charges were for his services in securing information necessary for the doctor or dentist in each case.

The patients paid for plaintiff's services. After being used, the radiographs were returned to and stored by plaintiff. He testified that it was generally understood that he owned the radiographs at all times.

In competition with plaintiff were x-ray laboratories operated by hospitals and doctors. In his memorandum of opinion denying appellant's motion for a new trial, the late Judge Charles S. Burnell well compared lay laboratories and medical laboratories:

"* * * the operation of lay laboratories such as that maintained by plaintiff is practically identical with that of medical laboratories; their charges are about the same; each type of laboratory retains possession of the radiograph, and it is common knowledge that these films are the property of the laboratory producing them. * * *

"In answer to a question by the court: 'I don't care whether it is a medical laboratory that is owned or operated by a physician or one that is operated by one who is not a doctor, does the laboratory as a rule and custom make any diagnosis other than the diagnosis of the film, the reading of the film?' The witness replied, 'That is all, whether it is a medical laboratory or not.'"

Former Rule No. 44, Sales Tax Rules and Regulations of the State Board of Equalization in effect during the taxable period involved read as follows:

"Hospitals, physicians, surgeons, dentists, and x-ray laboratories which furnish a diagnosis along with x-ray pictures making a single charge for both, are regarded as consumers of x-ray film used by them, and the tax applies to the gross receipts from the sales of x-ray film to them. 'Lay laboratories,' which do not furnish diagnoses are regarded as selling x-ray pictures and the tax applies to the charges for such pictures."

In conformity to this ruling, a tax of $857.26 was assessed against plaintiff. He paid the tax under protest, and brought this action for recovery.

The trial court found that plaintiff's business did not come within the purview of the tax act; and that the tax exemption given medical laboratories and not to lay laboratories was discriminatory.

From the judgment directing re-payment to the plaintiff of the tax money paid by him the State Board of Equalization appeals; also from the court's order denying a new trial.

Appellant contends that the record demonstrates that plaintiff developed x-ray pictures to the order of his customers for a consideration, and that, therefore, the transactions were sales within the meaning of the law; that the statute, Revenue and Taxation Code, § 1 et seq., reveals that the word "sale" as therein used means any transfer of title or possession of tangible personal property for a consideration; and that this includes producing, fabricating, or processing of tangible personal property for consumers who furnish, directly or indirectly, the materials used; also that the term "sale" includes any transfer, for a consideration, of the title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer.

Plaintiff contends that there was no sale of the radiographs themselves, that the title thereto remained at all times in him—that there was no transfer of title to tangible personal property which would bring the transactions within the statute.

Plaintiff also contends that the tax as to him is discriminatory. He points out that x-ray laboratories and hospitals "which furnish a diagnosis along with x-ray pictures, making a single charge for both" are exempt from taxation. See Rule 44 above quoted.

These two contentions will be discussed in order.

1. In Michigan it has been held that title to exposed X-ray film is not in the patient, but in the doctor who took and developed it. McGarry v. J. A. Mercier Co., 272 Mich. 501, 262 N.W. 296. No case has been found respecting property rights in radiographs made by lay technicians.

[1] In any event the testimony will not support a finding in this case that the radiographs at all times belonged to plaintiff Looking from the form to the substance of

the transactions here involved, it is apparent that plaintiff was selling radiographs. His contention that the charges were made solely for services may not be upheld.

One who dyes fabrics furnished to him for processing is subject to the sales tax in California. Banken v. State Board of Equalization, 79 Cal.App.2d 572, 180 P.2d 400. Prior to change in the statute making specific exemption optometrists were required to pay a sales tax upon glasses furnished to their patients. Kamp v. Johnson, 15 Cal.2d 187, 99 P.2d 274. In other jurisdictions photographers furnishing pictures are subject to sales taxes. Voss v. Gray, 70 N.D. 727, 298 N.W. 1; Cusick v. Commonwealth, 260 Ky. 204, 84 S.W.2d 14.

2. Plaintiff's contention of discrimination is more persuasive.

In Coca-Cola Co. v. State Board of Equalization, 25 Cal.2d 918, 921, 156 P.2d 1, 2, it is said: "Although not necessarily controlling, as where made without the authority of or repugnant to the provisions of a statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. (Citing cases.)"

[2] The word "diagnosis" has an established legal meaning. It is the recognition of a disease from its symptoms; it is a part of the practise of the healing art. Diagnoses may only be made by proficient persons, authorized by the State. People v. Jordan, 172 Cal. 391, 156 P. 451.

[3] Neither hospitals nor X-ray laboratories may make diagnoses. Therefore it is clear that to exempt hospitals and X-ray laboratories, and at the same time to tax lay laboratories, is discriminatory.

[4, 5] Section 1 of the 14th Amendment to the Constitution of the United States applies to state and local tax statutes. "While the state may classify broadly the subjects of taxation, it must do so on a rational basis so that all persons similarly circumstanced shall be treated alike." Barker Bros., Inc., v. City of Los Angeles, 10 Cal.2d 603, 607, 76 P.2d 97, 99. Rules of the agency empowered to enforce a tax which result in illegal discrimination are invalid. People v. Puritan Ice Co., 24 Cal.2d 645, 652, 151 P.2d 1.

The appeal from the order denying motion for a new trial is dismissed; the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



99 Cal.App.2d 845

PEOPLE v. WHISNER.
Cr. 4468.

District Court of Appeal, Second District, Division 1, California.
Oct. 17, 1950.

Gail Vincent Whisner was convicted in the Superior Court, Los Angeles County, W. Turney Fox, J., of first degree burglary, and from judgment of conviction and from an order denying a motion for a new trial he appealed. The District Court of Appeal, Drapeau, J., held that evidence was sufficiently substantial to connect defendant with the crime charged and to support judgment of conviction.

Affirmed.

1. Criminal law ⇐1160

Where there is evidence tending to support a verdict, District Court of Appeal cannot disturb verdict upon ground that it is not sustained by evidence and especially where trial court has refused a new trial.

2. Burglary ⇐42(3)

Evidence that camera found in defendant's possession was same type of camera that was missing from home of prosecuting witness that defendant had been seen by prosecuting witness in vicinity of home,

and defendant's evidence in explaining his possession of camera, was sufficiently substantial to connect him with crime charged and to support judgment of conviction for first degree burglary.

Fred G. Kennedy, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Dan Kaufmann, Deputy Attorney General, for respondent.

DRAPEAU, Justice.

Defendant was charged by information with the crime of burglary. The court sitting without a jury found him guilty as charged, and fixed the degree of the crime as first degree. Defendant's motion for a new trial was denied; judgment was pronounced, and he was sentenced to the county jail for a term of one year. Execution of such sentence was suspended and defendant was granted probation for two years upon condition that he serve the first five months thereof in the county jail. He here appeals from the judgment of conviction and from the order denying him a new trial.

It is here urged that the judgment is contrary to the law and the evidence; that the evidence is insufficient to sustain the judgment and the court erred in the admission of evidence.

The main contention appears to be that the evidence is insufficient to identify the articles found in appellant's possession as those stolen from the burglarized house.

The record discloses that on August 13, 1949, Mr. R. H. Galle left his home in Los Angeles around 7:40 p.m. At that time the house was locked, including the front door. When he returned about 11:30 that night, he found the screen had been removed from a back window and left on the ground, and that the front door, although closed, was unlocked. Mr. Galle's daughter returned home a few minutes before he did, and upon examination they found that two cameras, a light meter and a radio were missing from the house. They both testified that they had not given permission to appellant or to anyone else to enter their home and remove the stated articles.

On August 20, 1949, appellant was arrested in a barber shop having in his possession a camera and a light meter. He had offered the camera for sale at $35 with the statement that it was worth $110. This camera was introduced in evidence. Mr. Galle was asked if he recognized it as the one stolen from his house. He stated: "Well, it is one just like it. I couldn't swear until I see the serial number. * * * I have taken pictures with it. It is my daughter's camera." He then explained that he did not know where the serial number appeared on the camera, but he had asked the May Company to look it up (apparently from the record of the purchase) and he had the serial number on paper.

His daughter, Rosalie, testified that the camera "is an Argus C-3 just like mine." That its distinguishing mark was a serial number. As to the light meter, she stated it looked like hers but she could not prove it "because there are thousands of those."

Appellant took the stand in his own defense and stated that while he and one Vivian Moran were drinking a bottle of beer at the Spring Arcade cocktail bar on August 19, 1949, Miss Moran gave him the camera, stating that if he could sell it for her he could have all over $30 he might get for it; that it was understood that they would meet at the same place the next night.

Appellant further stated that the next day he came downtown about 3:00 in the afternoon, and went to a barber shop near First and Los Angeles Streets. Just as he was about to make a sale of the camera to Richard Nakano for $35 police officers came into the shop, questioned him about the camera and later placed him under arrest. He stated he had known Vivian Moran for two and a half or three years; that they had gone to a couple of shows together and to several bars; that he never made any specific dates with her, "it was just a matter of running into each other"; that he left her where he found her and did not know what occupation she pursued, nor

where she lived. He also stated that he had been in the Spring Arcade cocktail bar "maybe a hundred times" before his arrest; that he knew the bartenders there by sight but not by name, and that he had tried to locate Miss Moran but without success.

The record shows that at the time of his arrest, appellant gave to police officers Sherrill and Barry the same explanation regarding his possession of the camera.

The instant trial took place on November 4, 1949. In answer to the trial court's questioning, appellant testified he had been out on bail since September 14, 1949; and admitted that he had made rounds of the various cocktail bars, including the Spring Arcade, only twice since his arrest; that he then made inquiries as to the whereabouts of Vivian Moran but to no avail; that the bartender at the Spring Arcade told him her name sounded familiar but that he would have to see her to remember her.

[1] People v. Williams, 27 Cal.2d 220, 223, 163 P.2d 692, 694, was a prosecution for stolen turkeys. There, as here, appellant attacked the sufficiency of the evidence because of failure to prove that the three turkeys found in his possession were the turkeys stolen from the butcher shop. One of the prosecuting witnesses testified that "after having handled a turkey, he would know it later by just looking at it." In addition he identified a tag of ownership introduced in evidence and found on one turkey in appellant's possession. The court there stated 27 Cal.2d at page 227, 163 P.2d at page 695: "While it must be conceded that there is some confusion in the evidence on this issue and the record is not so clear as might be desired, still the sufficiency of the identification of the stolen property and the reconciliation of any discrepancies in the respective witnesses' statements at the trial were for the jury. * * * it was for the jury to determine whether or not to accredit defendant's entirely uncorroborated account of his previous purchase of the turkeys in his possession at the time of his arrest. 'If it were the rule that trial judges or juries must decide cases in conformity with the defendant's testimony, few criminals would ever be convicted.' People v. Rose, 26 Cal.App. 2d 513, 517, 79 P.2d 737, 739. As was said in People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467, 470, with regard to the function of an appellate court in reviewing the correctness of factual determinations made in the course of a criminal trial: 'This court has uniformly held that where there is evidence tending to support a verdict we cannot disturb the verdict upon the ground that it is not sustained by the evidence; and the application of this rule is strengthened in a case where, as here, the trial court has refused a new trial. It is settled beyond controversy that the weight to be accorded the evidence is a question for the jury.'"

[2] In the instant cause, Mr. Galle testified that the camera found in appellant's possession was the same type of camera that was missing from his home, and he positively stated: "I have taken pictures with it. It is my daughter's camera." He further stated that he had seen appellant in the vicinity of his (witness') home "off and on for the last six months, perhaps once a month. * * * I walked back and forth to the store there, and I would see different ones with him. * * * That is about 100 feet from my house." That he first saw appellant at a fire in the neighborhood; and the last time he saw him was about two months before the burglary.

While the evidence of identification is comparatively slight, appellant's presence in the neighborhood is an important circumstance, not to be treated merely as a coincidence. This evidence together with the testimony and statements of appellant in his attempt to account for his possession of the camera, was sufficiently substantial to connect him with the crime charged and to support the judgment of conviction.

In announcing his decision at the end of the trial, the trial court made some very pertinent comments: That appellant's explanation showed a complete lack of substantiality in that when he got out of jail on September 14th, he made no effort to even look for Vivian Moran until October 24th, a month and ten days later. And this in the face of the fact that he was charged

with stealing the camera and would find her a very material witness to substantiate his claim of innocence.

The judgment and order appealed from are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.



100 Cal.App.2d 10

SINDELL et al. v. SMUTZ.
Civ. 17424.

District Court of Appeal, Second District, Division 3, California.

Oct. 17, 1950.

Hearing Denied Dec. 14, 1950.

Proceeding by Harry K. Sindell and James T. Satchell to secure a writ of mandate commanding Huber H. Smutz, Zoning Administrator of the City of Los Angeles, to consider and pass upon petitioners' application to drill an oil well on their leasehold. The Superior Court of Los Angeles County, Joseph W. Vickers, J., entered a judgment granting writ of mandate and defendant appealed. The District Court of Appeal, Vallée, J., held that where for many years one oil well was permitted to an acre in the entire oil field, and hundreds of wells were drilled upon that basis, an ordinance restricting a small outlying part of field to two wells in a block was unduly oppressive and not reasonably necessary to promote general welfare of community, since it deprived owners of their right, coequal with right of other owners and lessees in oil field, to recover their fair share of oil from the common source of supply.

Affirmed.

1. Trial ⇐375

In action to compel zoning administrator to consider and pass upon petitioners' application to drill an oil well on their leasehold, where trial judge viewed area in question and all surrounding areas, conditions he observed and knowledge he gained constituted independent evidence which he had a right to consider in determining issues involved.

2. Municipal corporations ⇐121

Where at time petitioners acquired their oil and gas lease in area, area was restricted to one oil well in a block, but ordinance restricting oil wells was held invalid as applied to area, petitioners were not prevented from asserting their constitutional rights against a subsequent ordinance restricting oil wells to two in a block.

3. Municipal corporations ⇐600

Where for years one oil well was permitted to an acre in entire oil field, and hundreds of wells were drilled upon that basis, an ordinance restricting a small outlying part of field to two wells in a block, which was more than one per acre, was unduly oppressive and not reasonably necessary to promote general welfare of community, since it deprived owners of property of their right, coequal with rights of other persons in oil field, to recover their fair share of oil from common source of supply.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, James A. Doherty, Deputy City Attorney, Los Angeles, for appellant.

D. A. Boone, Long Beach, for respondents.

VALLÉE, Justice.

Appeal by defendant from a judgment rendered in a proceeding seeking a writ of mandate commanding defendant, as zoning administrator of Los Angeles, to consider and pass upon petitioners' application to drill an oil well on their leasehold.

Petitioners, as lessees, are the owners of an oil lease covering several contiguous parcels comprising more than an acre in a city block of an area of 4.74 acres in what is referred to in the record as the "restricted area" of the Wilmington Oil Field.

The block, referred to as District 19, is located north of and adjacent to Highway 101 and near the west boundary of the field. Petitioners have the exclusive right to drill,

and are obligated to drill, one well. District 19 is only partially improved. The west half is zoned for commercial uses. There are several business establishments, including a filling station, a restaurant and a garage. The remainder is largely unimproved. The southerly part along Highway 101 is zoned for commercial uses. The easterly half is improved with small residences. The block has fewer residences than most of the blocks to the south. Two oil wells have been drilled in District 19 and are now producing.

Under the initial general comprehensive zoning ordinance covering Wilmington Oil Field, adopted November 12, 1936, one well to an acre was permitted. In April, 1944, the city block here involved was designated as an oil drilling district. (Ord. 88,392) The block was later designated as District 19. In September, 1945, drilling in District 19 and certain other districts north of Highway 101 was restricted to one well in a city block. (Ord. 89,616) A block had previously been defined, so far as pertinent, as "that property entirely surrounded by public streets." At that time one well had been drilled in District 19. Bernstein v. Smutz, 83 Cal.App.2d 108, 188 P.2d 48, was an attack on the validity of Ordinance 89,616. We held that, under the facts there alleged, Bernstein was entitled to a trial on the question of its validity as applied to District 19. After the trial a writ of mandate issued and the administrator authorized a second well in District 19, which was drilled but not on petitioners' leasehold. On November 19, 1948, Ordinance 94,136 was adopted, providing "that not more than two (2) wells may be drilled in each city block" in District 19 and some other districts north of Highway 101.

The Wilmington Oil Field is in the city of Los Angeles. It is sometimes referred to as the city of Wilmington. It comprises an area about 4⅕ miles from east to west and 3⅖ miles from north to south. The field extends throughout the city of Wilmington from the southeasterly boundary in a northwesterly direction to the extreme northwest section. The entire field overlies one oil pool. There is no obstruction to the free flow of oil from north to south throughout the field. Highway 101—Pacific Coast Highway—running in a general easterly-westerly direction, intersects the field about three miles from its south boundary. The discovery well was drilled in 1936 near the southeast boundary. The field is a low pressure one and there have been no serious fires or explosions occasioned by oil wells. Torrance Oil Field is immediately to the west of the Wilmington field.

Following discovery of oil, the Council of Los Angeles, by numerous ordinances pursuant to a general scheme and program of zoning, created oil districts through the industrial area, business section and residential section of Wilmington up to Highway 101. In all of these districts drilling for and production of oil was permitted on the basis of one well to an acre. Variances were liberally granted. The business section of Wilmington is a substantial one, and wells have been permitted on the basis of one well to an acre throughout that section in close proximity to various types of buildings, including hotels, banks and mercantile establishments. The residential area to the northwest, between the business section and Highway 101, is densely populated with many well-kept homes, schools and churches. Wells have been permitted, drilled, and are now producing throughout that area on the basis of one well to an acre. In a great majority of the city blocks there are three or more wells to a block, many of them in close proximity to residences, schools and churches.

The part of the field north of Highway 101 is referred to in the record as the "restricted area." This area comprises an extremely small section of the city of Wilmington. It is partially zoned for oil drilling, commercial and residential uses. The residences in this area are more modest and in many instances evidence less care than those to the south in which drilling has been permitted on the basis of one well to an acre.

A few blocks north of District 19, in county territory adjacent to the restricted area, there are producing wells, a tank farm

and an oil refinery which are in operation. Immediately to the north of District 19 there are producing wells. Immediately to the west and adjacent to District 19 wells are producing on the basis of one well to an acre. Immediately to the south across highway 101 wells are producing on the basis of several wells to one block, one of said blocks being within 400 feet of District 19. Immediately to the east, in District 36, wells are permitted on the basis of one well to an acre, and in two other blocks on the basis of more than two wells to the block. There is no difference in the character of District 36 and the two other blocks and that of District 19. Within six months prior to the judgment, additional wells were drilled and producing immediately adjacent to District 19. The property surrounding District 19 is largely industrial in character. There are no noticeable odors or noises from wells drilled north of Highway 101. The areas of the blocks in the small restricted area vary from 1.52 to 16.16 acres. In many of the blocks south of Highway 101 in which wells have been drilled on the basis of one well to an acre the business and residential areas are of far greater value, more densely populated, and contain far more improvements than District 19.

The oil in the Wilmington field flows readily. There is drainage of oil from under petitioners' property by reason of wells in close proximity to District 19. There is drainage from north to south between the area north of Highway 101 and immediately east of Wilmington Boulevard and the area south of Highway 101 and east of Wilmington Boulevard. This movement has been occurring since the wells immediately south of Highway 101 were drilled. The fact that there are three or four wells in a block south of Highway 101 causes a reduction of the pressure in that area and a movement of the oil several blocks to the north to that area. There have not been sufficient wells drilled north of Highway 101 to prevent drainage. Drainage will continue to the south from north of Highway 101 until the number of wells both north and south of that highway has been equalized. Drainage from under petitioners' property will continue until all recoverable oil has been drained therefrom or until such time as petitioners are permitted to drill a well upon their property and recover their share of the oil. Each day the drainage continues and petitioners are prohibited from recovering oil under their lease, they are suffering a loss of several hundred dollars. Over a period of time the commercial part of the oil under petitioners' lease will migrate to the various wells and the low pressure area to the south. There was evidence that the ultimate recovery that might be had from a well drilled at the present time on petitioners' lease is about 90,000 barrels of 19 gravity oil in ten years.

The Municipal Code of Los Angeles makes provision for masking any unsightly condition that might exist by reason of producing wells and tanks. Pumping units and storage tanks must be submerged.

On December 1, 1948, petitioners applied to the zoning administrator for determination of the conditions and methods of operation for drilling of and production from an oil well on their leasehold in District 19. On December 14, 1948, the administrator notified petitioners that their petition was rejected because of Ordinance 94,136 and because more than two wells in the block was contrary to the policy of the zoning administrator. Petitioners appealed to the Board of Zoning Appeals. The appeal was dismissed.

The court found that:

No reasonable ground exists for limiting the small area north of Highway 101 "to two wells per block and permitting unlimited drilling in all other portions of the city, as long as there is one acre to each well drilled."

The "drilling of a third well on petitioners' property * * * would create less interference and less hazard to public health, safety and welfare than wells to the south and east through the heart of the city of Wilmington, permitted on the basis of one well to an acre."

Ordinance 94,136 permits the creation of conditions contrary to its alleged purpose of safety and aesthetic considerations in that it allows the erection of four derricks

and the drilling of four wells from the surface of each of two blocks which are adjacent to a high school in the area north of Highway 101.

The ordinance "does not afford equal rights to all, but restricts or enlarges rights according to the area of each particular block which in turn affects drainage and income, according to the area of each particular block."

Ordinance 94,136 deprives petitioners of rights coequal with the rights of adjacent owners and lessees to recover their fair share of oil from the common source of supply and deprives them "of valuable property rights without any corresponding benefit to the public health, safety, morals and welfare, and infringes upon constitutional guaranties." The ordinance, applied to District 19, is discriminatory, arbitrary and confiscatory as against petitioners' rights "and that of their lessors," without any gain to the public generally; does not apply uniformly to all property and property owners in the restricted area; creates a monopoly; and does not give petitioners equal protection of the law.

The ordinance is not required or necessary under the police power of Los Angeles and has no reasonable relation to the ends for which the police power exists to protect the public health, safety, morals and welfare.

The court adjudged that the Municipal Code of Los Angeles, as amended by Ordinance 94,136, and any rule, regulation or policy of the zoning administrator, insofar as they prevent petitioners from drilling a well on their leasehold, are unconstitutional. The judgment directed that a writ of mandate issue, commanding the zoning administrator to consider and pass upon petitioners' application to drill a well, and directing him to permit them to drill a well, without considering or applying such unconstitutional provisions, and to forthwith determine and prescribe conditions under which they may drill for and produce oil on their property.

[1] The trial judge, on stipulation of the parties, viewed District 19 and all of the surrounding areas. The conditions he observed and the knowledge he gained constitute independent evidence which he had a right to consider in determining the issues involved. Wheeler v. Gregg, 90 Cal.App.2d 348, 366, 203 P.2d 37; Rowland v. City of Pomona, 82 Cal.App.2d 622, 624, 625, 186 P.2d 447; Mitchell v. City of Santa Barbara, 48 Cal.App.2d 568, 573, 120 P.2d 131. Some of the knowledge gained and the conditions observed by the trial judge and other pertinent comments were stated by him at the close of the case. He said in part:

"The block immediately across the street to the south from our block is not restricted. The other blocks along Pacific Coast Highway and to the south thereof are not restricted. There are three wells operating within the block located about four hundred feet to the west of our block. There are three wells operating in each of the next four blocks immediately to the west [east] thereof. * * * Three or four wells in most of the blocks immediately south of the first tier of blocks south of Pacific Coast Highway. * * *

"The two-well per block restriction area is probably less than one per cent of the total area of Wilmington City which is devoted to the production of oil. * * *

"* * * the acreage, net acreage, of our block, District 19, is larger than twenty-eight of the others and smaller than only six of the others. So, it is true, * * * that insofar as acreage is concerned the ordinance does not attempt to give equal rights to all, but restricts such rights or enlarges them according to the area of each particular block. * * *

"It is hard for the Court to understand where there is any reasonable ground for limiting a small portion of a city to two-wells per block and permitting unlimited drilling in all other parts of the city, as long as there is one acre to each well drilled. The character of the neighborhood and surrounding houses gives less reason therefor than exists in many of the blocks to the south of Pacific Coast Highway.

"The number of houses in the block, that is, our block, gives no reason therefor, since they are fewer than in many of the blocks, if not in most of the blocks, to the southeast thereof. * * *"

The parties stipulated to the following persuasive facts: leases throughout the

field call for not less than one well per acre; property owners and lessees in the area have received, and are now receiving, a share of the oil produced from three or more wells in some blocks and in many cases four wells; the field is a low pressure field and there have never been any serious fires or explosions occasioned by oil wells.

Bernstein v. Bush, 29 Cal.2d 773, 177 P. 2d 913, had to do with spacing regulations in the Wilmington Oil Field. Public Resources Code, secs. 3600-3607. The petitioners, owners of noncontiguous lots of less than an acre each, entered into a community lease with the petitioner Bernstein. The petitioners contended the spacing regulations were discriminatory and therefore unconstitutional. The court, in part, said, 29 Cal.2d at page 778, 177 P.2d at page 916:

"They assert that such discrimination results from the fact that the enforcement of the regulations permits some owners of lands overlying the oil basin to exercise and enjoy their property right to take oil from the field, while the petitioners, who are property owners overlying the same oil supply, are deprived of the use and enjoyment of their coequal right. The mere assertion of the problem suggests the answer.

"Under the law of this state the landowner has a property right in oil and gas beneath the surface, not in the nature of an absolute title to the oil and gas in place, but as an exclusive right to drill upon his property for these substances. His unqualified and absolute title attaches after the substances have been reduced to possession. Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 819, 129 P.2d 383; Bandini Petroleum Co. v. Superior Court, supra, 110 Cal.App. 123, 127, 293 P. 899. This is a right which is 'as much entitled to protection as the property itself, and an undue restriction on the use thereof is as much a taking "for constitutional purposes as appropriating or destroying it."' People v. Associated Oil Co., supra, 211 Cal. [93] at pages 99-100, 294 P. [717] at page 721, and cases cited.

"In Ohio Oil Co. v. State of Indiana, 177 U.S. 190, at page 209, 20 S.Ct. 576, 44 L.Ed. 729, involving an oil and gas conservation measure, the Supreme Court said that all (not some) of the surface proprietors within an oil and gas field have the right to reduce to possession the oil and gas beneath the surface, and that they could not be absolutely deprived of that right without a taking of private property. The court went on to consider the owners' coequal right to take from the common source of supply, observing that one owner should not be permitted to convert an undue proportion of the supply to the detriment of others; hence that from the peculiar nature of the property right, the legislative power might be exerted in the protection of all the collective owners by securing a just distribution among them. Thus the Supreme Court held that a statute designed to protect life and property or prevent waste, or both, must apply without discriminating against the coequal rights of the property owners; also that a police regulation otherwise reasonable which was designed to secure to each a just distribution from the common source of the supply of oil and gas, took proper cognizance of the property owners' rights. See, also, Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W.2d 73. In the latter case it was said that the denial to one surface owner of his fair chance to recover in kind the oil and gas beneath the surface, or its equivalent, would be a confiscation of his property.

"In Railroad Commission v. Magnolia Petroleum Co., (Court of Civil Appeals of Texas) 169 S.W.2d 253, the test of confiscation was said to be the denial to one of the property owners of the equal opportunity with adjoining leaseholders to develop and realize the benefits from his leasehold; and it was concluded that confiscation resulted from the commission's ruling which had not accorded to the Magnolia company an equal opportunity with the surrounding lessees to recover its fair share of the recoverable oil lying beneath the surface. To the same effect and with a similar result is Marrs v. Railroad Commission, 142 Tex. 293, 177 S.W.2d 941. * * *

"In the absence of statutory prohibition, the right to drill an offset well was com-

monly resorted to as a means of protection by an owner whose property was being drained by a well drilled on adjoining land. The wasteful use of offset wells was recognized as one of the evils sought to be minimized by the enactment of well spacing regulations. Croxton v. State, 186 Okl. 249, 97 P.2d 11, 19; Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W.2d 935, 87 S.W.2d 1069, 99 A.L.R. 1107, 101 A.L.R. 1393. But since the mere opportunity for voluntary pooling of interests does not afford equal protection within the meaning of the federal and state Constitutions, regulatory provisions which in effect prohibit the drilling of offset wells may amount to a denial of the equal protection of the law and a taking of private property without due process of law. Equal protection is so denied where, as here, the law, in its application at least, does not afford adequate means of protection as a substitute for the right to drill an offset well."

In Wilkins v. City of San Bernardino, 29 Cal.2d 332, 175 P.2d 542, it was said that among the cases in which zoning ordinances have been held invalid were 1) cases where the ordinance attempts to exclude and prohibit existing and established uses or businesses that are not nuisances, and 2) cases where the restrictions create a monopoly. The ordinance in the present case does both. For many years one well to an acre was permitted in the entire field. Hundreds of wells were drilled on that basis. A small outlying part of the field from which oil migrates to these many wells was then restricted to one well in a block. After we held in Bernstein v. Smutz, supra, 83 Cal.App.2d 108, 188 P.2d 48 (Dec. 1947) that, under the facts alleged, this restriction infringed upon constitutional guaranties, and after the facts alleged were proven on trial, Ordinance 94,136 was adopted to permit the drilling of two wells in a block in the small—less than 1%—part of the field which for a short period had been restricted to one well in a block. This ordinance did not eliminate the unconstitutional features of the classification. Hundreds of wells still exist, one to an acre, in most blocks in the field. These and other wells are draining oil from below petitioners' property. The ordinance attempts to exclude and prohibit an existing use which is not a nuisance and grants a monopoly to owners and lessees in which there are, or in the future may be, more than two wells in a block.

Appellant says that a city block is a proper unit of land measure for zoning the small restricted area north of Highway 101 and that therefore the ordinance is not unreasonable. If, under the comprehensive zoning scheme originally adopted, the restriction had been one well in each block instead of one well in each acre, and if the blocks were all the same or nearly the same size, and if each owner were afforded the right coequal with the rights of other owners and lessees to recover his fair share of the oil from the common source of supply, the argument might have some force. Upon this record it has none.

Appellant argues that "the issues presented in the case at bar are far different from those involved in Bernstein v. Smutz, supra, 83 Cal.App.2d 108, 188 P.2d 48." The facts alleged in the Bernstein case differ from those in the case at bar only in this: In Bernstein, the ordinance limited drilling to one well in a block in a small part of the field; in the present case, the ordinance limits drilling to two wells in a block in the same small part of the field. All that we said in Bernstein, upon the assumption that the facts pleaded were true, applies with equal force here.

[2] It is argued that because petitioners acquired their lease after District 19 had been restricted to one well in a block, their contentions cannot be sustained. Petitioners acquired their lease about March 5, 1947. At that time District 19 was restricted to one well by Ordinance 89,616, which was subsequently held invalid as applied to that district. Appellant relies on Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W.2d 73, in which it was held that under a rule of the Railroad Commission, subdivisions of land as such which came into existence after an oil well spacing rule became effective, are not protected against confiscation. The case relied on is not

analogous. In that case after a spacing rule had been adopted, a 6.88-acre tract was subdivided into six smaller tracts, one of which was the 2.35-acre tract involved in the lawsuit. A well was drilled on each of the six tracts. The owners of the 2.35-acre tract sought to drill a second well thereon. The spacing rule prohibited the drilling of the second well. Notwithstanding, the Commission granted a permit to drill a second well to prevent confiscation of property. The court held that the Commission was not warranted in granting the permit as, under the spacing rule, any right the 2.35-acre tract had must be relegated to the rights of the 6.88-acre tract because, under the evidence, when the 6.88-acre tract was considered as a unit no well was needed to prevent confiscation. In the course of the opinion it was said that the Commission could not indulge in unreasonable discrimination between different tracts of land in the same field. See also Marrs v. Railroad Commission, 142 Tex. 293, 177 S.W.2d 941, 949. We have an entirely different situation here. When the block in question—District 19—is considered as a whole, at least another well is needed thereon to prevent discrimination and confiscation. The rule noted in the Gulf Land Company case does not obtain where, as here, the well is warranted as a protection to vested rights when applied to the entire tract as it existed before the subdivision. Humble Oil & Refining Co. v. Lasseter, Tex.Civ.App., 120 S.W.2d 541, 542 (error dismissed). Further, the ordinance is discriminatory as to petitioners' lessors. Since Ordinance 89,616 was invalid as applied to District 19, it cannot serve as an obstacle to the assertion by petitioners of their constitutional right.

Cases cited by appellant upholding, as constitutional, statutory regulations having to do with the location and spacing of wells, are not in point and need not be reviewed. In those cases the regulations provided equal treatment of the rights of the surface owners in the common source of supply, or contained provisions looking to the prevention of hardship upon owners in particular cases. The ordinance in the present case does not do either.

[3] Under the facts, the ordinance in question does not "afford adequate means of protection as a substitute for the right to drill an offset well." It deprives petitioners of their right, coequal with the right of other owners and lessees in the Wilmington Oil Field, to recover their fair share of the oil from the common source of supply and, consequently, infringes upon the constitutional guaranties invoked. There is no equality of production. Considering the physical facts appearing in the record, the reasonableness of the ordinance is not fairly debatable nor do the facts show a case where there may be a difference of opinion on the subject. It is clear that the exercise of legislative power has exceeded constitutional limitations. The facts are such as to require this court to conclude, as a matter of law, that the ordinance is unduly oppressive and not reasonably necessary to promote the general welfare of the community.

The case is one "related to regulations prohibiting the recovery of natural resources from the earth. Such a business must operate, if at all, where the resources are found. Considerations which justify an exercise of the police power that necessarily results in putting a business out of existence are different from those which justify regulations that do not prevent the operation of the business but merely restrict its location. Moreover, the Smith [In re Smith, 143 Cal. 368, 77 P. 180] and Palisades [Pacific Palisades Ass'n v. Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782] cases are based in part upon the fact that the ordinances in question were enacted under the guise of regulation and segregation but were in fact to insure monopolies to similar enterprise in unrestricted districts. See In re Ellis, 11 Cal. 2d 571, 575, 81 P.2d 911." Lockard v. City of Los Angeles, 33 Cal.2d 453, 467, 202 P.2d 38, 46, 7 A.L.R.2d 990.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

99 Cal.App.2d 824

MAXWELL v. BROUGHER et al.
Civ. 17635.

District Court of Appeal, Second District, Division 2, California.

Oct. 16, 1950.

Hearing Denied Dec. 14, 1950.

Action by Edgar Maxwell, for himself, and others against J. Whitcomb Brougher, Jr., and others, for judgment directing the manner in which the officers, boards and congregation of church should proceed in matter of hearing and disposing of charges made against the pastor of the church. The Superior Court, Los Angeles County, Arnold Praeger, J., sustained defendant's demurrer to the amended complaint without leave to amend and judgment was entered for defendants, and plaintiff appealed. The District Court of Appeal, Wilson, J., held that civil courts would not interfere with congregation's decision absolving pastor.

Affirmed.

1. Religious societies ⇐12(2)

Church group may create tribunals for decision of controversies with reference to its internal affairs and for ecclesiastical government within the association of its individual members and officers.

2. Religious societies ⇐12(5), 14

Where subject matter of dispute between members of church group is ecclesiastical, a matter which concerns church discipline or conformity of its members to standard of morals required of them, decision of church tribunal will not be interfered with by secular courts either by reviewing their acts or by directing them to proceed in certain manner or, in fact, to proceed at all.

3. Religious societies ⇐12(5)

Decrees of an ecclesiastical body are binding not only upon the church as such body but are binding and conclusive upon civil courts whenever pertinent and material to pending litigation.

4. Religious societies ⇐27(3)

Civil courts would not interfere with congregation's decision absolving pastor against whom charges had been made.

5. Religious societies ⇐25

In action against congregation of church, member of church was not entitled to accounting of church property and fellowship fund for the prospective allocation thereof between expected two factions.

6. Religious societies ⇐23(3)

Where members of a church of congregational character separate from organization, the members who remain constitute the church and retain its rights and property.

7. Religious societies ⇐27(3)

In action by member of church against congregation involving removal of pastor for alleged misconduct, where member alleged that he acted on behalf of entire congregation, but throughout amended complaint he referred to division of sentiment, one faction sustaining pastor, other seeking his removal, member averred such a conflict of interest that there could be no virtual representation by himself for entire congregation.

8. Parties ⇐11

Interests of party, who represents members of class in suit, and the represented parties must be so identical that the motive and inducement to protect and preserve may be assumed to be the same in each.

9. Declaratory judgment ⇐61

To enable Superior Court or District Court of Appeal to award a declaratory judgment there must be an actual controversy relating to legal right and duties of respective parties. Code Civ.Proc. § 1060.

10. Declaratory judgment ⇐313

In action by church member against congregation for declaratory judgment, allegation that position of congregation were unknown was not allegation of a controversy, since it did not appear that congregation's position was in opposition to that of member. Code Civ.Proc. § 1060.

A. Brigham Rose, Los Angeles, for appellant.

Harry W. Chase, Glendale, Meserve, Mumper & Hughes, Los Angeles, for respondents.

WILSON, Justice.

The question presented by this appeal is whether a court of law has jurisdiction to interfere with the internal disciplinary matters of a religious corporation and to enter and enforce a judgment directing the manner in which the officers, boards and congregation of such a corporation shall proceed in the matter of hearing and disposing of charges made against the pastor of the church.

Fortunately such controversies as the one involved in this action are few and it is to be regretted that the matter now before the court, as well as all schisms in religious organizations, could not have been terminated by the order of the ecclesiastical tribunals that are provided for that purpose without resort to the civil courts.

The amended complaint alleges that charges were presented to the pastor of the church in March, 1945, accusing him of having engaged in a course of conduct which, if the charges had been true, would be sufficient grounds for his removal as pastor; upon his refusal to resign the same charges were, in June, 1945, presented to the officers of the church with the request that the same be laid before the congregation; the pastor and the deacon board, in violation of the constitution, customs, regulations and discipline of the Baptist Church, failed to disclose the nature of the charges to the congregation but instead, on June 20, 1945, presented to the congregation a vote of confidence with the statement that the rumored charges against the pastor were untrue; the majority of the members present rejected the motion and voted in favor of hearing the evidence but a vote of confidence was declared to have been carried in favor of quashing the presentation of such accusations. The pleading contains allegations of other irregularities in the proceedings, various efforts of plaintiff to have the charges heard, and his failure to accomplish his desire.

Sprinkled through the complaint are allegations with reference to a "Fellowship Fund" in which plaintiff and all members of the church are alleged to have a financial and beneficial interest, together with statements concerning the alleged misuse of the funds. Such charges are not separately stated from those of alleged misconduct of the minister.

The second cause of action purports to be for declaratory relief. It is alleged that an actual controversy has arisen with respect to plaintiff's rights and those of the members of the congregation of the church but it is further alleged that "the attitude and position of the defendants named in this action are not known," followed by other averments with reference to the acts and conduct of the pastor and to the Fellowship Fund and buildings and property belonging to the church corporation.

Defendants' demurrer to the amended complaint having been sustained without leave to amend judgment was entered that plaintiff take nothing by his action, from which he has appealed.

[1, 2] Ecclesiastical decisions are not reviewable by the secular courts. The church here in question is an independent, democratic, strictly congregational organization governed solely within itself, owing no allegiance to a higher power or jurisdiction. Such an organization may create tribunals for the decision of controversies with reference to its internal affairs and for the ecclesiastical government within the association of its individual members and officers. Where the subject matter of a dispute is purely ecclesiastical in its character, a matter which concerns church discipline or the conformity of its members to the standard of morals required of them, the decision of the church tribunal will not be interfered with by the secular courts either by reviewing their acts or by directing them to proceed in a certain manner or, in fact, to proceed at all. If the civil courts undertook so to do they would deprive such bodies of their right of construing their own church laws including doctrinal theology and the uses and customs of

every religious denomination. Watson v. Jones, 13 Wall. 679, 724, 80 U.S. 679, 724 ff., 20 L.Ed. 666.

[3] The rule adopted by the Supreme Court of this state is that the decrees of an ecclesiastical body are binding not only upon the church as such body but are binding and conclusive upon the civil courts whenever pertinent and material to pending litigation. Wheelock v. First Presbyterian Church, 119 Cal. 477, 482, 51 P. 841; Permanent Committee, etc. v. Pacific Synod, 157 Cal. 105, 128, 106 P. 395. In Blount v. Sixteenth St. Baptist Church, 206 Ala. 423, 90 So. 602, cited by plaintiff, the court declares the democratic character of the Baptist Church and quotes from Nance v. Busby, 91 Tenn. 303, 18 S.W. 874, 15 L.R.A. 801, that discipline is administered by the body of the congregation; a majority of members voting when the church sits in conference determines the result of any motion or resolution disciplining a member; it is a pure democracy with the power of excommunication reposing in the majority of the members voting at any conference. Persons who are voluntary members of the organization submit themselves to the absolute power of a majority and tacitly agree to abide by and submit to such judgments.

[4] From the foregoing it is manifest that the civil courts will not interfere with the decision of the congregation insofar as the charges against the pastor of the church or any other theological or disciplinary matter is concerned.

[5, 6] The allegations with reference to the Fellowship Fund are so interspersed with those relating to the accusations against the pastor that it is difficult to separate them from one another. It is gleaned from the pleading and from the prayer that plaintiff seeks an accounting of the fund and in the event the pastor is permitted to retain his pulpit plaintiff and those having a common interest with him may have allocated to them a fair and equitable division of the property of the church. The authorities do not sustain plaintiff's position. Where members of a church of congregational character, such as the church here involved, separate from the organization the members who remain constitute the church and retain its rights and property. Dyer v. Superior Court, 94 Cal.App. 260, 270, 271 P. 113; Bomar v. Mount Olive, etc. Church, 92 Cal.App. 618, 623 ff., 268 P. 665; Watson v. Jones, supra, 13 Wall. at page 725.

[7, 8] Plaintiff alleges in his pleading that he is acting in behalf of the entire religious association by reason of the fact that he and the whole membership have a common and personal interest in the matters and things which are the subject of the action. Notwithstanding his assertion that he is acting on behalf of the entire congregation, throughout the amended complaint he refers to a division of sentiment, one faction sustaining the pastor, the other seeking his removal. He avers such a conflict of interest that there can be no virtual representation by himself for the entire congregation since the interests of the representative and the represented must "be so identical that the motive and inducement to protect and preserve may be assumed to be the same in each." County of Los Angeles v. Winans, 13 Cal.App. 234, 249, 109 P. 640, 647.

[9, 10] Disposition may be readily made of the second cause of action. To enable the court to award a declaratory relief judgment there must be an "actual controversy relating to the legal rights and duties of the respective parties, * * *." Code Civ.Proc. sec. 1060. Obviously there cannot be a controversy unless one party actually opposes the position taken by the other. If there be no controversy there is nothing to be determined by the court. Plaintiff's allegation that the position of defendants is unknown is not an allegation of a controversy since it does not appear that defendants' position is in opposition to that of plaintiff.

Judgment affirmed.

McCOMB, J., concurs.

MOORE, P. J., deeming himself disqualified does not participate herein.

100 Cal.App.2d 6

PEOPLE v. RUMLEY.

Cr. 4496.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1950.

Juanita Rumley was convicted in the Superior Court, Los Angeles County, William M. Byrne, J., of the unlawful possession of marijuana and from the judgment of conviction and order denying her motion for new trial, she appealed. The District Court of Appeal, Moore, P. J., held that the evidence was sufficient to establish that defendant had possession of marijuana found in her coat pocket and hence sustained conviction.

Judgment and order affirmed.

1. Poisons ⇐4

Marijuana is a "narcotic" within meaning of statute prohibiting possession of any narcotic except upon written prescription. Health and Safety Code, §§ 11001(h), 11500.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Narcotic".

2. Poisons ⇐4

Knowledge of the presence of a narcotic as being under one's physical control is the essence of offense of unlawful possession of a narcotic. Health and Safety Code, § 11500.

3. Criminal law ⇐1159(5)

Whether one accused of unlawful possession of narcotics had knowledge of the presence of the narcotic in his clothing, sleeping apartment or automobile is a question for trial court and its finding, when supported by substantial evidence, will not be reversed. Health and Safety Code, § 11500.

4. Poisons ⇐4

"Possession" is established within meaning of statute forbidding the possession of narcotics, when it is shown that accused had physical control of narcotics with intent to exercise such control, or having had such physical control, had not abandoned it, and that no other person had such possession. Health and Safety Code, § 11500.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Possession"

5. Poisons ⇐9

Evidence that defendant attempted to deceive arresting officer as to location of her abode was sufficient to establish that she had possession of marijuana found in pocket of her coat hanging in closet of apartment which she and her intended husband had rented under assumed names less than a week before and which they were occupying. Health and Safety Code, § 11500.

6. Criminal law ⇐351(10)

False statements made for the purpose of misleading an officer or warding off suspicion are indicative of a consciousness of guilt.

7. Criminal law ⇐351(7)

Where defendant's possession of marijuana had been established in prosecution for unlawful possession thereof, her refusal to identify it constituted substantial proof that she knew of the narcotic qualities of the cigarettes found in her possession and that their possession was forbidden by law. Health and Safety Code, § 11500.

8. Poisons ⇐4

The mere possession of marijuana subjects the possessor to the penalties prescribed by statute, and neither intent nor knowledge that it was marijuana is an element of the offense. Health and Safety Code, § 11500.

9. Poisons ⇐9

In prosecution for unlawful possession of marijuana, jury was justified in believing testimony of officers that defendant had admitted ownership of coat in the pocket of which marijuana was found and rejecting defendant's testimony at trial that coat was the property of another. Health and Safety Code, § 11500.

10. Criminal law ⇐406(1)

The admissions of a defendant against interest are competent proof upon his trial for a crime.

11. Criminal law ⇐1159(2, 4)

The credibility of witnesses or the truth or falsity of facts put in evidence are matters for the jury and, when fairly determined, such determination will not be disturbed on appeal.

Fred N. Howser, Attorney General, Donald D. Stoker, Deputy Attorney General, for respondents.

Joseph T. Forno, Los Angeles, for appellant.

MOORE, Presiding Justice.

Appellant was convicted of the crime of having in her possession cannabis sativa, the flowering tops and leaves of Indian Hemp, commonly known as marijuana. She was convicted by a jury and the court denied her motion for a new trial. She appeals from the judgment and from the order denying her motion for a new trial on the ground that the evidence is insufficient to sustain the verdict.

On November 25, 1949, appellant rented a "bachelor" apartment in a building on Rampart boulevard. She was accompanied by a man who represented himself to be her husband. They introduced themselves as Mr. and Mrs. R. C. Moore. This event occurred on the day of their marriage at Tijuana and they occupied the apartment on the following day. They were arrested at 11:30 o'clock in the evening of December 1 by police officer Eggenweiler in downtown Los Angeles. She informed the officer that she resided at a hotel on south Union avenue. Having failed to find appellant to be an occupant at that address, the officer took a key and a rent receipt from her purse which indicated she was a tenant of the Rampart building. Though she discussed the rent receipt, she withheld information as to whether she resided at the latter address. Accompanied by agent Sweeney of the United States Secret Service and officer Hooper of the Los Angeles police department, Eggenweiler proceeded to the Rampart building about one o'clock on the morning of December 2 and with the aid of the manager of the building gained entrance into the apartment. There they found in addition to the normal furniture for such a place divers garments, each of which was searched by the officer. In the left outside pocket of a red coat hanging in the closet he found a sack containing a green leafy substance, six cigarettes, cigarette papers and a partially burned cigarette. He thereupon exhibited the contents of the sack to agent Sweeney, and later in the day produced both coat and sack in a conference with appellant. In answer to his inquiry she promptly answered that the coat was hers, but when asked about the brown sack taken from its pocket she declined to answer "until I see my attorney." Eggenweiler sealed the sack and contents in a manila envelope and preserved them as evidence. The forensic chemist subjected them to an analysis and found them to contain five grams of marijuana. There was lipstick on the partially burned cigarette.

Appellant's only defense was that she and her husband held "open house" in their apartment after they returned from Tijuana and that the red coat had been left by a departed guest.

[1] Section 11500[1] of the Health and Safety Code forbids the possession of any narcotic except upon the written prescription of a person licensed to prescribe it. Marijuana is included among narcotics. Health and Safety Code, section 11001(h).

[2] Appellant contends that there is no evidence that she knowingly possessed the narcotic, citing People v. Gory, 28 Cal.2d 450, 170 P.2d 433; People v. Martin, 76 Cal.App.2d 317, 172 P.2d 910; People v. Bledsoe, 75 Cal.App.2d 862, 171 P.2d 950. However, in the Gory case it was pointed out that there is a distinction between knowledge of the character of the object

1. "Except as otherwise provided in this division, no person shall possess, transport, sell, furnish, administer or give away, or offer to transport, sell, furnish, administer, or give away, or attempt to transport a narcotic except upon the written prescription of a physician, dentist, chiropodist, or veterinarian licensed to practice in this State."

and the illegality of possession thereof on the one hand, and knowledge of the presence of the forbidden object as embraced within the concept of physical control with the attempt to exercise such control on the other. The latter is the possession denounced by the statute. Knowledge of the presence of a narcotic as being under one's physical control is the essence of the offense.

[3, 4] In order to justify a conviction the jury must be convinced that the party accused of having a narcotic in his possession on his premises or within reach of his habitation must have no more than knowledge of the presence of such narcotic and that such knowledge is the essence of the crime of possession. People v. Gory, supra, 28 Cal.2d page 455, 170 P.2d 436. The issue as to whether an accused had knowledge of the presence of the narcotic in his clothing, sleeping apartment or automobile, is one for the determination of the trial court and its findings when supported by substantial evidence will not be reversed. People v. Casas, 77 Cal.App.2d 255, 257, 175 P.2d 19. Possession of a narcotic as in the case of any other personal property is established when it is shown that the person accused had physical control thereof with intent to exercise such control, or having had such physical control, has not abandoned it and no other person has that possession. People v. Bassett, 68 Cal.App.2d 241, 247, 156 P.2d 457; Rest. Torts, sec. 216.

[5, 6] That appellant had possession of the narcotic is established by the foregoing principles and by the evidence received against her. Within one week after appellant and her intended husband rented the apartment under assumed names and while they were occupying it as their home she attempted to deceive the arresting officer as to the location of her abode. Although she discussed with him the rent receipt which he found in her purse she offered no excuse for her previous statements about her address except to explain that she had lived at the Union avenue address before her marriage and her family had not been informed of such marriage. It was an inference fairly drawn by the jury that her false statements were made in order to hinder the officers from finding her narcotics. False statements made for the purpose of misleading an officer or warding off suspicion are indicative of a consciousness of guilt. People v. Anderson, 90 Cal. App.2d 326, 333, 202 P.2d 1044.

[7, 8] When the officer presented her with the red coat she admitted that it was hers but declined to answer anything concerning the brown sack and its contents. She did not deny knowledge of such items. From her refusal to answer concerning them it was a fair inference that she knew of their incriminating nature. Possession of the marijuana by appellant having been established, her refusal to identify it constitutes substantial proof that she knew of the narcotic qualities of the cigarettes and that their possession is forbidden by law. People v. Physioc, 86 Cal.App.2d 650, 652, 195 P.2d 23; People v. Carlton, 83 Cal.App.2d 475, 477, 189 P.2d 299. Presence of marijuana in appellant's coat pocket found in the closet of her home was sufficient evidence of its possession and control and justifies the inference that she had knowledge that it was there. People v. Hoff, 84 Cal.App.2d 398, 400, 190 P.2d 616. Neither intent nor knowledge that it was marijuana is an element of the offense. The statute provides that the mere possession of marijuana shall subject the possessor to the penalties prescribed. People v. Sweeney, 66 Cal.App. 2d 855, 859, 153 P.2d 371.

[9, 10] Appellant after admitting ownership of the red coat to the officer attempted to repudiate such admission and to establish that the red coat was the property of another. The jury justifiably did not believe her testimony but chose to believe her admission as given in evidence by officers Eggenweiler and Sweeney. The admissions of a defendant against interest are competent proof upon his trial for a crime. People v. Lindsey, 90 Cal.App.2d 558, 565, 203 P.2d 572; People v. Mason, 65 Cal.App.2d 5, 10, 149 P.2d 742.

[11] Appellant attempts to make capital of discrepancies in the testimony of the witness Eggenweiler and of the fact that

the evidence against her is the uncorroborated testimony of police officers. Such arguments are classic and conventional. Courts have too repeatedly explained that the determination of the credibility of witnesses and the truth or falsity of facts put in evidence are matters for the jury to resolve and when fairly determined will not be upset on appeal. People v. Campbell, 80 Cal.App.2d 798, 800, 182 P.2d 626; People v. Yankee, 79 Cal.App.2d 431, 435, 179 P.2d 582.

Judgment and the order denying a new trial are affirmed.

McCOMB and WILSON, JJ., concur.



100 Cal.App.2d 40

NIELSEN v. MILLIGAN.

Civ. 17585.

District Court of Appeal, Second District, Division 1, California.

Oct. 19, 1950.

Action by Laura R. Nielsen against F. L. Milligan, M. D. for damages arising because of defendant's alleged malpractice in the treating of plaintiff. The Superior Court of Los Angeles County, James H. Pope, J., entered judgment in favor of plaintiff and defendant appealed. The District Court of Appeal, Drapeau, J., held that evidence sustained finding of trial court that physician was negligent in failing to take adequate steps to check infection when it first developed upon plaintiff.

Affirmed.

1. Negligence ⇐119(4)

Where general allegations of negligence are followed by an enumeration of specific acts, plaintiff will not be limited to proof of specific acts unless complaint clearly indicates intention of pleader to limit negligence to such acts.

2. Physicians and surgeons ⇐18(5)

In malpractice action, where plaintiff alleged negligence of physician in general terms and followed with an enumeration of specific acts of negligence, plaintiff was not limited to proof of specific acts alone, but was entitled to prove physician's lack of skill and his failure to accord proper care while he was administering to plaintiff.

3. Appeal and error ⇐1011(1)

Where evidence with respect to specific acts of negligence are conflicting, trial court's findings thereon are conclusive upon District Court of Appeal.

4. Physicians and surgeons ⇐18(8)

In malpractice action, evidence sustained finding of trial court that physician was negligent in failing to take adequate steps to check infection when it first developed.

5. Appeal and error ⇐1004(1), 1013

On appeal, decision of trial court and jury on subject of damages cannot be set aside unless verdict is so plainly and outrageously excessive as to suggest at first blush, passion or prejudice or corruption on part of jury.

6. Physicians and surgeons ⇐18(11)

$2,500 general damages to a woman injured by a physician's malpractice for loss of work for 4½ months, discomfort, anxiety, pain and suffering, and for a scarred and misshapen leg was not excessive.

Delvy T. Walton, Los Angeles, for appellant.

Keslar, Woodward & Weissman, James T. Woodward, Los Angeles, for respondent.

DRAPEAU, Justice.

Because plaintiff was overweight, she consulted defendant, a physician and surgeon, specializing in the treatment of obesity. He explained his treatment: special capsules to be taken three times a day, and injections in either the arm or buttock of aqua solution of the pituitary gland. Defendant gave plaintiff her first injection on

July 18, 1947, to wit: "I took the syringe with the needle attached from the sterilizer and then I sterilized the top of the 10 centimeter vial containing the solution of pituitary, pushed the needle through the rubber diaphragm, withdrew half a centimeter, sterilized the area on the buttock where the injection was to be given, gave the injection and then sterilized the area of the buttock again after the needle was withdrawn."

On Friday, July 25th, defendant gave plaintiff a week's supply of capsules and a second injection of the pituitary solution, proceeding "precisely the same as the first time she came."

As to this second treatment, plaintiff testified, however, that defendant picked up the needle from the table on which it was lying right beside the sterilizer and that he did not sterilize the punctured area on her hip after the injection. She further stated that after a few hours she had a burning sensation in her leg and discovered a red area as large as a cup surrounding the needle point of the injection. This was about four inches below the buttock. She tried without success to reach defendant by telephone that night and also the next day, Saturday, when a large water blister formed over an enlarged area. On Monday, she talked to defendant on the telephone regarding the condition of her leg, and was instructed by him to apply a solution of boric acid and to bathe the affected area in epsom salts. Defendant repeated this instruction on the following Wednesday and asked plaintiff to come to his office on Friday, August 1st.

By that time, plaintiff was walking with difficulty and took a taxi to defendant's office. He then examined her and found "an area of redness, approximately 3 centimeters across", in the general area of the injection of July 25th; that he "used the sterile needle with the syringe attached to test to see if there was any exacerbation there. There was none. That syringe came out dry." He then put on a borated gauze bandage and told plaintiff "if that bothered her any to put on an epsom salt compress and to keep in touch with me so I could give her adequate care." At this time he stated to plaintiff that he had experienced difficulty with three other patients who had suffered reaction as result of injections "from this vial" which contained the pituitary serum.

Thereafter, plaintiff's condition became progressively worse, and on August 4th, she consulted Dr. Milan S. Moore, who examined her and found that "she had an infection in the right hip"; that it showed redness, swelling and inflammation; that a cut more than half an inch deep and an inch and a half across was required to evacuate the pus; that it was a subsurface infection about one and one-half inches deep. Dr. Moore testified that he saw and treated plaintiff on August 4, 5, 6, 7, 8, 11, 13, 15, 19, 21 and 22; and that thereafter under his directions she took care of herself at home.

Dr. George J. Chais, a licensed physician and surgeon, duly qualified as an expert witness. In answer to a hypothetical question based upon the facts in evidence, he gave as his opinion that the defendant did not use the skill and care used by the average physician practicing in the community.

To the question: "Doctor, assuming that Dr. X, on the 25th day of July, 1947, made an injection of one-half cubic centimeter of the aqueous extract of the whole pituitary gland, in the right upper thigh of the patient, do you have an opinion as to whether Dr. X used the skill and care that the average surgeon and physician practicing in the vicinity of Los Angeles would have used? * * * The position being approximately 3½ to 4 inches below the buttock on the outer right thigh, which would place it approximately in this locality, Doctor, as testified to by the patient"—the witness answered: "That is not the accepted place to give an injection in the thigh. * * * That is considered too low for an injection into a gluteus."

The amended complaint alleged in substance that on July 25, 1947, defendant negligently and unskillfully treated and cared for plaintiff, "in that, among other things", he injected a defective serum into her right leg, using a needle that was not sterile, and thereby failed to use the skill and care that

an average physician practicing in the community would have used; all of which resulted in serious injury and damage to the plaintiff.

The trial court found that defendant equipped his office "with nothing other than" a sterilizer, hypodermic needles, a bottle of pituitary extract, a bottle of alcohol, and gauze sponges; that he employed in the role of a nurse, an unskilled "office girl" whose services he used to assist in the treatment of plaintiff. Further, that subsequent to the treatment administered on July 25, 1947, "a deep and serious infection set in and spread rapidly and extensively over the thigh of the said plaintiff until it reached the condition where the plaintiff became incapacitated * * * that the patient, the plaintiff in this action, returned to defendant physician and exposed her condition to him, and that he took no adequate or competent steps, nor did he use the knowledge, skill and care used by physicians practicing the same profession in this community, but that he instructed her to apply simple remedies herself, which remedies were not competent to cure a serious infection; and * * * that defendant * * * had no means in his office, and took no steps to obtain means to stop the infection."

The court also found that the pituitary solution was regularly used and supplied by a reputable pharmaceutical house; that defendant physician properly sterilized his needle and did not expose the same to contamination by placing it on the metal table. But that defendant "did not use the ordinary knowledge, skill and care, nor did he provide himself with the reasonable means, to attend to and treat any unusual or extraordinary result that might follow the ordinary course of practice in the medical profession, nor did he, in the treatment of the plaintiff, use the knowledge, skill, and care established by physicians in this community. The Court finds that the injuries, both special and general, sustained by the plaintiff were proximately caused by the failure on the part of defendant to use the knowledge, skill, and care of physicians practicing in this community."

Based on such findings, the court gave judgment in favor of plaintiff and denied defendant's motion for a new trial. Defendant appeals from such judgment.

It is here urged that the judgment is wholly unsupported by the evidence when considering (1) the charges of negligence as alleged in the amended complaint, and (2) the specific findings of the trial court thereon in favor of appellant. In other words, appellant states that the question for consideration is therefore "whether there is any substantial evidence in the record to support the finding of lack of skill on the part of defendant physician and surgeon, in view of the specific finding that the serum was regularly used and supplied by a pharmaceutical house, not a party to the action, and was skillfully administered to the plaintiff by the use of a sterile needle."

Quoting from the amended complaint, to which no demurrer was interposed, negligence of appellant was alleged as follows: "That on or about the 25th day of July, 1947, * * * the defendants proceeded to treat plaintiff, but defendants and each of them negligently, carelessly, recklessly and unskillfully treated and cared for plaintiff, in that, among other things, * * * defendants * * * injected a defective serum into the right leg of plaintiff and also used a needle which was not sterile in the making of said injection and * * * did thereby fail to use and exercise that degree of knowledge, skill, care and diligence in treating and caring for plaintiff that an average physician and surgeon practicing in the vicinity of the City of Los Angeles would have used; and that as a direct and proximate result thereof the plaintiff suffered serious injuries and damages as hereinafter alleged."

It is clear that this allegation points not only to negligence in the treatment administered by appellant using defective serum and a needle that was not sterile, but also to the negligent care accorded respondent during the course of treatments.

[1] As stated in Jackson v. Hardy, 70 Cal.App.2d 6, 13, 160 P.2d 161, 165, quoting from Olcese v. Hardy, 40 Cal.App. 323, 331,

180 P. 666: " 'Where general allegations of negligence are followed by an enumeration of specific acts, the plaintiff will not be limited to proof of specific acts unless the complaint clearly indicates the intention of the pleader to limit the negligence to such acts.' "

In Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 149, 155, 157 P.2d 1, 4, action for malpractice, the court stated: "The absence of care in doing an act which produces injury to another, is actionable. The term 'negligence' signifies and stands for the absence of care. * * * The same rule permitting the pleading of negligence in general terms has been applied in malpractice cases. Dunn v. Dufficy, 194 Cal. 383, 228 P. 1029; Ragin v. Zimmerman, 206 Cal. 723, 276 P. 107; McGehee v. Schiffman, 4 Cal.App. 50, 87 P. 290. That in such instances, in addition to general allegations of negligence, the complaint may include a recital of certain related particulars does not deflect from the force of the general rule that 'it is sufficient in cases of this class to plead that the thing done was negligently done.' "

[2] The pleading here alleges negligence in general terms and the fact that there follows an enumeration of specific acts, i. e., the use of defective serum and a needle that was not sterile, does not alter the character of such allegation. Both of these specific acts may properly be classed as evidentiary facts, provable under the allegation of general negligence. See Jackson v. Hardy, supra. On the other hand, respondent is not limited to proof of the specific acts alone, but under her allegation of negligence generally, she is entitled to prove appellant's lack of skill and his failure to accord proper care while he was administering the treatments.

[3, 4] The evidence with respect to the specific acts of negligence was conflicting. The trial court's findings thereon are conclusive upon this court. Nevertheless, the record discloses substantial evidence in support of the findings of appellant's negligence in failing to take adequate steps to check the infection when it first developed. Such findings amply support the judgment in respondent's favor.

Appellant claims that certain questions asked of him by the trial judge constituted prejudicial misconduct. Appellant was questioned with respect to the size and arrangement of the rooms of his office suite, articles of furniture and medical equipment contained therein. There appears to be no merit in this point. An examination of that part of the record objected to bears out opposing counsel's comment in the reply brief: "anyone at all acquainted with the trial Judge's methods knows that he is patient, kindly, deliberate, never hasty or intemperate, and cases tried before him proceed in the highest type of judicial atmosphere. Nowhere in his questioning can there be found any evidence of an inquisitorial attitude."

It is further urged that the award of $2,500 general damage is excessive. The record discloses that respondent was unable to work following the injection of July 25, 1947, for a period of at least four and one-half months. During this period she was subjected to discomfort, anxiety, pain and suffering. Her leg is scarred and misshapen.

[5, 6] As has been many times stated, "Upon appeal, the decision of the trial court and jury on the subject (of damages) cannot be set aside unless the verdict is 'so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury.' (citation of cases.)" McNulty v. Southern Pacific Co., 96 Cal.App.2d 841, 846, 216 P.2d 534, 538. There is nothing in the record before us which suggests either prejudice or corruption on the part of the trial court in making the award here complained of.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

WHITE v. TOWERS.
Civ. 17767.

District Court of Appeal, Second District, Division 2, California.

Oct. 16, 1950.

Rehearing Denied Oct. 30, 1950.

Hearing Granted Dec. 14, 1950.*

Action by Claude White against Charles Towers, for malicious prosecution. The Superior Court, Los Angeles County, Arnold Praeger, J., entered an order sustaining defendant's demurrer to complaint without leave to amend, and plaintiff appealed. The District Court of Appeal, Wilson, J., held that investigator who brought two charges against plaintiff for violation of state fish and game law was immune from civil liability for alleged malicious prosecution.

Judgment affirmed.

1. Appeal and error ⇐717

While opinion of trial judge is part of record on appeal, it is not a decision of case, but merely states reasons for decision, and only question to be determined by reviewing court is whether trial court reached proper legal conclusion. Rules on Appeal, rule 5(a, b).

2. Appeal and error ⇐717

On appeal, where plaintiff assigned as error several holdings made by trial judge in his written opinion stating reasons for sustaining of demurrer, the Supreme Court would consider whether court was correct in sustaining demurrer and would not consider statements contained in opinion. Rules on Appeal, rule 5(a, b).

3. Officers ⇐114

It is policy of law that where officer is acting within scope of his duties he should not be subjected to harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in exercise of his judgment or discretion, or because of an erroneous construction and application of law.

4. Malicious prosecution ⇐42

Where investigator of Fish and Game Commission charged plaintiff with pollution of waters in violation of law in municipal court, and subsequently charged plaintiff in federal court with similar offense, and both charges were dismissed, investigator was acting in course of performance of his delegated duty, and investigator was immune from civil liability for alleged malicious prosecution. Fish and Game Code, §§ 10, 13, 20, 21, 481; 33 U.S.C.A. § 407; Const. art. 4, § 25½.

Joseph K. Coady, Bellflower, for appellant.

Fred N. Howser, Attorney General, Bayard Rhone, Norman Sokolow, Deputy Attorneys General, for respondent.

WILSON, Justice.

This is an action for malicious prosecution. Plaintiff has appealed from the judgment following an order sustaining defendant's demurrer to the complaint without leave to amend.

[1, 2] Plaintiff assigns as error several "holdings" made by the trial judge in his written opinion ordering the sustaining of the demurrer. While the opinion is a part of the record on appeal, Rules 5(a) and 5 (b), Rules on Appeal, 22 Cal.2d 4, it is not a decision of the case but merely states the reasons for the decision. The only question to be determined by the reviewing court is whether the trial court reached the proper legal conclusion. We therefore shall consider whether the court was correct in sustaining the demurrer and not the statements contained in the opinion to which plaintiff has taken exception.

It is alleged in the complaint that on October 5, 1948, defendant filed in the Municipal Court of Long Beach a complaint charging plaintiff with a violation of section 481 of the Fish and Game Code of California in that he deposited into the waters of the state of California certain petroleum, deleterious to fish and plant life; plaintiff was tried on October 28, 1948, and the charge was dismissed; about April 29, 1949, defendant swore to an affiadavit which was filed in the District Court of the United States for the Southern District of California alleging that plaintiff discharged into the navigable waters of the United States approximately 4,000 barrels of pe-

* Subsequent opinion 235 P.2d 209.

troleum oil in violation of section 407 of Title 33 U.S.C.A.; on July 19, 1949, plaintiff was tried and discharged and the information was dismissed.

The complaint contains the usual allegations in such a case—the institution of criminal proceedings against plaintiff, final determination in his favor, malice and want of probable cause. In addition there is attached to the complaint as an exhibit a copy of defendant's affidavit filed in the United States District Court which resulted in plaintiff's prosecution in that court. In such affidavit it is set forth that defendant was an investigator employed by the California Division of Fish and Game when he filed the affidavit and put in motion plaintiff's arrest and prosecution.

Defendant maintains that by reason of his official position he is immune from civil liability for damages while plaintiff contends that defendant's position as investigator did not place him sufficiently high in the official scale to entitle him to immunity. The pollution of waters along the shores of the state is a matter of concern to the Fish and Game Commission. It is one of the duties of the commission to see that such waters are not defiled by the introduction therein of any substance deleterious to fish and plant life. It is the duty of the commission to prosecute under state or federal statute, or both, whenever a violation comes to its notice or is observed by any of its employees. One of the obligations of an investigator employed by the commission is to make observation and inquiry as to whether the littoral waters have been polluted by the discharge therein of any forbidden materials. Upon the ascertainment of facts warranting a prosecution for such pollution it is his legal duty to apprehend the person responsible for the offense, to assemble evidence upon which prosecution of the perpetrator of the unlawful act may be brought to justice, and to initiate proceedings in the proper court therefor.

The division of Fish and Game in the Department of Natural Resources is administered through the Fish and Game Commission provided for by section 25½ of article IV of the Constitution. Fish and Game Code, secs. 10 and 13. Without merit is plaintiff's contention that section 21 of that code, which provides that "all deputies" are public officers and have the power and authority of peace officers, excludes defendant from immunity for civil damages, because he was not a deputy. Section 20 authorizes the commission to employ such deputies, clerks, assistants "and other employees" as they may need to discharge the duties imposed by law upon the commission. Defendant as one of the "other employees" was acting on behalf of the commission when he filed the criminal complaints against plaintiff for the enforcement of the provisions of the law.

Even though defendant was not a deputy immunity was extended to him since as an investigator he was a public servant acting in his official capacity and within the scope of his jurisdiction and exercising judgment and discretion in the discharge of his duties. White v. Brinkman, 23 Cal. App.2d 307, 317, 73 P.2d 254; Norton v. Hoffmann, 34 Cal.App.2d 189, 199-200, 93 P.2d 250. Plaintiff relies on Prentice v. Bertken, 50 Cal.App.2d 344, 123 P.2d 96, in which the court referred to the immunity granted to certain public officers and stated, 50 Cal.App.2d at page 350, 123 P.2d at page 99, that public policy did not require the doctrine of immunity to be extended to a peace officer. That declaration is dictum since on the following page the court held that in any event the complaint did not state sufficient facts to constitute a cause of action for the reason that it did not clearly appear that the prosecution had been terminated. Since the termination of the prosecution is a necessary element in an action for malicious prosecution the failure so to allege would be fatal to the complaint without regard to the official position occupied by the defendant.

[3, 4] It is the policy of the law that where an officer is acting within the scope of his duties as defined by law he should not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion, or because of an erroneous construction and

application of the law. Cooper v. O'Connor, 99 F.2d 135, 138, 69 App.D.C., 100, 118 A.L.R. 1440, and cases cited. As stated in the Cooper case, 99 F.2d at page 142, to hold that only the members of the Fish and Game Commission should be immune would defeat the purpose of the law. The administrative duties of the commission necessarily require that some of such duties shall be delegated to its employees, hence when the act of the employee occurs in the course of the performance of his delegated duty it is the official action of the commission and the same immunity extends to the employee as would be enjoyed by the members of the commission.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



100 Cal.App.2d 1

PEOPLE v. COLLETTA.
Cr. 4487.

District Court of Appeal, Second District, Division 2, California.
Oct. 17, 1950.

Sam Colletta was convicted in Superior Court, Los Angeles County, W. Turney Fox, J., for burglary in the second degree and he appealed. The District Court of Appeal, McComb, J., held that the evidence was sufficient, although it was entirely circumstantial, to justify the trial court's conclusion, that defendant broke into the hardware store, and to sustain conviction.

Affirmed.

1. Burglary ⇐41(1)

Evidence was sufficient, although entirely circumstantial, to justify trial court's conclusion that defendant broke into hardware store, and to sustain conviction for burglary in second degree.

2. Criminal law ⇐938(1)

Where defendant in burglary prosecution alleged that he had made diligent but unsuccessful attempt to locate two witnesses prior to his trial, but there was no showing that he made any effort to produce them at trial nor that he made attempt to obtain their depositions and testimony of three other witnesses would have been merely cumulative, trial court did not abuse its discretion in denying defendant's motion for new trial.

3. Criminal law ⇐945(1), 1156(3)

Determination of question whether newly discovered evidence which is cumulative evidence is of such a nature as to have produced different result if it had been presented on trial, rests largely in sound discretion of trial court, whose determination will not be disturbed on appeal in absence of showing of abuse of discretion.

Russell E. Parsons, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Howard S. Goldin, Deputy Attorney General, for respondent.

McCOMB, Justice.

From a judgment of guilty of burglary in the second degree after trial before the court without a jury, defendant appeals.[1] There is also an appeal from the order denying his motion for a new trial.

Questions

First: *Was the evidence sufficient to sustain the judgment of guilty?*

This question must be answered in the affirmative. The evidence disclosed that Felix B. Seay was the owner of a hardware store located at 7522 Sunset Boulevard, Los Angeles. On July 30, 1949 (Saturday) at approximately 5:30 p.m. he left his store which was locked. Mr. Seay

1. Defendant's brief does not conform with Rule 15(a) of the Rules on Appeal (22 Cal.2d 12) in that it is not prefaced by a topical index of its contents or a table of its authorities.

did not go to his store on Sunday. Mr. Fraser, who operated a bakery next to Mr. Seay's store, on Monday, August 1, 1949, at about 3:45 a.m. heard hammering sounds emanating from the hardware store, whereupon he summoned the police. When Officer Donovan arrived at the store at approximately 4:00 a.m. on the morning of August 1st, he found that other police officers had arrived before him; that the back door to the store was open and the glass in the back window broken. The combination had been knocked off the safe and a hydraulic automobile jack was lying near the safe.

At about 4:45 a.m., Officer Donovan was driving on Hobart near its intersection with Sunset Boulevard when defendant was seen leaving a taxicab. The officer asked defendant where he had taken the taxicab, to which defendant replied "on Sunset Boulevard" near a big drive-in. Defendant was then asked why his hands were all dirty. He replied that he had been out with a friend of his named "Johnny" and Johnny's girl friend, that his hands had become dirty when he had changed a flat tire.

He was then taken back to Sunset Boulevard and asked to point out where he had entered the taxicab. Defendant indicated a place described as Simon's Drive-in on Sunset Boulevard near Ivar.

Defendant was then taken to the Hollywood Cab Company where a cab driver named Ocha stated that he had picked defendant up on the southwest corner of Fountain and LaBrea streets and had received a dollar from him. Defendant agreed that he had given the cab driver a dollar.

Fountain and LaBrea is about two blocks south and two or three blocks west of the hardware store, and there is no drive-in restaurant at that corner.

The officer also asked defendant where his car was, to which defendant stated that he had loaned his Buick to a friend named Ralph Fire at about 11:00 p.m. the previous evening so that Fire could go to the races at Del Mar, and that he expected his car would be gone for a day or two. In defendant's pocket were found three keys, one of which appeared to be an automobile key. Defendant was asked if he had a hydraulic jack in his car, to which he replied "No". Defendant stated that he had a bumper jack.

The police then accompanied defendant to his motel room at the Hollywood Star Motel on Sunset Boulevard where they met defendant's wife. In their room was a double bed and a single bed. In the single bed a man was asleep. The officer asked defendant who the man was and was told he was Johnny Tisano. Upon being awakened the man was asked his name and he stated he was Ralph Fire. Defendant and Mr. Fire were taken to the City Hall and en route Mr. Fire was asked if he had been driving defendant's car, to which he replied in the negative. He said he had been with defendant until about 12:30 a.m. that night at which time they had separated.

After leaving defendant at the City Hall, Officer Donovan and his partner returned to the hardware store and about 75 yards west thereof located defendant's Buick. The back end of the car had a trunk compartment, the handle of which was turned to the side, and in this compartment the officers found a tubular metal hydraulic jack handle. There was no other jack in the car and the only tool pertaining to a jack was this handle. The key which Officer Donovan had taken from defendant's pocket was used to unlock the ignition of the Buick.

Defendant was asked how he had received two or three fresh cuts on the high part of his left hand between the thumb and index finger. He replied that he had been cut while helping his friend change a tire about a half hour prior to the time he had been taken into custody.

At the hardware store the officer had seen a hatchet which appeared to have blood on it lying on the floor in front of the safe. At the City Hall defendant had been asked to stand on a newspaper. The cuffs of his trousers had been turned down and pieces of grey or greyish blue putty had fallen out. When asked if he knew what it was, defendant said "Yes. It is a piece of putty." He said he had done some work in New Mexico and that the putty had been in his pants cuffs ever since. Later defendant was taken to the rear win-

dow of the hardware store where there were found about a dozen pieces of putty. Such putty was placed in an envelope and delivered together with the putty taken from defendant's trousers cuff to a police chemist who testified that the putty found in defendant's cuff and at the hardware store were the same or of similar coloring. He did not state that the putty itself was the same in both cases.

The chemist also testified that the jack found in the store had an original or basic color of blue or bluish green, while the handle found in defendant's car was of a basic color of black, and that he had found black paint on the jack itself, particularly on the area which would receive or retain the handle, and that he had found blue paint on the jack handle. He testified that the blue paint which was on the jack handle could have come from the jack, though he could not definitely state that the blue was from the jack. Likewise the chemist stated that he could see the stain on the hatchet handle which had been found, though there was not a sufficient sample to ascertain whether it was human blood.

Defendant denied having entered the hardware store, stated that he had been at a restaurant known as Leon and Freddie's located on the Sunset Strip until about midnight when he had taken his wife to the Hollywood Star Motel and then had rejoined his friends at Leon and Freddie's. He said that he had loaned his car to Fire who was going to Del Mar. He also said that there were two Fires, one of whom was a jockey, and that he had met both Fires in Leon and Freddie's that night.

[1] From the foregoing evidence which was entirely circumstantial, the trial court was justified in reaching the conclusion that defendant was the culprit who broke into the hardware store. In a prosecution for burglary the evidence on which a defendant is convicted may be purely circumstantial and if substantial, as in the present case, is sufficient to support the judgment of guilty. (People v. Flynn, 73 Cal. 511, 512 et seq., 15 p. 102; People v. Warner, 25 Cal.App. 751, 754, 145 p. 545; People v. Roeder, 41 Cal.App.2d 495, 499, 107 P.2d 92; People v. Fitch, 73 Cal.App.2d 825, 826 et seq., 167 P.2d 211; People v. Anderson, 37 Cal.App.2d 615, 619, 100 P. 2d 348.)

People v. Draper, 69 Cal.App.2d 781, 160 P.2d 80, relied on by defendant, is clearly distinguishable on its facts from the present case. In the cited case the only evidence against the defendant was the fact that several minutes after the door to the service station was observed to be open, he was seen standing beside a building 50 to 75 feet away. Very properly the court held that such evidence was insufficient to sustain a judgment of guilty.

Second: *Did the trial court abuse its discretion in denying defendant's motion for a new trial?*

[2, 3] This question must be answered in the negative. On a motion for a new trial defendant filed an affidavit alleging that he had made a diligent but unsuccessful attempt to locate Jack Nash and Ralph Fire prior to the time of his trial. However at the time of trial he testified that Jack Nash was in Chicago, and that Ralph Fire was in Illinois. Thus it appears he knew where they were located, but there is no showing that he had made any effort to produce either or both of them at the trial nor that he made an attempt to obtain their depositions. He also claimed in his affidavit that upon a retrial he could produce a Mr. Polino, a James Pizzo as well as a Mr. Harding who had observed his being searched by the police officers. The testimony of these last three witnesses would have been merely cumulative of testimony given at the time of trial. The rule is established that the determination of the question whether newly discovered evidence which is cumulative evidence is of such a nature as to have produced a different result if it had been presented on the trial, rests largely in the sound discretion of the trial court, whose determination will not be disturbed on appeal in the absence of a showing of an abuse of discretion. (People v. Blain, 46 Cal.App.2d 844, 847 et seq., 117 P.2d 27.)

In the present case there is not alone a failure to show that the trial court abused its discretion, but it appears from the rec-

ord that its discretion was wisely exercised in the promotion of substantial justice.

The judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.



99 Cal.App.2d 865

KELLEY v. STATE BOARD OF SOCIAL WELFARE.

Civ. 17712.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1950.

Rehearing Denied Nov. 2, 1950.

Hearing Denied Dec. 14, 1950.

Charles G. Kelley brought proceedings against the State Board of Social Welfare, in the Superior Court, to review proceedings before the Board and to obtain an order directing the Los Angeles County Board of Supervisors to reimburse him in certain sums deducted from payments of old age assistance to him. The Superior Court, Los Angeles County, Clarence M. Hanson, J., gave judgment for defendant and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that a written agreement between husband and wife that wife's earnings are to be her property alone is not binding upon the Board of Public Welfare in determining amount of aid to be granted the husband.

Judgment affirmed.

1. Paupers ⇐43(2)

Facts that husband and wife made written agreement that wife's earnings were her separate estate, and that husband and wife lived separate and apart were not binding upon welfare board in determining amount of aid to be granted to husband, and aid to husband could be reduced during periods when wife worked.

2. Paupers ⇐43(2)

Spouses may by agreement convert community earnings into separate property as between themselves, but such agreements are not binding upon welfare board in proceedings for determining amount of aid to be awarded.

Charles G. Kelley, in pro. per.

Fred N. Howser, Attorney General, Dan Kaufmann, Deputy Attorney General, for respondent.

MOORE, Presiding Justice.

Appellant petitioned the superior court to review the proceedings which he had instituted before respondent board for the purpose of obtaining its order directing the Los Angeles county board of supervisors to reimburse him in certain sums deducted from their "short" payments of old age aid to appellant. While his petition contains a number of demands and although the court below "reviewed the entire proceedings" as required by sections 2182 and 2182.1 of the Welfare and Institutions Code yet at the time of oral argument appellant waived all his contentions for reversal except his claims that his relief should not be diminished on the hypothesis that he owns a community interest in his wife's earnings.

During the period for which his aid was reduced his wife was employed. He appealed to respondent on a number of occasions from the orders of the board of supervisors relative to his asserted rights to increased allowances. On each review the board considered his contention that his wife's earnings were her separate property. In each instance it was held that Mrs. Kelley's earnings belonged to the community. On a former occasion the superior court approved respondent's order and on appeal that judgment was affirmed by this court in Division Three. 82 Cal.App.2d 627, 186 P.2d 429, 431. In that decision the court considered the board's "finding that the spouse's income is community income" and held that a release signed by appellant relinquishing all rights to his wife's earnings was ineffective in view of the facts that the wife had applied her earnings to the needs of the community, and also she considered her earnings to be community property. After that decision, upon ap-

pellant's petition to have reviewed the status of the wife's earnings, the matter was again in June, 1948, brought before respondent board. At that time the board considered a second agreement of appellant and his wife dated in January, 1948, which was after the decision by Division Three. By such agreement it was provided that her earnings would be her separate property. Respondent board decided that such agreement was impotent to effectuate appellant's wishes. In July, 1948, by amended petition, the identical point was presented by appellant's assertion that his wife's earnings had been her separate property for 25 years.

On this appeal, as in the court below, appellant bases his claim to additional aid upon the same grounds that they were urged on prior reviews and upon the same alleged contracts as heretofore presented. The complete file of the superior court in this proceeding is before the court on this appeal. After the "Return of Record" had been filed, appellant presented his brief in which he sets forth his contention as to why the action of respondent was erroneous. Again he has urged that the judgment should be reversed because of the uncontradicted proof that his wife's earnings are her separate property. Having waived all his points except his contention that his wife's earnings should not be considered in fixing the amount of aid to be paid him, an observation upon that subject will close this discussion.

The decision of Division Three of this court, supra, determined not only the constitutional validity of sections 2181[1] and 2184[2] of the Welfare and Institutions Code, but also determined the correctness of respondent's application of those statutes. Moreover, it properly held that under the showing made, Mrs. Kelley's earnings are community property. The proof supporting such finding was (1) her application of her earnings to community needs; (2) payment of her federal income tax on a community property basis; (3) her statement that she considered her earnings to be community property. Appellant's attempt to release by a writing his interest in the wife's earnings was wholly ineffectual.

[1, 2] Coming to the judgment now under review, the only additional fact presented to the board was that appellant had procured his wife to join him in a written agreement that her earnings are her separate estate. At the oral argument he attempted to reinforce the evidential value of such agreement by declaring that he "lives separate and away from" his wife. The board was not impressed by such attempts to circumvent the former decision nor is this court moved by appellant's arguments. There is no denying that spouses may by agreement convert community earnings into separate property so far as they are personally concerned but such agreements are not binding upon respondent in proceedings for determining the amount of aid to be awarded an applicant. It is a truism familiar to all literate men that a spouse takes

1. "The board of supervisors, directly or through an authorized investigator, shall upon receipt of an application for aid, promptly, without any unnecessary delay, and with all diligence, make the necessary investigation. Such investigation shall be completed within 60 days after receipt of the application.

"The board shall upon receipt of the report of the investigation determine the ability of responsible relatives to contribute to the support of applicant and designate the amount of aid, if any, to be granted. The maxim degree of liability of the responsible relative shall be determined by 'Relatives' Contribution Scale.' [Omitted herein.] In determining ability to contribute, the financial circumstances of responsible relatives shall be given due consideration and, in unusual cases, contributions at less than the amount fixed by 'Relatives' Contribution Scale' may be made as the board of supervisors may deem justifiable. A married daughter of the applicant shall not be required to make contributions unless she has income constituting her separate property."

2. "The board may annually or oftener make such investigation as the board deems necessary to determine the recipient's eligibility to continue to receive aid under this chapter. The amount of aid may be changed or aid may be discontinued if the board finds that the recipient's circumstances have changed sufficiently to warrant it."

her mate "in poverty and in wealth, in sickness and in health, so long as they both shall live." The act providing aid for the aged would be a mockery if a wife could live in her mansion in abundance, while scorning her husband in his chill penury or watching the state's beneficence mollify his wretchedness.

Appellant's motion for augmenting the record is granted. His motion "for one basic finding" is denied.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.



99 Cal.App.2d 849

SKETCHLEY v. LIPKIN et al. (two cases).
Civ.17226.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1950.

As Modified Oct. 18, 1950.

Action by Harry J. Sketchley and Harry J. Sketchley, doing business under the fictitious firm name and style of Beverley & Hollywood Plumbing Company, against Sam P. Lipkin, the Underground Power Equipment Corporation of America, a corporation, and others to enjoin defendants from exercising any right over a certain machine invented by plaintiff or from keeping, using or alienating the novel features or parts thereof. Defendants filed a cross-complaint to recover an expenditure by them of money for labor and materials in fabricating a machine. The Superior Court of Los Angeles County, Vernon W. Hunt, J., entered a decree joining the defendants upon condition that plaintiff paid defendant Lipkin money invested by Lipkin in the construction of a machine, and both parties appealed. The District Court of Appeals, Moore, P. J., held that where plaintiff conceived and developed a device for cleaning sewers, and communicated his scientific knowledge to his son-in-law concerning machine solely by reason of his reliance upon son-in-law's promise to formulate in writing all of the terms of an oral contract to manufacture and promote machine, but son-in-law and other defendants refused to execute written agreement even though they had received from plaintiff the secret and scientific knowledge for the construction and manufacture of invention, plaintiff was entitled to a decree enjoining defendants from exercising any right over machine invented by plaintiff, free and clear of any condition that plaintiff pay son-in-law money invested by son-in-law in construction of machine.

Judgment affirmed as amended.

1. Appeal and error ⇐882(3)

In action to enjoin defendants from manufacture and sale of plaintiff's invention, where a joint venture between the plaintiff and defendants was not pleaded nor advanced at trial, defendants could not advance theory of joint venture for first time on appeal.

2. Injunction ⇐56

Where plaintiff conceived and developed a device for cleaning sewers, and in the confidence of his family circle communicated his scientific knowledge to his son-in-law concerning the inventions solely by reason of his reliance upon son-in-law's promise to formulate in writing all the terms of an oral contract for manufacture and promotion of invention, plaintiff was entitled to be protected in enjoyment of his invention by an injunction restraining son-in-law from divulging nature of invention.

3. Injunction ⇐56

The recipient of a secret process of manufacture imparted to him in confidence or to one who accepts it in consideration of an agreement to perform valuable covenants which the latter violates will be enjoined from using such secret process.

4. Injunction ⇐56

When a contractee has gained an intimate knowledge of an invention by virtue of an agreement to use it according to specified terms and thereafter repudiates agreement, contractor will be awarded injunctive relief to prevent use of such knowledge of his secret process or invention so gained from him by his contractee.

5. Appeal and error ⇐1009(1)

In action to enjoin defendants from exercising any rights over a certain machine invented by plaintiff, where trial court from substantial evidence found that plaintiff communicated his scientific knowledge to his son-in-law concerning invention solely by reason of his reliance upon son-in-law's promise to formulate in writing all the terms of an oral agreement to manufacture and promote invention, and that plaintiff was not guilty of any in equitable conduct, District Court of Appeals was without authority to modify finding.

6. Appeal and error ⇐994(3), 1011(1), 1012(1)

It is function of trial court not only to determine weight and credibility of evidence, but where there is a conflict in evidence trial court's finding is final.

7. Appeal and error ⇐717

Neither trial court's written opinion nor responsive remarks in course of trial are competent to impeach finding by showing that trial judge believed certain witnesses whose testimony was contrary to his decision.

8. Injunction ⇐34

Injunctive relief is available as matter of right to prevent invasion of one's property rights where he has complied with all procedural requirements.

9. Equity ⇐66
Injunction ⇐56

When inventor's right has been violated, injunctive relief will not be denied unless defendant brings forth some cause finding equity growing out of subject matter which would entitle him to a remedy against other party and where defendant has acted with full knowledge of an adverse claim, defendant has no equity to be protected therefrom and maxim that one who seeks equity must do equity is inapplicable.

10. Trusts ⇐30½(1)

Where plaintiff conceived and developed a device for cleaning sanitary sewers and communicated his scientific knowledge to his son-in-law concerning machine solely by reason of his reliance upon son-in-law's promise to formulate in writing all the terms of an oral agreement to manufacture and promote device, son-in-law became a trustee and as such was obligated to preserve for plaintiff all trades he could and scientific knowledge entrusted to him.

11. Equity ⇐62

Equity follows the law.

12. Equity ⇐62

Where the rights of plaintiff were determined by law, chancellor was without authority to grant what law denied.

13. Injunction ⇐56, 108

Where plaintiff conceived and developed a device for cleaning sewers, and communicated his scientific knowledge to his son-in-law concerning the machine solely by reason of his reliance upon son-in-law's promise to formulate in writing all the terms of their oral agreement to manufacture and promote machine, but son-in-law willfully ignored oral agreement and refused to execute a written agreement even though plaintiff had turned over trade secrets and scientific knowledge, plaintiff was entitled to an injunction restraining son-in-law from exercising any right over machine, free and clear of any condition that he reimburse son-in-law money invested by son-in-law in construction of machine.

14. Equity ⇐65(2)

Equity does not aid him who has breached his agreement.

15. Constitutional law ⇐278(1)

No court has the power to divest a person of property right in an invention or to choose a contractee to whom inventor must make an assignment of invention.

16. Injunction ⇐194

In action to enjoin defendants from exercising any right over a certain machine invented by plaintiff, where plaintiff did not ask for nor demand possession of machine or parts assembled by defendant, court had no authority to require plaintiff to accept them as condition of injunctive relief.

17. Injunction ⇐204

Where defendant in open court expressly waived any defense based upon

claim that plaintiff's invention was in the public domain, an order enjoining defendants from making, selling or using a machine which had been fabricated by defendants by use of ideas and mechanical construction of machine invented by plaintiff was not too broad, especially where information concerning machine was disclosed originally in confidence.

Reynolds, Painter & Cherniss, by Louis Miller, Los Angeles, for plaintiff.

Harry G. Sadicoff, Los Angeles, for defendants.

MOORE, Presiding Justice.

Both parties have appealed from a decree enjoining defendants from exercising any right over a certain machine invented by plaintiff or from keeping, using or alienating the novel features or parts thereof on condition that plaintiff pay defendant Lipkin moneys assertedly invested by him in the construction of such machine.

For about 12 years preceding 1947, in connection with his plumbing business, plaintiff was engaged in inventing, constructing, and perfecting a machine for cleaning sewers and other subterranean conduits. While he had through the years discussed his device with his son-in-law, defendant Lipkin, it was not until 1947 that the latter became so interested in the device that he negotiated to acquire an interest. In July, 1947, they orally agreed that a corporation should be organized to own and exploit the invention; its stock to be divided on the basis of 51 per cent to Lipkin and 49 per cent to plaintiff; no dividends to be paid until plaintiff should be reimbursed in the sum of $25,000 for his expenses in developing the machine; both to receive salaries in the same amount; Lipkin to invest $25,000 and further to finance the corporation by the sale of its nonvoting shares to the extent of $250,000; Lipkin to handle sale and promotions, plaintiff to supervise construction and direct the use and operation of the machines fabricated by the corporation; exclusive rights to the exploitation of the machines in Washington, Oregon and California to be reserved by plaintiff—all such covenants and stipulations to be embodied in a writing by Lipkin's attorney.

A second meeting of the parties assembled in mid-August for the purpose of executing the contract. The attorney presented a writing he had prepared for the signatures of plaintiff and Lipkin. Plaintiff and his son promptly pointed out that the document contained no provisions for equality of salaries of Lipkin and plaintiff, for Lipkin's investment of $25,000 or for his financing the company in the sum of $250,000, for plaintiff's reservation of exclusive territorial rights, for the division of the stock between plaintiff and Lipkin on the basis of 49 and 51 per cent respectively. When plaintiff refused to sign the writing, Lipkin promised plaintiff that a new draft of the agreement would contain the omitted provisions. Thereupon the attorney caused plaintiff and his son "Bud" to execute a power of attorney as a necessary instrument to be used in effecting the proposed corporation. Pursuant thereto, the attorney caused to be organized in Nevada the Underground Power Equipment Corporation of America. While the "dummy" organizers authorized the issuance of the corporate shares to plaintiff and his son and to Lipkin and his two associates, Roberts and Mendes, no application was made to the corporation commissioner of California for a permit to issue securities. Without closing the negotiations for the written contract required, Lipkin occupied plaintiff's shop and offices and put Mendes to work in a machine shop supervising a new construction herein referred to as the "underground machine." As such work proceeded, plaintiff believed that Lipkin would cause to be produced a written contract with the terms and covenants already agreed upon. While so believing, he and his son imparted to Lipkin and Mendes their experiences in building models number 1 and 2, fully advised them concerning the mechanical problems to be encountered, gave them full information concerning the materials and equipment necessary to be assembled, and furnished them with plans, drawings and specifications used in building machine number 2. The underground machine was

fabricated by use of the confidential and secret information supplied Lipkin by plaintiff while the latter was relying upon Lipkin to prepare and execute the contract embodying the covenants and terms orally agreed upon. Such machine is in no material respect different from plaintiff's number 2. Lipkin's promises to prepare the written contract were continuously made for the purpose of obtaining the blue prints, plans, descriptive matter and all available confidential information from plaintiff. While Lipkin had not in the first instance made such promise with no intention of performance, he subsequently developed such intent and at all times he knew that plaintiff supplied all such confidential information solely by reason of his belief in and reliance upon Lipkin's promises.

When plaintiff refused further to deal with Lipkin without the written contract, defendants appropriated to their own use all the information supplied them by plaintiff and manufactured one or more underground machines by the use of plaintiff's machines and drawings and the information imparted to Lipkin by plaintiff, and were about to build and sell other machines in competition with plaintiff.

Thereupon plaintiff instituted this action. Upon issue joined by a general denial and a special answer alleging (1) laches of plaintiff and (2) the expenditure by defendants of large sums of money for labor and materials in fabricating a machine, the controversy was submitted to arbitrament of the superior court. Following a trial the chancellor made findings of the facts above recited and further that (1) plaintiff cannot enjoin defendants' wrongful acts under the patent laws of the United States; (2) if they are not enjoined plaintiff will suffer irreparable injury, involving a multiplicity of actions; (3) "in good faith" the corporate defendant expended moneys and incurred indebtedness prior to November 1, 1947, in the aggregate sum of $29,532.24 "in connection with the fabrication of one or more of said machines through money supplied by defendant Sam P. Lipkin."

Upon such findings the court concluded and adjudged on December 17, 1948, that defendants are enjoined from making or transferring any machine embodying any of the ideas, principles and construction contained in or relating to the machine developed, constructed and perfected by plaintiff for cleaning sanitary sewers, drains and conduits, or from divulging to others any information obtained from plaintiff which might be necessary or useful in constructing or using such machine and ordered that immediately at the expiration of ten days after this judgment shall have become final, defendants shall surrender to plaintiffs any and all machines and equipment under control of defendants purchased or manufactured by them in connection with the fabrication of the machine which is the subject of this action.

"*Upon the Condition* that plaintiff shall on or prior to January 17, 1949, deposit with the clerk of the above entitled court for the use and benefit of the defendant Sam P. Lipkin and to be paid by the clerk of the above entitled court to said Sam P. Lipkin immediately at the expiration of ten days after this judgment shall have become final, the sum of $29,532.24.

"*Otherwise* judgment shall be and is that the plaintiff take nothing by his action * * *."

Both parties appealed: defendants from the entire judgment; plaintiffs from that portion which requires as a condition to the permanent injunction that plaintiff deposit with the clerk of the court for Lipkin's benefit at the expiration of ten days after the judgment has become final the sum of $29,532.24 and providing otherwise that plaintiff take nothing and defendants recover their costs.

Defendants' Contentions

Defendants now contend:

(1) The relation of Lipkin and plaintiff was a joint venture; it should be dissolved; each partner should be paid the amount of his contributions from the joint assets; if they are insufficient to pay such indebtedness, they should be prorated.

(2) The use of a corporation to carry out the joint venture does not rob the enterprise of its partnership character.

(3) The failure of the parties to agree upon the disposition of losses does not defeat the claim of joint venture; sharing of losses follows the sharing of profits.

(4) The very difficulty of determining the nature of the contract is an additional reason for finding it was a joint venture.

(5) Dissension is a sufficient cause for dissolution. Either party may require an accounting.

Defendants' Claims Without Merit

[1] Each and all of the contentions of defendants proceed upon the theory that they pleaded and proved a joint venture of plaintiff and Lipkin. Not only was no such theory pleaded but it was not advanced at the trial. Except for their allegation that Lipkin invested approximately $4,000 in the business and that plaintiff allowed defendants to continue to spend money to the extent of $16,000 in developing the machine there is nothing contained in the answers of defendants that was not substantially covered by their general denial. In as much as a litigant may not advance a theory for the first time on appeal, Martin v. Auerbach, 94 Cal.App.2d 222, 226, 210 P.2d 321; Engleman v. Malchow, 91 Cal.App.2d 341, 345, 205 P.2d 413; Adams v. Petroleum Midway Co., 205 Cal. 221, 225, 270 P. 668, the points advanced by defendants are of no avail. We therefore forego a discussion of the merits of their arguments in support of a joint venture relationship otherwise than to say that the findings are completely devoid of mention of a joint venture. Defendants' pleadings were prepared, and the action was tried, by counsel other than Mr. Sadicoff. Other observations with respect thereto will occur as incidental to the treatment of plaintiff's appeal.

Plaintiff Is Entitled To Complete Injunctive Relief

[2-4] Under the findings plaintiff is entitled to be protected in the enjoyment of his own invention. He conceived and developed the device for cleaning sanitary sewers. As a trade secret it was his property. In the confidence of the family circle he communicated his scientific knowledge to his son-in-law concerning the machine solely by reason of his reliance upon Lipkin's promise to formulate in writing all the terms of their oral agreement. The recipient of a secret process of manufacture imparted to him in confidence or to one who accepts it in consideration of an agreement to perform valuable covenants which the latter violates will be enjoined from using such secret process. Hollywood M. P. Equipment Co. v. Furer, 16 Cal.2d 184, 188, 105 P.2d 299; Holley v. Hunt, 13 Cal.App.2d 335, 336, 56 P.2d 1240; 43 C.J. S., Injunctions, § 148, p. 752. Thus by the cited authorities it is established that the owner of an unpatented device is by legal principles protected against the piracy of his invention because it is his own by virtue of being the original product of his mind. But the strong arm of equity reaches further. When a contractee has gained an intimate knowledge of such an invention by virtue of an agreement to use it according to specified terms and thereafter repudiates the agreement, the contractor will be awarded injunctive relief to prevent the use of such knowledge of his secret process or invention so gained from him by his contractee. Hollywood M. P. Equipment Co. v. Furer, supra.

In addition to plaintiff's ownership of the invention and his consequent right to an undisturbed enjoyment thereof, plaintiff's device and secret knowledge imparted in confidence to Lipkin were misappropriated. Despite this fact the judgment requires plaintiff to pay Lipkin over $29,000 as a condition to complete relief and defendants now demand that at least such condition be perpetuated if no additional advantage may be gained. Adding such condition is without authority. The agreement was definite that the terms agreed upon would be reduced to writing. Not only did defendants refuse to abide by such agreement but they attempted to defeat plaintiff of his rights. They pleaded and attempted to prove that plaintiff arbitrarily refused to perform the obligations of the oral contract; that it was he who made false statements and promises to induce Lipkin into the oral contract; that Lipkin was by such statements and promises persuaded to employ an attorney and to

organize the corporation and that plaintiff permitted Lipkin to expend large sums of money in improving and constructing the machine; that although plaintiff stated that the contract was agreeable and that he was willing to sign it, he conceived a plan to secure for himself the expenditure by Lipkin of huge sums and to acquire for his own use and benefit the machine as improved and developed by defendants. While such allegations were found to be false and untrue they indicate defendants' purpose to deprive plaintiff of his valuable invention. Lipkin never reduced the oral contract to writing; neither did he ever confess his error or otherwise attempt to conciliate plaintiff.

[5-7] Defendants' arguments on the facts in their endeavor to induce this court to make different findings are without basis in law. On substantial evidence the court found the terms of the oral agreement and that plaintiff was guilty of no inequitable conduct. We are consequently powerless even to modify such findings. It is the function of the trial court not only to determine the weight and credibility of evidence, Taylor v. Humbird, 85 Cal.App.2d 40, 42, 191 P.2d 788, but where there is a conflict in the evidence the trial court's finding is final. Seidenberg v. George, 76 Cal.App.2d 306, 308, 172 P.2d 891. Also, they seek to impeach the findings by showing that the trial judge believed certain witnesses whose testimony was contrary to the decision. In this they follow a vain pursuit. Neither his written opinion nor his responsive remarks in the course of the trial are competent for such purpose. Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 781, 163 P.2d 756; Stone v. Los Angeles County Flood Control District, 81 Cal.App.2d 902, 907, 185 P.2d 396.

The Conditional Basis For The Injunction

[8, 9] Turning now to the question of the condition attached to the decree for injunction against defendants' use of plaintiff's invention—defendants assume that the maxim "who seeks equity must do equity" applies to plaintiff. Upon such assumption they contend, and evidently the trial court misconceived, that as a condition to his being awarded injunctive relief against defendants, he should restore to them the moneys they had expended in constructing the underground machine. Such reasoning involves the erroneous notion that if a wrongdoer were apprehended in the act of stealing his neighbors herds after he had driven them 500 miles toward the market he would be liable for their restoration only on condition that the neighbor reimburse him for the amounts expended on the long journey. The answers to such contention instantly appear. It is definitely established that injunctive relief is available as a matter of right to prevent the invasion of one's property rights where he has complied with all procedural requirements. Meridian Ltd. v. City and County of San Francisco, 13 Cal.2d 424, 427, 90 P.2d 537, 91 P.2d 105; Felsenthal v. Warring, 40 Cal.App. 119, 129, 131, 180 P. 67; Richards v. Dower, 64 Cal. 62, 64, 28 P. 113; 43 C.J.S., Injunctions, § 14, p. 425. In making such contention defendants misconceive the status of an infringer. In seeking relief against one who repudiates his agreement and appropriates a novel invention the inventer is not required to sacrifice his own rights. A noble principle does not alter or remake a contract. It must be enforced according to its terms. Where the inventor's rights have been violated, relief will not be denied him "unless defendant brings forward some corresponding equity growing out of the subject matter then in suit, which would * * * entitle him to a remedy against the other party * * *. Where defendant acted with full knowledge of an adverse claim, he has no equity to be protected therefrom, and the maxim [who seeks equity must do equity] is inapplicable." 30 C.J.S., Equity, § 91, pages 466, 467; Nu-Grape Bottling Co. v. Comati, 6 Cir., 40 F. 2d 187, 189. Peculiarly applicable to defendants' contention are the holdings in Pacific Western Oil Co. v. Bern Oil Co., 13 Cal.2d 60, 72, 87 P.2d 1045, and City of Los Angeles v. Watterson, 8 Cal.App.2d 331, 48 P.2d 87. In the first, the plaintiff had acquired parcel *A* which over-lay an oil structure. Knowing that the petroleum pool did not extend to parcel *B*, the defend-

ant fraudulently contracted for the right to occupy the surface thereof in order to accomplish a secret slant penetration of the pool beneath parcel *A* and the removal of the plaintiff's oil. It was held that such defendants were chargeable with the value of all the oil removed without any deduction for expense of recovery. In the Watterson case it was held that equity will not permit its rules to be made instruments of injustice. The city was not required to restore the sum of money paid upon the purchase of the bonds as a condition of cancelling defendant's fraudulent acquisition thereof. More appropriate to the facts here involved is the maxim "he that hath committed iniquity shall not have equity". See Goble v. O'Connor, 43 Neb. 49, 61 N.W. 131, 134.

[10] Not only should plaintiff's property rights be protected by injunction because they are his own but under the findings Lipkin became a trustee and as such was obligated to preserve for plaintiff all that had been entrusted to him. If he had expended moneys to defend the invention they would be recoverable but for sums disbursed by the trustee in his efforts to cheat plaintiff and gain ownership of the invention to the exclusion of plaintiff, he has no right to a judgment. The right to be reimbursed for expenses incurred in preserving trust property is intended for honest trustees. Recovery is limited to expenses of a trustee "properly incurred by him in the performance of his trust." Civ.Code, sec. 2273. No part of the $29,000 claimed was productive of actual benefit to plaintiff. The machine built by defendants was in all essential respects a replica of plaintiff's number 2. One who becomes an involuntary trustee through his own fault has no right to reimbursement as provided by the cited code section. The principle is illustrated in adjudicated cases. A disloyal attorney had in the course of his employment acquired certain tax titles on the plaintiff's property. He had not done so on her orders or for her benefit, but to gain for himself. He was a volunteer and acted secretly against his client and therefore became an involuntary trustee through his own fault. He was not entitled to reimbursement for his outlay as a condition to the decree quieting title against him. McArthur v. Goodwin, 173 Cal. 499, 504, 160 P. 679. The maxim is applicable to a trustee only when he has conducted the affairs of his trust honestly, dealt fairly and made no attempt to make a secret profit for himself. Kinert v. Wright, 81 Cal.App.2d 919, 927, 185 P.2d 364; East Tennessee & Western North Carolina Ry. Co. v. Robinson, 19 Tenn.App. 265, 86 S.W.2d 433, 439.

[11-13] Furthermore, defendants ignored the oral agreement Lipkin had made with plaintiff. By reason of their wilful breach of the contract upon which plaintiff relied in disclosing his secret processes and methods defendants are in no position to recover disbursements. Equity follows the law. The rights of plaintiff being determined by law, the chancellor was without authority to grant what the law denies. DeMattos v. McGovern, 25 Cal.App.2d 429, 432, 77 P.2d 522. Having wrongfully breached their contract they have no right to demand of equity that it grant their claims. Gavina v. Smith, 25 Cal.2d 501, 506, 154 P.2d 681; 10 Cal.Jur., p. 516.

[14] It was found not only that Lipkin represented that he would prepare a written agreement to include the terms specified but that his representations "were originally and continuously made for the purpose of obtaining from plaintiff the confidential information relating to said machine * * * that such confidential information * * * was obtained by said defendants with the knowledge of the fact that plaintiff would not have supplied such information to said defendants except under the belief and understanding by plaintiff that the oral understandings of the parties would be reduced to writing and executed by the parties." In the light of such finding there is no basis for an arbitrary requirement that plaintiff pay a huge sum of money as a condition for being protected by injunction in the enjoyment of his property. Dawson County Irrigation Co. v. Stuart, 142 Neb. 428, 6 N.W.2d 602. Having accepted the confidence reposed in him by plaintiff, Lipkin became a constructive trustee and was

under obligation to refrain from abusing such confidence by obtaining an advantage to himself at the expense of plaintiff. Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 576, 126 P. 351; Brison v. Brison, 75 Cal. 525, 528, 17 P. 689. His violation of the oral promise to reduce the agreement to writing was a fraud against the plaintiff and from it a trust arose in favor of the latter. Therefore, his hands are unclean and he can take no advantage of his own wrong. Equity does not aid him who has breached his agreement.

Having convicted Lipkin of his fraud the trial judge substituted compassion for equity and made a decree that would exempt such defendant from any penalty whatsoever, and in addition thereto apparently allowed him liberal compensation for his time and for that of his associates. The amount of moneys awarded defendants is $16,632.24 in excess of the cost to plaintiff in constructing his number 2. Such a penalty as a prerequisite to the granting of an injunction against one who has voluntarily undertaken to do what he is not bound to do is wholly unauthorized. Voluntary payments cannot be recovered. McMillan v. O'Brien, 219 Cal. 775, 780, 29 P.2d 183; Leahy v. Warden, 163 Cal. 178, 181, 124 P. 825; Schwarz v. Hatch, 45 Cal.App.2d 510, 518, 519, 114 P.2d 677; Fatjo v. O'Connell, 41 Cal.App.2d 64, 69, 105 P.2d 1036. Especially is this true of one who is guilty of tortious acts. There is no intimation in the findings that plaintiff ever requested Lipkin to spend any money. On the contrary, when plaintiff rejected the writing presented to him as the written contract, Lipkin had then expended no more than $487.72. While he had placed orders for parts that required the payment of $962, such orders could have been cancelled. Despite his refusal to prepare the written contract, he proceeded to incur indebtedness. He knew then and at all subsequent dates that plaintiff would not sign the document as presented on August 15. He pursued his persistent course in building the new machine with the evident intention of appropriating the invention to his own use. Under no known principle is he entitled to recover the amount of his disbursements. Rotea v. Izuel, 14 Cal.2d 605, 610, 95 P.2d 927.

[15] The invention here involved is the property of plaintiff. He had the right to contract for the assignment thereof on terms of his own choosing and to persons of his own choice. No court has the power to divest him of that right or to choose a contractee for him. Rosenberg v. Lawrence, 10 Cal.2d 590, 594, 75 P.2d 1082; Sacramento Box and Lumber Co. v. Rosenberg Bros. & Co., 109 Cal.App. 56, 58, 292 P. 146; Bennett v. Northwestern National Insurance Co., 84 Cal.App. 130, 134, 257 P. 586.

[16] Inasmuch as plaintiff did not demand possession of machine or parts assembled by defendants, the court had no authority to require plaintiff to accept them as a condition of injunctive relief. Where a plaintiff does not ask for an award of specific personal property it is a gratuitous and meaningless act for the court to extend to him a real or supposed benefit that the litigant manifested no desire to obtain. Morrison v. Bowman, 29 Cal. 337, 354.

[17] Finally, the contention that the injunction is too broad is without support. No right of defendants is violated in enjoining them from making, selling or using a machine which has been fabricated by defendants by the use of the ideas and mechanical construction of a machine invented by plaintiff. Holley v. Hunt, 13 Cal.App.2d 335, 56 P.2d 1240. Especially is this true where the information concerning the machine was disclosed in confidence. Hollywood M. P. Co. v. Furer, 16 Cal.2d 184, 188, 105 P.2d 299. Moreover, defendants are in no position now to make such contention after having in open court expressly waived any defense based upon the claim that plaintiff's invention is in the public domain.

It is ordered that (1) the last two paragraphs of the conclusions of law be and are stricken; (2) the judgment be and is amended by striking therefrom the last two paragraphs and by inserting in lieu thereof the following:

"And it is ordered and adjudged that plaintiff recover his costs of suit which are hereby taxed in the sum of $———."

As so amended the judgment is affirmed.

It is further ordered that plaintiff recover from defendants his costs of appeal.

McCOMB and WILSON, JJ., concur.



99 Cal.App.2d 828

PEOPLE v. WHELPTON et al.

Cr. 4457.

District Court of Appeal, Second District, Division 2, California.

Oct. 16, 1950.

Marsden Whelpton and Mrs. Dallas Steele Wilkins were convicted in the Superior Court of Los Angeles County, W. Turney Fox, J., of violating the Corporate Securities Law, and from the judgments and orders denying their motions for a new trial, they appealed. The District Court of Appeal, McComb, J., held that obtaining loans for corporation upon representation that the money thus advanced could be used to purchase stock in the corporation constituted a sale of securities within meaning of Corporate Securities Law and that the evidence sustained convictions.

Judgments and orders affirmed.

1. Criminal law ⇐1130(3)

Defendant's brief on appeal from conviction, which was not prefaced by a topical index of its contents or a table of authorities, did not conform with Rules on Appeal. Rules on Appeal, rule 15(a).

2. Licenses ⇐42(6)

Evidence sustained conviction of violation of Corporate Securities Law by selling securities without a permit. Corporations Code, §§ 25500, 26104.

3. Licenses ⇐18½(24)

Obtaining purported loans to a corporation upon the representation that money thus advanced could be used to purchase stock in the corporation constituted a "sale" of a "security" within meaning of Corporate Securities Law, making sale of securities without a permit unlawful. Corporations Code, §§ 25008, 25500, 26104.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Sale" and "Security".

4. Licenses ⇐18½(10, 22)

As defined in Corporate Securities Law making sale of securities without a permit unlawful, a share of stock is a "security" and a "sale" includes an offer to sell, attempt to sell, solicitation of sale, option to sell, or contract to sell. Corporations Code, §§ 25008, 25500, 26104.

5. Licenses ⇐18½(13)

That receipt issued for money advanced to corporation upon representation that it could be used to purchase stock in the corporation indicated on its face that transaction was a loan did not exempt transaction from provisions of Corporate Securities Law under subsection thereof making such law inapplicable to promissory notes not offered to the public or sold to an underwriter for resale. Corporations Code, §§ 25008, 25102 (c),

6. Licenses ⇐18½(30)

Transactions by which defendants obtained loans to a corporation upon representation that the money thus advanced could be used to purchase stock in the corporation constituted sales of securities to the "public" within meaning of Corporate Securities Law, though the group solicited by defendants was comparatively small. Corporations Code, §§ 25008, 25500, 26104.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Public".

7. Licenses ⇐18½(23)

Transactions by which defendants obtained loans to corporation upon representation that the money thus advanced could be used to purchase stock in the corporation were not within provision of Corporate Securities Law providing that giving of privilege to convert a security into another security of same company is not sale

of a security within the act. Corporations Code, §§ 25008, 25009(c).

8. Licenses ⇐18½(23)

Giving investors an option to purchase stock in corporation in consideration of their making purported loans to corporation without having first obtained a permit for issuance and sale of securities constituted a violation of Corporate Securities Law. Corporations Code, §§ 25008, 25500, 26104.

9. Conspiracy ⇐43(12)

A conspiracy need not be pleaded in the information, if the evidence actually shows the existence of a conspiracy.

10. Conspiracy ⇐47
Licenses ⇐42(4)

Evidence that defendants solicited purported loans for corporation from various persons, telling them that receipts for money thus loaned, signed by one of the defendants as vice president-treasurer of corporation, could be turned in for stock in the corporation was sufficient to support implied finding that defendants conspired and agreed to undertake the performance of an unlawful act and sustained conviction of violation of Corporate Securities Law by selling securities without a permit, though information did not charge a conspiracy. Corporations Code, §§ 25008, 25500, 26104.

Arthur C. Fisher and John C. Packard, Los Angeles, for appellants.

Fred N. Howser, Attorney General, Frank Richards, Deputy Attorney General, William E. Simpson, District Attorney, Jere J. Sullivan and Richard S. Chapman, Deputy District Attorneys, Los Angeles, for respondent.

McCOMB, Justice.

[1] After trial before the court without a jury, defendants Whelpton and Wilkins were found guilty on six counts of violating the Corporate Securities Act. From the judgments and orders denying their motions for a new trial, they appeal.*

Defendants contend the evidence is insufficient to sustain their conviction.

[2] This proposition is untenable. The evidence discloses that the Chino Hills Oil Company, a California corporation, was organized April 23, 1943. Defendant Whelpton, one of the organizers, was issued a permit on September 16, 1943, to sell and issue 1,765 shares of stock to certain named persons. The stock was placed in escrow and never removed therefrom. The final expiration date of such permit was February 15, 1944. After such date and about September 20, 1947, Mrs. Hostettler loaned to the corporation two separate sums, one of $200, the other of $500; received a receipt therefor signed by defendant Whelpton as vice president-treasurer. At the time she made the loan she was told by defendant Whelpton that if they got oil production they would refund the money to her or she could turn the receipt in and get shares of stock for it. Defendant Wilkins made similar statements to her. Such evidence is sufficient to sustain the conviction on count 8 of the information.

On August 7, 1948, and again on August 18, 1948, defendant Wilkins told Mr. Kirscherman that the Chino Hills Oil Company was drilling for oil and that if he would loan the company money, when the well got into production the corporation commissioner would be asked for a permit to issue more stock and he would immediately be given his money back with which he could buy stock. Relying on this statement he gave her a check for $1,500 dated August 7, 1948, another for $1,500 dated August 18, 1948, and received a receipt signed by defendant Whelpton as vice president-treasurer. Such evidence sustains the convictions under counts 10 and 11 of the information.

Defendant Wilkins on or about August 7, 1948, told Mr. Mettler that the Chino Hills Oil Company needed some money to buy casing; that the well was finished, and that after production had been obtained, he could get shares of stock in the corporation

*. Defendant's brief does not conform with Rule 15(a) of the Rules on Appeal (22 Cal.2d 12) in that it is not prefaced by a topical index of its contents or a table of authorities.

for $10 per share. On August 20, 1948, and September 7, 1948, defendant Wilkins repeated the same statements to Mr. Mettler; on August 7, 1948, he gave her his check for $2,500, on August 20, 1948, gave her another check for $2,000, and on September 7, 1948, a similar check for $2,500. In connection with each of these transactions he received a receipt from the corporation signed by defendant Whelpton, vice president-treasurer. Such evidence sustains the convictions under counts 12, 13 and 14 of the information.

[3, 4] The circumstances pertaining to these transactions, to wit, the written statements in each receipt that the money was a "loan to Chino Hills Oil Co."; the representations by the defendants as part of the transactions that the investors' money could be used for the purpose of buying stock in the company, was a "sale" of a "security" as these words are defined in the Corporate Securities Law. A share of stock is a "security" and a "sale" includes an offer to sell, an attempt to sell, a solicitation of sale, an option to sell or a contract to sell. (Sections 26104, 25500, 25008 of the Corporate Securities Law, Deerings Corporations Code, 1949 Supp.) Under the law defendants' statements to the investors that their receipts or loans might be used to buy stock in the corporation was a sale under the circumstances of this case.

[5] There is no merit in defendants' contention that since the receipts which were issued indicated on their face that the transaction in each instance was a loan the transactions were exempt from the Corporate Securities Law under Section 25102 (c) (formerly Corporate Securities Act, Sec. 2, para. (b) subd. 11 [Stats.1937, p. 1431]).

Such receipts, it is apparent when considered in connection with the other evidence received, were mere subterfuges for the purpose of avoiding the other provisions of the act. In effect the investors were told that by loaning money at that time they would be given stock when the oil well was placed upon production. (People v. Sidwell, 27 Cal.2d 121, 128, 162 P.2d 913; People v. Aresen, 91 Cal.App.2d 26, 36, 204 P.2d 389, 957.)

[6-8] Neither is there any merit in defendants' contention that these transactions were not with the general public but only with the stockholders of the Chino Hills Oil Company. While the group solicited by defendants was comparatively small, it nevertheless constituted "the public" under the Corporate Securities Act. (Mary Pickford Co. v. Bayly Bros. Inc., 12 Cal.2d 501, 514, 86 P.2d 102.) The transaction in question did not fall within the provisions of section 25009, subdivision (c) of the Corporate Securities Law. Defendants violated the act when they gave the investors an option to buy stock in the corporation in consideration of their making purported loans to it. (People v. Boles, 35 Cal.App.2d 461, 463, 95 P.2d 949.)

Finally, defendants' proposition that the conviction under count 8 may not stand because "there is no charge that defendant Whelpton conspired with defendant Wilkins" is untenable.

[9] A conspiracy need not be pleaded in an information if the evidence actually shows the existence of one. (People v. Tanner, 3 Cal.2d 279, 299, 44 P.2d 324. People v. Weaver, 56 Cal.App.2d 732, 740 et seq., 133 P.2d 818; People v. Gregory, 12 Cal.App.2d 7, 15 et seq., 54 P.2d 770.) The evidence disclosed that Mrs. Hostettler had known both defendants since 1932; that she saw them at the well and in the office of the corporation many times, and was told by them that the receipts for the money she loaned could be turned in for stock in the corporation. In each of the other transactions defendant Wilkins solicited the money and defendant Whelpton issued the receipts therefor. In addition both defendants tried to obtain a loan of $30,000 from Messrs. Mettler and Kirscherman.

[10] The foregoing evidence is sufficient to support the trial court's implied finding that defendants conspired and agreed to undertake the performance of an unlawful act.

Judgments and orders are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

99 Cal.App.2d 869

SEARLES v. SEARLES.
Civ. 17801.

District Court of Appeal, Second District, Division 2, California.
Oct. 17, 1950.

Vera Searles brought a divorce action against George Searles. The Superior Court, Los Angeles County, Arthur Crum, J., entered a decree granting the divorce and quieting title to a parcel of land in the parties as joint tenants, and defendant appealed. The District Court of Appeal, Moore, P. J., held that the trial court's finding that the parties were joint tenants in the ownership of the property was not inconsistent with its conclusion that the title thereto should be quieted in the names of both as joint tenants subject to the encumbrances of record and subject to a prior claim of $2,000 in favor of the plaintiff.

Affirmed.

1. Divorce ⇐253

Where trial court had found ultimate fact that wife made down payment of $2,000 on realty acquired during marriage out of her sole and separate property, there was no merit in husband's contention that trial court had made no finding as to portion of $2,000 that was paid out of wife's separate funds or was borrowed on strength of her personal credit.

2. Husband and wife ⇐249

Where wife uses her own property to borrow money, money so borrowed is hers in separate ownership.

3. Divorce ⇐249(1)

Where wife was granted divorce on grounds of extreme cruelty and nonsupport, trial court had power to quiet title against husband as to realty acquired during marriage, or to otherwise deprive him of his interest in property by reason of his inequitable conduct.

4. Divorce ⇐286

In divorce action, where decree entered quieted title to parcel of land in husband and wife as joint tenants, but failed to require wife to render accounting of her collection of rentals from said property, in absence of injustice done by wife's failure to account, such failure did not require reversal.

5. Divorce ⇐249(3)

Where disposition of separate property of either spouse is issue in divorce action, court has power to hear and determine such issue.

6. Divorce ⇐253

In divorce action, trial court's finding that parties were joint tenants in ownership of realty was not inconsistent with its conclusion that title thereto was quieted in names of both parties as joint tenants subject to encumbrances of record and subject to prior claim of $2,000 in favor of wife. Civ.Code, § 683.

7. Partnership ⇐305

Payment of debt of partnership to one of partners is not handicap to division of proceeds of sale of partnership property among partners, any more than is payment of mortgage due third party.

8. Divorce ⇐250

Where wife was initiator of transaction in acquiring realty during marriage, she was entitled under divorce decree to reimbursement of such sums as she advanced toward payment of purchase price before property could be owned in equal shares by husband and wife as joint tenants.

9. Appeal and error ⇐907(3)

In absence of transcript of evidence, presumptions are that findings of trial court were supported.

Earl C. Broady, Los Angeles, for appellant.

George E. Cannady, Los Angeles, for respondent.

MOORE, Presiding Justice.

This appeal is on the judgment roll. Respondent was awarded a decree of divorce which quieted her title to a parcel of land in both herself and appellant as joint tenants. The latter now demands a reversal

on the grounds that (1) findings were not made as to all material issues; (2) the conclusions and judgment are inconsistent with the findings.

While the divorce was granted on the grounds of extreme cruelty and nonsupport, no attack is made upon that part of the judgment. It was decreed that the property be sold by the commissioner named in the judgment and from the proceeds of sale, after paying costs and commissioner's fee, $2,000 be paid to respondent to reimburse her for moneys paid out of her separate funds on the purchase.

As to the acquisition of the property respondent alleged that it was purchased by her at the price of $13,500, "and $2000.00 of that sum was paid in cash by plaintiff out of her separate property, and out of money borrowed by her and on the strength of her separate credit," and that she allowed title to be taken in the names of both as joint tenants upon the promise of apellant to pay at least one half of the unpaid balance; that he has not paid anything on the unpaid amount and while respondent has been required to make all monthly payments appellant frequently asserted that he would not "put a dime in the said property." The court found such allegations to be true and that it was necessary for respondent to employ an attorney to prosecute her action and that she was without funds to pay attorney's fees.

[1, 2] Appellant complains that there is no allegation or promise that respondent should be reimbursed the total of $2,000 and that there is no finding as to the portion of the $2,000 that was paid out of respondent's separate funds or was borrowed on the strength of her personal credit. The answer to such contention is that the court found the ultimate fact that respondent made the "down payment of $2000 out of her sole and separate property." If she used her own property to borrow the $2,000, the money so borrowed was hers in separate ownership. Estate of Ellis', 203 Cal. 414, 416, 264 P. 743; Hogevoll v. Hogevoll, 59 Cal.App.2d 188, 194, 138 P.2d 693.

[3-5] Appellant complains that the court refused to require respondent to render an accounting of her collections of the rentals from the property; that she received $260 per month as income and paid out $135 on the monthly installments of her indebtedness. It is true that no formal accounting appears in the judgment roll. But this action was primarily one for divorce. Since the court had power to quiet title against appellant or otherwise deprive him of his interest in the property by reason of his inequitable conduct and since no injustice was done by respondent's failure to account it cannot be said that such failure to require an accounting necessitates a reversal. Although appellant was convicted of extreme cruelty and failure to provide, no order was made for him to provide for his wife in any sum. Not only did he escape without contributing to her support while inflicting his cruelties upon her but no order requires him now to contribute any sum for her future support, while he receives a half interest in a valuable property without having passed the slightest consideration therefor. Under the facts of the divorce count, the court would have been acting within its equitable powers had it quieted respondent's title to the realty, leaving appellant no interest therein. Litt v. Litt, 75 Cal.App.2d 242, 245, 170 P.2d 684. Where in a divorce action the disposition of separate property of either spouse is in issue, the court has power to hear and determine such issue. Roy v. Roy, 29 Cal.App.2d 596, 603, 85 P.2d 223.

[6-8] Appellant contends that since the court found that the parties are joint tenants in the ownership of the property, it was error to conclude that the title thereto is "quieted in the names of both * * * as joint tenants subject to the encumbrances of record and subject to a prior claim of $2,000 in favor of the plaintiff." His theory is that since a joint interest is one owned in equal shares, Civ.Code, sec. 683, and since a joint tenancy requires a unity of interest, Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003, the court's conclusion is inconsistent with the findings in that it gives respondent a greater interest than that of appellant. Such logic is inconsistent with common sense. Payment of the debt of a partnership to one of the partners is not a handi-

cap to the division of the proceeds of sale of a partnership property among the partners any more than is the payment of a mortgage due a third party. As the initiator of the transaction in acquiring the property involved respondent is entitled to reimbursement of such sums as she advanced toward payment of the purchase price before the property can be owned in equal shares by joint tenants. Jamison v. Cotton, 136 Cal.App. 127, 130, 28 P.2d 39. By subjecting the entire property to the debt of $2,000 due respondent the joint tenancy estates will in effect share equally the burdens and benefits of the partition.

[9] In the absence of a transcript of the evidence the presumptions are that the findings were supported.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.



99 Cal.App.2d 872

OPPENHEIMER v. ARNOLD et al.

Civ. 17835.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1950.

Action by John G. Oppenheimer against C. E. Arnold and another, for causing the discharge of plaintiff from his employment as engineering aid in the Department of County Engineer and Surveyor. The Superior Court, Los Angeles County, William B. McKesson, J., issued order sustaining the demurrer to the complaint, and entered an adverse judgment upon such order, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that the complaint did not allege a cause of action.

Affirmed.

1. **Appeal and error** ⇐102

Order sustaining demurrer to complaint is non-appealable.

2. **Appeal and error** ⇐113(1)

Order denying motion to vacate judgment is non-appealable.

3. **Torts** ⇐13

Complaint alleging that county engineer and his assistant chief deputy terminated services of engineering aid before his six months' probationary period had expired, and that they presented false evidence to county civil service commission without knowledge of engineering aid in order to gain approval of the discharge, did not allege cause of action.

4. **Malicious prosecution** ⇐37

Complaint for malicious prosecution by discharged civil service employee against department head for causing employee to be discharged is insufficient in that it is collateral attack on commission's order discharging employee.

5. **Officers** ⇐72(2)

In order to successfully attack a discharge of probationary civil service employee ordered by department head with consent of civil service commission, complaint must allege extrinsic fraud employed by department head procuring such consent.

6. **Officers** ⇐69.6

Reasons for discharge of an engineering aid during his probationary service are not required.

7. **Counties** ⇐88, 93

County engineer and his assistant chief deputy are immune against judgment for their orders as heads of Department of Engineering and Surveying, and such immunity is absolute and extends to all their acts, including discharge of probationary employee.

John C. Oppenheimer in pro. per.

Harold W. Kennedy, County Counsel, Andrew O. Porter, Deputy County Counsel, John B. Anson, Deputy County Counsel, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

[1, 2] From the order sustaining demurrer to his complaint, from the adverse

judgment entered upon such order, and from the order denying his motion to vacate that judgment, plaintiff has appealed. Since both orders are nonappealable the ensuing discussion pertains only to the validity of the decree.

Appellant alleged that defendant Arnold was the county engineer and Pore was his assistant chief deputy; that he was employed by Los Angeles county as an engineering aid I in the department of county engineer and surveyor; that he was appointed to a permanent position from a civil service eligible list May 11, 1949, and was serving the usual six months' probationary period; that on September 1, 1949, respondents suspended him without pay and on the twelfth they terminated his services as of the thirteenth; that in order to gain the approval of the discharge by the county civil service commission respondents presented false evidence to the commission without the knowledge of appellant. The complaint alleges damages in the sum of $566.49 for lost wages, for "5 per cent a year special damages" and exemplary damages in the sum of $10,000.

[3-6] No cause of action is alleged. [Section 34(7) of the Los Angeles County Charter provides: "The rules shall provide * * * for a period of probation not to exceed six months, during which period a probationer may be discharged or reduced with the consent of the Commission."] The complaint for malicious prosecution by a discharged civil service employee against the department head for causing plaintiff to be discharged is insufficient in that it is a collateral attack on the commission's order discharging plaintiff. Moreover, in order successfully to attack a discharge ordered with the consent of the commission a complaint must allege extrinsic fraud employed in procuring such consent. Caraker v. Webster, 24 Cal.App.2d 300, 301, 74 P.2d 1048. Neither a request of the civil service commission for a hearing nor extrinsic fraud committed upon it by respondents nor a demand that the discharge be revoked is alleged. Section 34(7) says nothing about charges, or trial, or opportunity to be heard. Reasons for the discharge of an engineering aid during his probationary service are not required. Neuwald v. Brock, 12 Cal.2d 662, 669, 86 P.2d 1047; Snelling v. Civil Service Board, 90 Cal. App.2d 865, 867, 204 P.2d 358.

[7] In discharging appellant respondents acted in their official capacity. They are therefore immune against judgment for their orders as heads of the Department of Engineering and Surveying. Such immunity is absolute and extends to all their acts. It protects them in their exercise of judgment and discretion in the discharge of their duties. White v. Brinkman, 23 Cal.App.2d 307, 317, 73 P.2d 254; Spalding v. Vilas, 161 U.S. 483, 498, 16 S.Ct. 631, 40 L.Ed. 780.

Affirmed.

McCOMB and WILSON, JJ., concur.



99 Cal.App.2d 876

LONDON et al. v. MORRISON et al.

Civ. 17874.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1950.

William A. London and another brought an action against Wilton M. Morrison and another. From judgments or orders of the Superior Court, Los Angeles County, William B. McKesson, J., setting aside the court clerk's dismissal of the action on plaintiffs' motion, granting defendants' motion to dismiss, and ordering plaintiffs' motion off the calendar, plaintiffs appealed. The District Court of Appeal, Moore P. J., held that plaintiffs were not entitled to entry of an order of voluntary dismissal by the clerk, but that defendants were entitled to a mandatory order of dismissal by the Superior Court after the lapse of one year following entry of its order transferring the case to the Su-

perior Court of San Diego County for trial, where the costs and fees for making up the transcript for transmission to such court had not been paid.

Orders affirmed.

1. Courts ⇐488(1)

Though plaintiffs failed to deposit with clerk of Superior Court, wherein action was commenced, amount of costs and fees for transfer of case to Superior Court of another county for trial, order of transfer divested transferor court of jurisdiction to take any other step in action except to dismiss it after lapse of one year following entry of order without payment of such costs and fees. Code Civ. Proc. §§ 399, 581b.

2. Courts ⇐488(1)

A court, to which action is transferred from another court for trial, has same jurisdiction over action as transferee court would have had if action had been originally commenced therein, but does not acquire jurisdiction until transfer fee is paid and papers filed therein. Code Civ.Proc. §§ 399, 581b.

3. Courts ⇐488(1)
Dismissal and nonsuit ⇐27

Where plaintiffs did not pay fees and costs for transfer of action from superior court wherein it was commenced to superior court of another county for trial during year after entry of transfer order, transferee court did not acquire jurisdiction of case, and since transferor court had no jurisdiction thereof, plaintiffs were not entitled to entry of order of voluntary dismissal by clerk of such court. Code Civ. Proc. §§ 399, 581b.

4. Courts ⇐488(1)
Dismissal and nonsuit ⇐21

The statute providing that action transferred by court wherein it was commenced to another court must be dismissed by transferor court, where costs and fees for making up transcript or transmitting it to transferee court are not paid within year after entry of transfer order, is not permissive, but mandatory, and deprives plaintiffs, failing to pay such costs and fees within prescribed time, of their right under another statute to dismiss action voluntarily before commencement of trial. Code Civ.Proc. §§ 399, 581, 581b

5. Dismissal and nonsuit ⇐59

An action transferred from one court to court of another county must be dismissed by court wherein it was commenced, where costs and fees for making up transcript for transmission to transferee court are not paid within year after entry of transfer order. Code Civ.Proc. §§ 399, 581b.

Sylvan Y. Allen, Los Angeles, for appellants.

Everett H. Smith, Los Angeles, for respondents.

MOORE, Presiding Justice.

Plaintiffs appeal from (1) "the judgment or order" entered on January 25, 1950, setting aside the dismissal of the action entered by the clerk on plaintiffs' request; (2) the judgment or order entered on February 15, 1950, granting defendants' motion to dismiss the action and ordering plaintiffs' motion to dismiss off calendar. Inasmuch as the appeal involves technical procedural questions, a chronology of events from and after the filing of the complaint are essential to a consideration of the points discussed. They follow.

February 18, 1948, action filed.

September 25, 1948, demurrer and Notice of Motion for change of place of trial filed.

November 9, 1948, order entered changing place of trial to San Diego.

November 10, 1949, defendants file notice of motion to dismiss action under section 581b [1].

December 15, 1949, plaintiffs file their Request for Entry of voluntary Dismissal.

December 19, 1949, defendants' motion to dismiss the action is ordered off calendar.

1. All section numbers refer to the Code of Civil Procedure.

January 4, 1950, defendants file Notice of Motions (1) to set aside plaintiff's voluntary dismissal and (2) to restore defendants' motion for dismissal to the calendar.

January 11, 1950, plaintiffs file their opposition to defendants' motion.

January 25, 1950, defendants' motion to set aside plaintiffs' voluntary dismissal is granted and defendants' motion to restore to the calendar their motion to dismiss the action is granted.

February 8, 1950, plaintiffs file notice of motion for permission to dismiss the action without prejudice.

February 15, 1950, Order entered dismissing the action on defendants' motion under 581b and defendants are awarded judgment against plaintiffs for their costs.

Appellants' contentions are: (1) section 581 [2] authorizes any plaintiff to dismiss his action at any time prior to submission and such privilege is not discounted by section 581b [3]; (2) section 581b authorizes the original court to dismiss, on the motion of either party, after the lapse of a year from

2. Section 581. An action may be dismissed in the following cases:

"1. *By plaintiff*, by written request to the clerk, filed with the papers in the case, or by oral or written request to the justice where there is no clerk, at any time before the actual commencement of trial, upon payment of the costs of the clerk or justice; provided that a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant. If a provisional remedy has been allowed, the undertaking shall upon such dismissal be delivered by the clerk or justice of the peace to the defendant who may have his action thereon. A trial shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or his counsel, and if there shall be no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.

"2. *By either party*, upon the written consent of the other. No dismissal mentioned in subdivisions 1 and 2 of this section shall be granted unless upon the written consent of the attorney of record of the party or parties applying therefor, or if such consent is not obtained upon order of the court after notice to such attorney.

"3. *By the court*, when either party fails to appear on the trial, and the other party appears and asks for the dismissal, or when, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court, and the defendant moves for such dismissal.

"4. *By the court*, with prejudice to the cause, when upon the trial and before the final submission of the case, the plaintiff abandons it.

"5. [Dismissal with or without prejudice.] The provisions of subdivision 1, of this section, shall not prohibit a party from dismissing with prejudice, either by written request to the clerk or oral or written request to the justice, as the case may be, any cause of action at any time before decision rendered by the court. Provided, however, that no such dismissal with prejudice shall have the effect of dismissing a counterclaim or cross-complaint filed in said action or of depriving the defendant of affirmative relief sought by his answer therein. Dismissals without prejudice may be had in either of the manners provided for in subdivision 1 of this section, after actual commencement of the trial, either by consent of all of the parties to the trial or by order of court on showing of just cause therefor."

3. Section 581b. "No action heretofore or hereafter commenced, where the same was not originally commenced in the proper court, and which has been ordered transferred to the proper court, shall be further prosecuted, and no further proceedings shall be had therein, until the fees and costs of the transfer thereof and of filing the papers in the court to which transferred have been paid, as provided in Section 399 of this code; and all such actions heretofore or hereafter commenced must be dismissed by the court in which the action or proceeding was originally commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, where the costs and fees of making up the transcript or papers or for transmission of the same to the clerk or justice of the court to which it is ordered transferred, or of filing the papers anew, have not been so paid for one year after the entry of the order for transfer."

the date of the order changing place of trial; (3) no hearing having taken place on defendants' motion for dismissal under section 581b, in the absence of an affirmative defense it was a statutory right of plaintiffs to order a dismissal; (4) defendants' motion having been filed first and both motions having been submitted together, plaintiffs' motion should have been granted; (5) jurisdiction to dismiss an action is retained by the original court; (6) the court had no authority to set aside the clerk's order of dismissal.

In support of such contentions appellants cite both sections 581 and 581b, also Simpson v. Superior Court in and for Los Angeles County (1945), 68 Cal.App.2d 821, 158 P.2d 46; Sullivan v. Compton (1943), 61 Cal.App.2d 500, 143 P.2d 357; Cook v. Stewart McKee & Co. (1945), 68 Cal.App.2d 758, 157 P.2d 868; McDonald v. California Timber Co. 2 Cal.App. 165, 83 P. 172. Appellants' arguments ignore legal logic and the cited authorities shoot wide of the mark.

[1-3] From the chronology it is to be observed that the case was ordered to be transferred to the San Diego court for trial. Appellants were required to deposit with the clerk the costs and fees for the transfer before such transfer should be made. Section 399. Although such deposit was not made the order of transfer had divested the Los Angeles court of jurisdiction to take any other step in the action except one, namely, it was required to dismiss the action after one year had elapsed within which the costs and fees for making up the transcript "have not been so paid". Section 581b.

The court to which an action has been transferred shall have and exercise over it the same jurisdiction it would have had if it had been originally commenced therein. But such court does not acquire jurisdiction until the transfer fee has been paid and the papers filed in that court. The San Diego court never acquired jurisdiction of the case and since the Los Angeles court had none, it was an idle act for appellants to order a voluntary dismissal or for the clerk of the court to accept it. Had they paid the fees to and filed a voluntary dismissal in the San Diego court, appellants would now be on solid ground. But their act in ignoring the order of change of place of trial renders their position untenable.

By filing the voluntary dismissal, they undertook to defeat respondents of such rights as might attach to a judgment of dismissal. They knew that a year had elapsed after entry of the order of transfer and that respondents had already filed their motion for a dismissal of the action under the provisions of section 581b. In filing the voluntary dismissal they were in no better position than is the plaintiff who files a dismissal after a cause has been fully tried or a demurrer sustained without leave to amend. Whenever such action has been attempted it ended disastrously for the moving party. Goldtree v. Spreckels, 135 Cal. 666, 67 P. 1091; Provencher v. City of Los Angeles, 10 Cal.App.2d 730, 52 P.2d 983; Hancock Ditch Co. v. Bradford, 13 Cal. 637; Spellacy v. Superior Court of Los Angeles County, 23 Cal.App.2d 142, 72 P.2d 262.

[4, 5] Appellants contend that under section 581 they had a distinct authorization to dismiss at any time prior to a submission and that such right is not impaired by 581b. By such contention they disregard the doctrine that when a statutory exception exists with reference to an asserted right a litigant must bring himself within the exception. Section 581b is a separate statute of equal authority with that of 581. Also, since respondents obtained the order for transfer and a year having expired, they gained a definite, substantial right under 581b for a mandatory order of dismissal. No reasonable construction of 581 can override 581b. The latter is not a permissive statute, but is positive and mandatory. *Such action must be dismissed by the court wherein it was commenced where the costs and fees of making up the transcript for transmission to the transferee court have not been so paid for one year after the order of transfer.* McDonald v. California Timber Co., 2 Cal.App. 165, 83 P. 172, is not pertinent. The plaintiff there dismissed the action prior to a hearing of the motion for change of place of trial.

In view of the foregoing it would be useless to discuss other points raised by appellants.

Both orders are affirmed.

McCOMB and WILSON, JJ., concur.



TOSSMAN v. NEWMAN.
Civ. 17706.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1950.

Rehearing Denied Nov. 6, 1950.

Hearing Granted Dec. 14, 1950.*

Action by Max Tossman against Alfred Newman for injuries received by plaintiff in a collision between defendant's automobile and a motorcycle upon which plaintiff was riding. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered judgment upon the verdict for defendant, and plaintiff appealed. The District Court of Appeal, McComb, J., held that the evidence supported the verdict for defendant.

Affirmed.

1. Appeal and error ⇐1067

In action for injuries received by motorcyclist in collision with automobile traveling in opposite direction when automobile driver was making left turn from highway into his private driveway, refusal of motorcyclist's requested instructions dealing with correct method for vehicle driver to make left turn at intersection, was not prejudicial error. Vehicle Code, §§ 81, 86, 540.

2. Automobiles ⇐244(47)

In action for injuries to motorcyclist, where east-bound motorcyclist's view of west-bound automobile driver making left turn from highway into his private driveway was unobstructed for more than 300 feet, but he did not see automobile until he was about 35 feet from point of impact, and he then turned to right, speeded up his motorcycle and passed in front of automobile, evidence supported verdict for automobile driver.

3. Appeal and error ⇐996

Where conflicting inferences and conclusions may be drawn from the evidence, an appellate court is bound by findings of trial jury.

4. Appeal and error ⇐205

Where a question to which an objection is sustained does not in itself indicate that the answer to it will be favorable to party seeking to introduce the testimony, before ruling will be reviewed on appeal an offer of what is proposed to be proven must first be made to trial court so that reviewing court can determine whether proposed evidence would have been material and beneficial to party offering it.

5. Appeal and error ⇐205

Where questions asked defendant on cross-examination did not indicate that the answers would be either material or beneficial to plaintiff nor was any offer of proof made as to what answers the witness would give to the questions, appellate court would not consider whether trial court properly sustained objections.

Alvin G. Greenwald, Los Angeles, and Leonard G. Ratner, Beverly Hills for appellant.

Roger E. Kelly and Bauder, Gilbert, Thompson, Kelly & Veatch, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before a jury in an action to recover damages for injuries received by plaintiff in a collision between defendant's automobile and a motorcycle upon which plaintiff was riding, plaintiff appeals.

Facts: The evidence being viewed in the light most favorable to respondent (defendant), it appears that on May 3, 1948, defendant was driving his automobile in a westerly direction on Sunset Boulevard at about 35 miles per hour, and after giving a hand signal for more than 60 feet indica-

* Subsequent opinion 233 P.2d 1.

ting that he intended to make a left turn, he started to make a turn into a private driveway. He slowed down to about 5 miles per hour, and as he did so he observed plaintiff approaching in an easterly direction in the south lane of the boulevard on a motorcycle, traveling at approximately 35 miles per hour and about 35 feet away. At the same time plaintiff observed defendant and in an effort to prevent a collision turned to the right, increased the speed of his motorcycle and drove in front of defendant's car. The left front fender of defendant's automobile struck the left side of plaintiff's motorcycle with resulting injuries to him. The view of each party was unobstructed for over 300 feet, except for other traffic which may have been on the road.

Questions: First: *Did the trial court commit prejudicial error in refusing at plaintiff's request to give the jury the following instructions?*

"Section 81 of the Vehicle Code provides: 'Street' or 'highway' is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel.

"Section 86 of the Vehicle Code provides: 'Intersection' is the area embraced within the prolongation of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways, of two highways which join one another at approximately right angles or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict.

"Section 540 of the Vehicle Code provides: The driver of a vehicle intending to turn left at an intersection shall approach in that portion of the right half of the roadway nearest the center line thereof and after entering the intersection, the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered unless otherwise directed by markers, buttons, or signs."

[1] This question must be answered in the negative. In the present case the evidence disclosed that the road in question was not a highway but a private driveway. Hence the foregoing instructions were not applicable since they would be applicable only where the facts involve an intersection as defined under sections 81 and 86 of the Vehicle Code. The area where the accident occurred in this case did not fall within the definitions prescribed by the Vehicle Code.

The trial court, however, properly instructed the jury as to defendant's duty of care while turning to the left at his private driveway. Section 544 of the Vehicle Code was read to the jury.

[2, 3] Second: *Was the verdict for defendant supported by the evidence?*

This question must be answered in the affirmative. From the evidence set forth above the jury was justified in believing that plaintiff was contributorily negligent since his view was unobstructed for more than 300 feet, and he did not see defendant's automobile until he was about 35 feet from the point of impact. Also the jury may have believed that plaintiff was contributorily negligent in turning to the right, speeding up his motorcycle and passing in front of defendant's automobile. Where, as in the present case, conflicting inferences and conclusions may be drawn from the evidence an appellate court is bound by the findings of the trial jury.

Third: *Did the trial court commit prejudicial error in sustaining objections to questions asked defendant by plaintiff on cross-examination?*

This question must be answered in the negative. Prior to the trial of the action plaintiff took the deposition of defendant. At the trial plaintiff read the deposition into evidence. When plaintiff rested his case defendant's counsel adopted the testimony of defendant introduced through his deposition and then asked him a few additional questions, whereupon the following questions were asked by plaintiff's counsel, to which objections were made and the court sustained the objections:

"Q. Just a minute. Mr. Newman, you stated, it is a fact, is it not, that you arrived at the studio at 11:30 on this day? A. Approximately, yes.

"Mr. Kelly: Asked and answered. It has been read, the complete testimony was read this morning.

"The Court: Sustained.

"Mr. Greenwald: Your Honor, I am cross-examining at this time.

"The Court: Nothing to cross-examine, he just asked a couple of questions." * * *

"Q. Did you when you were at either N-3 or N-1 look westerly on Sunset to see if there were any vehicles approaching? A. Indeed I did.

"Q. And what did you see? A. I saw nothing at all, no vehicle of any sort.

"Q. And was it after you had looked or during the time that you were looking that you made, started to execute your turn? A. Would you ask that question again, please?

"Mr. Greenwald: Mr. Reporter?

"Mr. Kelly: Your Honor, in the interest of saving time I am going to object to this line of questioning as improper cross-examination, having been asked and answered, went into thoroughly at the deposition that was read this morning. We are just going over the same thing.

"The Court: Sustained.

"Mr. Greenwald: Well, your Honor, as I understand it, counsel has made a deposition a part of his direct testimony. Now I believe that it is my right to cross-examine with reference to the statements that were made and to show that the witness' statements are not correct but in fact are improper as I believe there are contrary statements in the deposition.

"Mr. Kelly: You asked all the questions at the time of the deposition, counsel.

"The Court: Sustained."

[4, 5] The law is established in California that where a question to which an objection is sustained does not in itself indicate that the answer to it will be favorable to the party seeking to introduce the testimony, before the ruling will be reviewed on appeal an offer of what is proposed to be proven must first be made to the trial court so that the reviewing court can determine whether the proposed evidence would have been *material* and *beneficial* to the party offering it. (Heinz v. Heinz, 73 Cal.App.2d 61, 66, 165 P.2d 967; Price v. Price, 71 Cal.App.2d 734, 738, 163 P.2d 501.) In the instant case the questions to which objections were made did not indicate that the answers would be either material or beneficial to plaintiff, nor was any offer of proof made as to what answers the witness would give to the questions. Hence the foregoing rule is applicable and we will not consider whether the trial court properly sustained objections to the questions or not.

Judgment affirmed.

MOORE, P. J., and WILSON, J., concur.



100 Cal.App.2d 57

PEOPLE ex rel. SMITH v. CITY OF SAN JOSE, et al.

Civ. 14545.

District Court of Appeal, First District, Division 2, California.

Oct. 20, 1950.

Proceeding in quo warranto brought by the People of the State of California upon the relation of Ralph Smith, against the City of San Jose, a municipal corporation, City Council of City of San Jose and others to test the validity of annexation of two inhabited parcels of land to city. The Superior Court of the State of California in and for the County of Santa Clara, M. G. Del Mutolo, J., heard cause as agreed statement of facts and without additional evidence gave judgment for defendants and plaintiffs appealed. The District Court of Appeal, Nourse, P. J., held that failure of city to divide annexation of two noncontiguous parcels into two separate questions at election invalidated the annexation.

Reversed with directions to enter judgment for plaintiffs.

1. Appeal and error ⇐1008(1)

In quo warranto proceeding to determine validity of annexation of two parcels contiguous to city, where finding, if interpreted to mean that two parcels were contiguous to each other, was not supported by agreed statement of facts and no additional evidence was taken, finding would be disregarded on appeal. Gen. Laws, Act 5159, § 6.

2. Quo warranto ⇐55

In quo warranto proceedings, where the complaint alleges invalidity of annexation, the burden is on defendant to prove the proceedings are valid. Gen. Laws, Act 5159, § 6.

3. Quo warranto ⇐47, 55

In both common-law writ of quo warranto and information in nature of quo warranto, the ordinary rules of pleading were reversed and state is bound to show nothing.

4. Quo warranto ⇐55

Where, in quo warranto proceeding to question validity of annexation of land to city, the complaint alleged the two parcels were not contiguous and answer denied this but no proof was offered, and stipulation of facts and findings conceded parcels not contiguous, the parcels are shown conclusively not to be contiguous. Gen. Laws, Act 5159, § 6.

5. Municipal corporations ⇐34

Where two parcels of land, both contiguous to city but not contiguous to each other, were sought to be annexed in single election as one proposition, there was improper election, as electors of each parcel were entitled to vote on proposition of annexation of that parcel separately. Gen. Laws, Act 5159, § 6

Martin S. Walsh, George H. Barnett, San Jose, for plaintiffs and appellants.

Robert E. Cassin, City Atty., Eugene L. Rendler, Asst. City Atty., San Jose, for defendants and respondents.

NOURSE, Presiding Justice.

In these proceedings in quo warranto to test the validity of the annexation of inhabited territory to the City of San Jose the defendants had judgment. The cause was tried on an agreed statement of facts and without any additional evidence. Findings of fact were made. They add nothing to the judgment as will appear hereafter. Accordingly the appeal presents questions of law alone and we may confine our discussion to two of these as they control the judgment.

The proceedings are taken under the Annexation Act of 1913, Deering's Gen. Laws, Act 5159, Statutes 1913, p. 587, prior to its repeal in 1949. Section 6 of that act as amended, Statutes 1915, p. 307, reads as follows: "* * * Whenever, upon proceedings had and taken and at elections called and held in accordance with the provisions of this act, *the electors of each of two or more such bodies of outside territory* have voted in favor of the annexation thereof to the same municipal corporation, the legislative body of such municipal corporation must submit to the electors thereof, as separate propositions, each to be voted upon separately and without regard to the others, the question whether each [of] such bodies of new territory shall be annexed to, incorporated in and made a part of such municipal corporation." (Emphasis ours.)

The complaint alleged that the two parcels were two separate and entirely severable properties and did not adjoin each other in any particular.

[1] (1) The trial court found that both parcels were contiguous to the boundaries of the City of San Jose but there was no agreement and no finding that they were contiguous to each other. But even if that finding could be effective here it must be disregarded because there was no evidence disclosing that the two parcels were contiguous to each other. On the other hand it is frankly conceded that they were not.

It is this finding which forms the basis for respondents' main argument that the judgment must be affirmed. But if we

were to accept respondents' interpretation of the finding it is not supported in that respect by the agreed statement of facts and, since no additional evidence was taken, the finding will be disregarded on appeal. Crawford v. Imperial Irrigation Dist., 200 Cal. 318, 335, 253 P. 726; Baer v. Lorimer, 219 Cal. 677, 679, 28 P.2d 909; Los Angeles Athletic Club v. Board of Harbor Commissioners, 130 Cal.App. 376, 394, 20 P.2d 130. See also Larkin v. Bank of America, 93 Cal.App.2d 594, 603, 209 P.2d 801; Taylor v. George, 34 Cal.2d 552, 556, 212 P.2d 505.

[2] (2) In quo warranto proceedings of this nature wherein the complaint alleges the invalidity of the annexation proceedings the burden is upon the defendants to prove that such proceedings were valid. The precise question was decided by this court in People v. Town of Corte Madera, 97 Cal.App.2d 726, 218 P.2d 810, 811, where we said: "This court had occasion in People ex rel. Stephenson v. Hayden, 9 Cal.App.2d 312, 49 P.2d 314, 315, to consider the question of pleading in quo warranto cases. We held there that a complaint which pleaded in general terms that defendant was 'usurping, intruding into, and unlawfully holding and exercising the office of Supervisor * * *' was sufficient.

[3, 4] "'It was a peculiarity of both the common-law writ of quo warranto and information in the nature of quo warranto that the ordinary rules of pleading were reversed and the state was bound to show nothing'. 22 Cal.Jur. p. 220." See also 44 Am.Jur. p. 167. The application of the rule to this case is clear. The complaint alleged: "That the said two precincts are two separate, distinct and entirely severable properties and do not adjoin each other in any particular whatsoever; and the said precincts are separated by land that is not a road, stream, railroad, or other natural or artificial barrier or right-of-way; that at only one point are the two precincts less than 100 feet apart; that all other points, which comprise 99% of said territory, in the two precincts are separated by an area greater than 100 feet, and in a large portion of the area the two precincts are separated by territory equal to three (3) city blocks of uninhabited area which was annexed to the City of San Jose in 1947." The answer denied this in general terms, but no proof was offered in support of the denial. The stipulation of facts stated that the two parcels were contiguous to the City of San Jose. The trial court found: "The territory annexed to the City of San Jose is and at all times herein mentioned was contiguous thereto." We may assume that both the stipulation of facts and the findings conceded that the parcels were not contiguous to each other, particularly as the complaint contained a metes and bounds description of the entire tract of land and of the territory separating them which was excepted from the proceedings. These allegations were not denied in the answer. They show conclusively that the two parcels were not contiguous to each other.

[5] We have this simple case. Two parcels of land, both contiguous to the boundaries of the city but both noncontiguous to each other, were both sought to be annexed in a single election presented to the electors as one proposition. A clear example of the wisdom of the statute is found in the result. The two separate parcels were designated as precinct No. 1 and precinct No. 2 respectively. The vote in precinct No. 1 (for annexation of both parcels) was 80 for annexation to 40 against; the vote in precinct No. 2 (on the same proposition) was 48 for annexation and 74 against. It is conceivable that the electors in precinct No. 2 might have favored the annexation of that parcel but objected to the annexation of the other parcel. It is also conceivable that the electors in precinct No. 1 favored the proposition only because it included parcel 2. But aside from any speculation as to the intentions of the electors, we hold that the election was improperly held and that the electors of each parcel were entitled to vote on the proposition of the annexation of that parcel separately.

The judgment is reversed with direction to enter judgment for the plaintiffs.

GOODELL, J., concurs.

100 Cal.App.2d 22

DALY v. WHITE.

No. 14520.

District Court of Appeal, First District, Division 1, California.

Oct. 18, 1950.

William White filed an application for a preliminary injunction to restrain James Daly from prosecuting an action for damages arising out of an automobile collision. The Superior Court in and for the County of Santa Clara, Byrl R. Salsman, J., denied application and White appealed. The District Court of Appeal, Bray, J., held that where both actions were between the same parties arising out of the same transaction, and filed in the same county, but plaintiff in action second filed secured service first over the plaintiff in action first filed, trial court had jurisdiction of both actions, and in its discretion could order the consolidation of both cases for trial, and deny an application by plaintiff in action second filed to enjoin plaintiff in action first filed but second served from prosecuting action.

Affirmed.

1. Abatement and revival ⇐6

There is no priority of jurisdiction between cases filed in same court and in same county, nor is there any conflict of jurisdiction between them.

2. Injunction ⇐1

The granting of an injunction is a matter discretionary with trial court.

3. Action ⇐57(1)
Injunction ⇐137(1)

Where two actions were between the same parties, arising out of same transaction, and were filed in same county, but plaintiff in action second filed secured the first service over plaintiff in action first filed, trial court had jurisdiction of both cases and in its discretion could order consolidation of both cases for trial and deny a temporary injunction by plaintiff in action second filed to enjoin plaintiff in action first filed but second served from prosecuting action.

4. Abatement and revival ⇐9

Abatement lies only where not only subject matter of two actions is same and parties are same, but where parties plaintiff and parties defendant are identical, and it does not lie with respect to cross suits pending in same court where relationship of parties to suits is reversed.

Lee T. Strine, Sunnyvale, for appellant.

John H. Machado, San Jose, for respondent.

BRAY, Justice.

The superior court denied an application by defendant and appellant White for a preliminary injunction to restrain plaintiff and respondent Daly from prosecuting this action. Defendant appealed.

Question Presented.

Can the plaintiff in an action second filed but first served enjoin the plaintiff in an action first filed but second served from prosecuting that action, where both actions are between the same parties, arise out of the same transaction, and are filed in the same county?

Facts.

On July 11, 1948, appellant and respondent were operating automobiles which collided with each other. On June 22, 1949, respondent filed suit against appellant in the superior court of Santa Clara County for damages for personal injuries alleged to have been received in the accident. On July 8 appellant filed a suit against respondent in the same county for damages for the injuries which he claimed to have received in the accident. On July 11 summons and complaint in the second suit were served upon respondent, who, on August 29, filed an answer but no cross-complaint. This second suit was placed upon the setting calendar. Thereafter, on October 1, appellant was served with summons and complaint in the first suit. Appellant then applied for a preliminary injunction to restrain respondent from proceeding in the second suit. After hearing, this application was denied.

Will Injunction Lie?

Appellant contends that injunction is proper to restrain a multiplicity of proceedings, citing section 526 of the Code of Civil Procedure: "An injunction may be granted

in the following cases: * * * 6. Where the restraint is necessary to prevent a multiplicity of judicial proceedings". To the same effect, Civil Code, § 3422. He also cites Lincoln v. Superior Court, 51 Cal.App. 2d 61, 124 P.2d 179, and Gorman v. Superior Court, 23 Cal.App.2d 173, 72 P.2d 774. In the Lincoln case the Madera County superior court in an action to dissolve a partnership conducted through the device of four Massachusetts trusts, restrained the prosecution of four other actions brought in Los Angeles county superior and municipal courts, allegedly for the purpose of harassing the partners, the subject matter of which actions was included in the Madera County action. The appellate court upheld the restraint on the ground that a multiplicity of proceedings was involved. The Gorman case involved actions arising out of a collision between two trucks. The first action was filed in Merced County. The day the defendants in that action were served, they filed in Fresno County an action against the plaintiffs in the Merced County action. Service in this action was made later the same day. The plaintiffs in the Merced County action (the first filed and served) applied to the appellate court for a writ of prohibition to restrain the plaintiffs in the Fresno County action from proceeding. The court held, 23 Cal.App.2d at page 177, 72 P.2d at page 776: "The superior court of Merced county not only had concurrent jurisdiction, but acquired jurisdiction over the whole litigation with full power to bring in all necessary parties and make a complete adjudication of the entire controversy through the fact that process of that court was first served." In both the Lincoln and Gorman cases the courts were considering the question of jurisdiction between courts of different counties. But the rule is different where the actions are brought in the same court in the same county. This is established by Hamm v. San Joaquin & Kings River Canal Co., 44 Cal.App.2d 47, 111 P.2d 940. There two suits between the same parties arising out of the same automobile accident were filed. The defendants in the first suit filed were the plaintiffs in the second suit. As in our case, first service was made in the second suit. The plaintiff in the second suit moved the court to dismiss the first suit for lack of jurisdiction because summons was served in his suit first. That motion was denied; and the cases were consolidated and tried together. In both actions cross-complaints were filed which were later stricken by the court. The plaintiff in the first suit obtained a $20,000 judgment, and in the second suit in which he was defendant judgment went for him, too. On appeal appellant claimed that the $20,000 judgment against him was void for the reason that the court lacked jurisdiction to try the cause since the court first acquired jurisdiction in the second cause because it was the one in which summons was first served. Concerning this contention the court said (Hamm was the plaintiff in the suit first filed, but second served) in 44 Cal.App.2d at pages 54–55, 111 P.2d at page 945:

"In support of their contention that the judgment for the respondent Hamm is void for lack of jurisdiction the appellants rely on section 416 of the Code of Civil Procedure, which provides in part:

" 'From the time of the service of the summons and of a copy of the complaint in a civil action, * * * the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings.'

"There is nothing in the language of that section in conflict with the theory that the Merced superior court did not also acquire jurisdiction of the same parties, and retain control of all the subsequent proceedings in both cross suits involving the same automobile casualty, which were instituted and consolidated for trial in that same court. There was no conflict of jurisdiction between different courts. The same jury and judge tried and determined all issues of both cases at the same time. It is true that the court is deemed to acquire jurisdiction of the parties *at the time* of the service of the summons and complaint. That does not mean the same court may not subsequently acquire jurisdiction of the same parties in a cross suit involving the identical issues so as to consolidate the cases and determine the issues at one time."

The court then stated that the Gorman case, supra, is not in conflict, pointing out that in that case the actions were filed in different counties and that the reason assigned for the ruling that the court in which the summons was first served was entitled to control all subsequent proceedings in the litigation, was "that 'this will work no injustice to them while to permit them to proceed in an independent action [in another county] will lead to unnecessary duplication and confusion, with resulting injustice to some of the parties'." It then stated: "That situation does not exist in the present case where both actions are pending in the same court, and they are consolidated for trial and the court retains, not only the jurisdiction, but the control of all proceedings in both cases. The last-mentioned procedure is not in violation of section 416 of the Code of Civil Procedure." 44 Cal.App.2d at pages 55–56, 111 P.2d at page 945. See also Myers v. Superior Court, 75 Cal.App.2d 925, 172 P.2d 84, where the court approved that portion of the Hamm opinion which held that the rule of jurisdiction between courts in separate counties did not apply to the same court in the same county.

[1] We held in Kromm v. Kromm, 84 Cal.App.2d 523, 191 P.2d 115, that there is no priority of jurisdiction between cases filed in the same court in the same county, nor is there any conflict of jurisdiction between them. See also Brown v. Campbell, 110 Cal. 644, 43 P.12.

At first blush Hilton v. Reed, 46 Cal.App. 2d 449, 116 P.2d 98, cited by appellant, seems to be opposed to this view. However, on analysis it clearly appears that the court did not consider the fact that the two actions were there pending in the same county, nor decide anything except the uncertainty of the allegations of the complaint. While the court states that the rule is well settled in California that the pendency of a prior action based on the same cause, contested by the same parties, and commenced in the same jurisdiction, is ground for the abatement of the second action, it did not apply that rule, nor did it discuss either the Hamm or the Myers case. The decision actually was that the allegations of the complaint were so uncertain that the court erred in overruling appellant's demurrer as to uncertainty. Hence, the case is of no value on the question being considered here.

[2, 3] The granting of an injunction, of course, is a matter discretionary with the trial court. 14 Cal.Jur. 180; Riviello v. Journeyman Barbers, etc., Union, 88 Cal. App.2d 499, 199 P.2d 400. As we have shown, the actions being pending in the same court in the same county, the court had jurisdiction of both, and therefore there exists no right of priority to have the proceedings in either action postponed to await the trial of the other. In its discretion, in order to avoid the necessity of two trials, the trial court may order the consolidation of both cases for trial. In case of such consolidation the court can give the parties full opportunity to present every issue upon which they rely in both cases, and can protect the rights of the parties. For example, it can give the appellant, the party whose summons was first served, the benefits of proceeding as plaintiff, as was done in the Hamm case.

Abatement.

[4] Both parties in their briefs discuss the question of abatement. Appellant contends that the injunction should have been issued as the first action should be abated. The position of respondent is not quite clear in his brief. It is either that the injunction was properly denied because he contends that appellant had an adequate remedy, to wit, motion in abatement; or that abatement will not lie in any event. Although only a second action is abated by pendency of a prior action, and we have concluded there is no priority here, abatement could not lie in this case, as it lies only where not only the subject matter of two actions is the same and the parties are the same, but where the parties plaintiff and the parties defendant are identical. "* * * the parties in the second suit must stand in the same relative position as plaintiff and defendant." 1 Am.Jur. 33. "It has been held that abatement will not lie unless the suits are founded on the same issues and the plaintiffs are the same in both actions. [Citations.] Abatement does not lie with

respect to cross suits pending in the same court where the relationship of the parties to the suits is reversed." Hamm v. San Joaquin, etc., Canal Co., supra, 44 Cal.App. 2d at page 56, 111 P.2d at page 945. See also National Auto. Ins. Co. v. Winter, 58 Cal.App.2d 11, 136 P.2d 22.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



100 Cal.App.2d 27

McWILLIAMS v. LOS ANGELES TRANSIT LINES.

Civ. 17789.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1950.

Lester W. McWilliams brought action against the Los Angeles Transit Lines to recover damages for personal injuries received in a collision between a streetcar and an automobile. The Superior Court, Los Angeles County, Harold B. Jeffery, J., gave judgment for defendant, and plaintiff appealed. The District Court of Appeal, McComb, J., held that an affidavit of an attorney to the effect that the jury's foreman made research into technical matters dealing with the issues before the jury could not be received to impeach the verdict since the attorney's knowledge could only be obtained by hearsay.

Affirmed.

1. New trial ⇦143(1)

A juror cannot impeach his own or fellow juror's verdict by an affidavit unless verdict was reached by chance. Code Civ. Proc. § 657, subd. 2.

2. New trial ⇦145

Hearsay statements in affidavits are not admissible to impeach verdict of jury.

3. New trial ⇦145

Affidavit of attorney in automobile and streetcar accident case that jury's foreman, an engineer, looked up technical data at his home about cohesive power of streetcar wheels and rails and reached his own conclusions of space required to stop at given speeds, and without mentioning his research expressed his opinions to the jury which in a degree he was unable to estimate influenced their thinking, could not be received to impeach the verdict, since the attorney's knowledge could only be hearsay. Code Civ.Proc. § 657, subd. 2.

Arthur Strock, Los Angeles, for appellant.

Morrow & Trippet, by Henry R. Thomas, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before a jury in an action to recover damages for personal injuries received in a collision between a streetcar and an automobile, plaintiff appeals.

Facts: After the jury had been empaneled to try an action for damages resulting from the alleged negligence of defendant, whose streetcar collided with an automobile in which plaintiff was riding, the foreman of the jury, Mr. Kroesche, read certain books on the subject of engineering which he had in his own private library. The information which he obtained therefrom, relative to the cohesive force between steel wheels on a streetcar and the tracks upon which it ran, he used in his consideration of the case when it was submitted to the jury. These facts were brought to the attention of the trial court on a motion for a new trial through the affidavit of Arthur Strock, attorney of record for plaintiff, wherein he said in part:

"Herold J. Kroesche was foreman of that jury and as a juror voted for the defendant; said Mr. Kroesche is a Chemical Engineer and has been a Chemical Engineer since 1924. During the trial of the ac-

tion, in open court, he asked of the Judge Presiding, Honorable Harold B. Jeffery, and of counsel for plaintiff and of counsel for answering defendant [Los Angeles Transit Lines, a corporation] what the weight of the streetcar involved in the accident was. He was then and there, in open court, given the answer that the streetcar weighed 43,500 lbs. not loaded.

"Said Mr. Kroesche owns and has in his private library certain books on the subject of Engineering; among them are Kent's Engineering Handbook, 1923 Edition, and Duff's Physics. During the course of the trial and before the case was submitted to the jury, at night in his home between sessions of court, and not during the actual course of the trial in court, said Mr. Kroesche examined said books for the purpose of determining, among other things, data re the cohesive force between the steel wheels of the subject streetcar and the steel tracks upon which it ran at and before the time of the subject accident, when the streetcar brakes are locked and its wheels are sliding. From his reading and calculations at that time, he reached the conclusion that if the streetcar involved in the accident is traveling at a speed of 20 miles per hour at a time when the brakes were first applied, and if the wheels became locked and sliding without interruption down to the time the streetcar stopped, that would cause the streetcar, with the wheels starting to slide at said speed of 20 miles per hour, to come to a stop 122 feet following the time when the wheels first began to slide. For the purpose of this computation, he assumed that the average velocity, from the time the streetcar first began to slide until the streetcar came to a stop, was 10 miles per hour. He used as a basis for his computation the cohesive force of steel streetcar wheels on steel streetcar tracks as he determined that cohesive force to be by reason of his said examination at home of the aforementioned books. At no time during the trial, in evidence in open court, was there any testimony as to said cohesive force or the effect it would have in bringing the streetcar to a stop. His examination of said books and his determination therefrom of said cohesive force was a matter which he considered as a material factor, among other factors, in reaching his decision in the lawsuit.

"Said Mr. Kroesche did not mention to any of the other jurors in the case at that time that he had read the books as aforementioned, but in his discussions with jurors of the facts of this case, both as a juror and as a foreman of the jury he expressed opinions which were in a material degree, to what extent he cannot estimate, influenced, guided, and directed by his reading of the books as aforesaid."

Question: Was the trial court correct in refusing to grant a motion for a new trial predicated on the statements in the affidavit of Attorney Strock?

This question must be answered in the affirmative and is governed by these rules:

[1] 1. A juror cannot impeach his own or his fellow juror's verdict by an affidavit unless the verdict was reached by chance. (Section 657, subsec. 2, Code of Civ.Proc.)

[2] 2. Hearsay statements in affidavits are not admissible to impeach the verdict of a jury. (Woods v. Pacific Greyhound Lines, 91 Cal.App.2d 572, 577, 205 P.2d 738; Noble v. Key System, Ltd., 10 Cal.App.2d 132, 143, 51 P.2d 887; People v. Willis, 70 Cal.App. 465, 475, 233 P. 812; Snoffer v. City of Los Angeles, 6 Cal.App.2d 14, 16, 43 P.2d 852).

Applying the foregoing rules to the facts in the present case it is evident that most of the statements contained in the affidavit could not have been predicated on anything other than hearsay evidence, for example that Mr. Kroesche examined books for the purpose of determining:

a. "Data re the cohesive force between the steel wheels of the subject streetcar and the steel tracks upon which it ran at and before the time of the subject accident, when the stretecar brakes are locked and its wheels are sliding."

b. That "from his reading and calculations at that time, he reached the conclusion that if the streetcar involved in the accident is traveling at a speed of 20 miles per hour at a time when the brakes were first applied,

and if the wheels became locked and sliding without interruption down to the time the streetcar stopped, that would cause the streetcar, with the wheels starting to slide at said speed of 20 miles per hour, to come to a stop 122 feet following the time when the wheels first began to slide."

c. That "for the purpose of this computation, he assumed that the average velocity, from the time the streetcar first began to slide until the streetcar came to a stop, was 10 miles per hour."

d. That "he used as a basis for his computation the cohesive force of steel streetcar wheels on steel streetcar tracks as he determined that cohesive force to be by reason of his examination at home of the aforementioned books."

e. That "his examination of said books and his determination therefrom of said cohesive force was a matter which he considered as a material factor, among other factors, in reaching his decision in the lawsuit."

f. That he "did not mention to any of the other jurors in the case at that time that he had read the books as aforementioned, but in his discussions with jurors of the facts in this case, both as a juror and as a foreman of the jury he expressed opinions which were in a material degree, to what extent he cannot estimate influenced, guided, and directed by his reading of the books."

[3] Clearly Mr. Strock could only learn Mr. Kroesche's purpose in examining the books from statements made to him by Mr. Kroesche. Likewise he could only know the conclusions which Mr. Kroesche reached as a result of statements to him by Mr. Kroesche. In addition he could only know that Mr. Kroesche assumed certain facts in his calculations by being told what facts had been assumed. Nor would it be possible for the affiant to know what went on in the jury room but from statements made either by Mr. Kroesche or other members of the jury. Finally, the only way that the maker of the affidavit could know that Mr. Kroesche was influenced in his discussions with the jurors by what he had read, and that Mr. Kroesche did not know to what extent he had been influenced, was by statements by Mr. Kroesche to him, which constituted hearsay evidence.

The trial judge was correct in declining to grant a motion for a new trial upon such hearsay evidence.

The foregoing reasoning is not inconsistent with the rule announced in Pacific Solvents Co. v. Superior Court, in and for Los Angeles County, 88 Cal.App.2d 953, 199 P.2d 740. Such case dealt with the requirements for the issuance of a subpoena duces tecum which involved section 1985 of the Code of Civil Procedure, which reads: "*Subpoena duces tecum.* All applications before trial for subpoenas duces tecum shall be accompanied by an affidavit specifying the exact matters or things desired to be produced, and setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his possession or under his control."

This section requires setting forth in full detail the full materiality of the papers which it is sought to have produced to the issues involved in the case. There is nothing in section 1985 of the Code of Civil Procedure which prohibits the issuance of a subpoena duces tecum predicated upon an affidavit which states facts which have been ascertained from hearsay. The case has no application to the prohibition in section 657, subsection 2 of the Code of Civil Procedure, which prohibits a juror from impeaching his own verdict except where the verdict has been determined by chance.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

99 Cal.App.2d 880

SAPHIRE v. LOS ANGELES TRANSIT LINES.

Civ. 17882.

District Court of Appeal, Second District, Division 2, California.
Oct. 17, 1950.

Action by Florence Saphire against Los Angeles Transit Lines, a corporation, for injuries sustained by plaintiff in a collision at an intersection between the streetcar of defendant and the automobile in which plaintiff was riding as a passenger. The Superior Court, Los Angeles County, William J. Palmer, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Moore, P. J., held that the streetcar motorman's negligence, although slight, was the proximate cause of the collision and contributed to the plaintiff's injuries.

Affirmed.

1. Street railroads ⇐102(1)

Where westbound streetcar motorman's vision was obscured by southbound streetcar standing at intersection, but motorman drove his streetcar too fast across intersection and collided with southbound automobile, which was passing the standing streetcar, causing injury to automobile passenger, motorman's negligence, although slight, was proximate cause of collision and contributed to automobile passenger's injuries.

2. Negligence ⇐93(14)

Where passenger of automobile was injured in collision between automobile and streetcar at intersection, passenger was not chargeable with negligence of driver of automobile.

3. Negligence ⇐22

Amount of ordinary care exercised by driver of any power propelled conveyance should be measured by the probable perils to be encountered.

4. Street railroads ⇐81(4)

Streetcar operator has obligation to be constantly on look out when crossing traffic congested intersection and to use such reasonable precautions as circumstances require, and his failure to do so is culpable negligence.

5. Street railroads ⇐90(2), 99(1)

The duties of streetcar motorman and chauffeur are reciprocal, and each is required to approach street intersection with due regard for right of other.

6. Street railroads ⇐85(4)

Streetcars do not have an absolute or pre-eminent right of way over intersections, merely for reason that a streetcar runs on steel rails.

7. Street railroads ⇐90(3)

Where westbound streetcar motorman's vision was obscured by southbound streetcar, standing at intersection on traffic-congested avenue, failure of motorman to give any warning of his approach nor to give one at such reasonable time prior to his arrival at west rail of southbound tracks as to forewarn driver of southbound automobile, which was passing standing streetcar, was negligence creating liability for resulting collision.

8. Appeal and error ⇐996

Where the facts have been determined by trial court, they are not open to question on appeal if reasonable inferences drawn from evidence constitute sufficient proof to establish the issue.

9. Evidence ⇐597

Any substantial testimony is sufficient support for a finding.

10. Appeal and error ⇐717

The opinion of trial judge and his remarks in course of trial can not impeach findings of court.

Harry B. Dowsing, Los Angeles, for appellant.

A. J. Blackman, Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendant has appealed from a judgment entered against it on a finding that the negligent operation of its westbound "9" street car on its private right of way

caused injury to respondent. Contemporaneously with the arrival of the "9" car at the easterly curb of Vermont avenue, appellants' "F" car moving south on Vermont arrived at the loading zone a short distance north of the private right of way. The "9" car was operated by motorman Hazelton; the "F" car was in charge of one Sholander. As Hazelton waited on the east curb, his view of the vehicular traffic going south on Vermont was obscured by the standing "F" car. Because his view was so obstructed he waited where he stood to be reassured by Sholander that the "F" car would remain in its position while the "9" car crossed the avenue. Having been signalled by the latter, Hazelton proceeded across Vermont at about four or five miles an hour. As he could not clearly observe the traffic on the west side of Vermont, so also, a motorist proceeding southward on that avenue could not, at the moment of passing the "F" car, see the "9" car as it moved across the avenue. Thus when Hazelton arrived at the lane of traffic west of the standing "F" car he was suddenly confronted with the Solomon automobile going about ten miles an hour as it approached the oncoming westbound "9" car. The "9" car struck the sedan nine feet east of the west curb of Vermont and pushed it about six feet along the tracks.

From the facts established the court below found that both Hazelton and the operator of the Solomon sedan were negligent. Both blindly drove engines of destruction into an area where they knew they were likely to encounter perils. Two facts are outstanding: (1) the "9" car struck the sedan; (2) the former had the right of way. While, as the trial judge said, Hazelton "had the right to assume that the driver of the automobile would exercise ordinary care and would yield the right of way" yet he knew that he was approaching a dangerous situation: a traffic-congested portion of a popular avenue concealed from his view by street car "F". He could not see the motorcars coming toward the westbound tracks until he was practically at the lane of travel. Although his behavior might have been free from negligence in rural or suburban communities he knew that near the intersection of Vermont and the private right of way he might meet a southbound motorcar at any moment of a summer's day as he was crossing Vermont avenue. Therefore he should have proceeded at a speed at which he could bring the car to a standstill within such time as he might be sure of avoiding a collision. Instead of his making a sudden stop, notwithstanding his prompt effort to do so, he drove on, to the damage of the innocent passenger in the colliding vehicle.

[1-6] While the negligence of Hazelton was slight, still it was a proximate cause of the collision and contributed to respondent's injuries. As a passenger she had nothing to do with the operation of the sedan. Therefore she is not chargeable with the negligence of its driver. By the exercise of a modicum of his ordinary care Hazelton would not have struck the automobile. His speed under the circumstances was greater than reasonable care warranted. The amount of ordinary care exercised by the driver of any power propelled conveyance should be measured by the probable perils to be encountered. A traffic-congested avenue in a highly developed area with a standing street car obscuring the view of the operator of a conveyance crossing such avenue is a place fraught with such perils. Such an area imposes upon the operator the obligation to be constantly on the lookout and to use such reasonable precautions as the circumstances require. His failure to do so is culpable negligence. Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 646, 158 P. 119. On arriving at a street intersection the duties of the motorman and the chauffeur are reciprocal. Each is required to approach it with due regard for the right of the other, "and in such a manner as not unreasonably to infringe upon the rights of the other." Merely because a street car runs on steel rails, it has not for that reason an "absolute or pre-eminent right of way over intersections". Primm v. Market Street Ry. Co., 56 Cal.App.2d 480, 486, 132 P.2d 842, 845; Wright v. Los Angeles Ry. Corporation, 14 Cal.2d 168, 173, 93 P.2d

135; O'Connor v. United Railroads, 168 Cal. 43, 48, 141 P. 809. Instead of watching out for the traffic concealed by the "F" car, Hazelton was watching that car. This was negligent inattention to potential perils. Collier v. Los Angeles Ry. Co., 60 Cal.App. 2d 169, 175, 140 P.2d 206.

[7-9] Moreover, in view of the findings, Hazelton did not give any warning of his approach nor give one at such reasonable time prior to his arrival at the west rail of the southbound tracks as to forewarn the driver of the approaching automobile. Such failure was negligence and the question of his culpability is an issue for the trial court's determination. Lund v. Pacific Electric Ry. Co., 25 Cal.2d 287, 298, 153 P.2d 705; White v. Los Angeles Ry. Corporation, 73 Cal.App.2d 720, 727, 167 P.2d 530; Scott v. City & County of San Francisco, 91 Cal.App.2d 887, 889, 206 P.2d 45; Charves v. San Francisco-Oakland Terminal Rys., 44 Cal.App. 221, 224, 186 P. 154. Respondent testified that no bell was sounded and that is sufficient. Simonet v. Frank Pellissier & Sons, 61 Cal.App.2d 41, 45, 141 P.2d 922; Thompson v. Los Angeles Ry., 165 Cal. 748, 752, 134 P. 709; Charves v. San Francisco-Oakland Terminal Railways, supra. The facts having been determined by the trial court are not open to question on appeal if the reasonable inferences drawn from such testimony constitute sufficient proof to establish the issue. Brice v. Evans, 97 Cal. App.2d 412, 217 P.2d 738; Erreca v. Western States Life Ins. Co., 19 Cal.2d 388, 397, 121 P.2d 689, 141 A.L.R. 68; In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. Any substantial testimony is sufficient support for a finding.

[10] Appellant's attack upon the reasoning of the trial judge in deriving his decision is in vain. It has long been established that neither the opinion of a trial judge nor his remarks in the course of trial can impeach the findings of the court. Stone v. Los Angeles County Flood Control District, 81 Cal.App.2d 902, 907, 185 P.2d 396; Redsted v. Weiss, 73 Cal.App.2d 889, 891, 167 P.2d 735.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

SNIDOW et al. v. HILL et al.

Civ. 17858.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1950.

Rehearing Denied Nov. 6, 1950.

Hearing Denied Dec. 14, 1950.

Action to quiet title to certain realty by Houston A. Snidow and Mildred K. Snidow against Hayden Hill and Alice K. Hill. The Superior Court, Los Angeles County, William P. Haughton, J., entered judgment in favor of the plaintiffs and the defendants appealed. The District Court of Appeal, McComb, J., held that no fraud was perpetrated on the defendants, that the contract was not uncertain as to dates and amounts of payments due under it, and that defendants were in default at time the action was filed and defendants were not entitled to recover amounts paid under terms of the contract.

Judgment affirmed and purported appeals from order denying motion for new trial and order denying a jury trial dismissed.

See also 222 P.2d 962.

1. Appeal and error ⇐209(1)

In action to quiet title to certain realty where trial court expressly found that purchasers' allegations of fraud on part of vendors were untrue and purchasers did not attack sufficiency of evidence to sustain finding, finding was binding on appeal.

2. Vendor and purchaser ⇐77

Where realty contract provided that purchasers agreed to pay not less than $3,000 on the first day of January and the first day of June of each year, language was clear and unambiguous and exact dates of payment as well as minimum amount thereof was clearly stated in contract.

3. Vendor and purchaser ⇐194, 196

Where realty contract provided that purchasers agreed to pay not less than $3,000 on first day of January and first day of June of each year and provided that sellers should have right to all proceeds from fruit or other rents, issues and profits until obligation was paid, latter provision was for payments to be made in addition to minimum requirement of $6,000 a year.

4. Appeal and error ⇐209(1)

Where trial court found that purchasers were in default at time action to quiet title was commenced by vendors and purchasers did not attack sufficiency of evidence to sustain such finding, finding was binding on appeal.

5. Appeal and error ⇐209(1)

Where trial court found that vendors and purchasers entered into agreement for sale of certain realty, and sufficiency of evidence to sustain finding was not question on appeal, finding was binding on appeal.

6. Quieting title ⇐51

Where in prayer of purchasers' original answer in quiet title action they requested that court declare them to be equitable owners of realty and compel vendors to execute a valid conveyance thereof to them, while in prayer to amended and supplemental answer, purchasers requested that vendors take nothing by their suit but be required to account for all monies received from realty, such relief was inconsistent with a rescission and defendants were not entitled to recover amount paid under terms of realty contract.

7. Appeal and error ⇐257

Where no exception was taken or noted by defendants to ruling denying a jury trial, point was not available to defendants on appeal. Code Civ.Proc. §§ 646, 647.

8. Appeal and error ⇐106, 110, 870(2, 6)

An order denying a motion for a new trial and an order denying a jury trial are reviewable on appeal from a judgment but are not "appealable orders". Code Civ. Proc. §§ 646, 647.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Appealable Orders".

Barry Sullivan and Harry V. Leppek, Los Angeles, for appellants.

Allard, Brownsberger, Shelton & O'Connor and L. A. Shelton, all of Pomona, for respondents.

Houston A. Snidow, Azusa, in pro. per.

McCOMB, Justice.

This is an action to quiet title to certain real property. Defendants (1) appeal from the judgment in favor of plaintiffs, (2) purportedly appeal from (a) the order denying a jury trial and (b) the order denying a motion for a new trial.

Facts: In July, 1945, plaintiffs owned a 17-acre citrus grove located in the county of Los Angeles just east of Glendora. At such time Mr. Snidow and Mr. Hill were general partners in a business known as the L. A. Trailer Service. About the 27th of June, 1945, they had a conversation culminating in an oral agreement for the purchase and sale of the citrus grove owned by plaintiffs. Under the terms of their agreement the price of the property was $55,000 including the fruit on the trees which was either picked or was in the process of being picked. Mr. Hill undertook and agreed to sell a home and a boat which he owned and to apply the proceeds toward the down payment on the grove. It was agreed that Mr. Snidow might take as much money as was or should become available out of the L. A. Trailer Service during the ensuing months and the portion of the proceeds thereof would apply toward the down payment on the grove. In addition defendants agreed to pay $3,000 on January 1 and July 1 of each year.

Pursuant to this agreement defendants entered into possession of the property. Prior to March 15, 1946, defendants had paid plaintiffs $1,000 in cash and also other monies which were applied toward the purchase price. On March 16, 1946, Mr. Snidow and Mr. Hill agreed as to the balance due on the purchase price and in May, 1946, the oral agreement between the parties was reduced to writing.[1]

1. This agreement reads as follows:
"This agreement made and entered into by and between Houston A. Snidow and Mildred K. Snidow, hereinafter sometimes referred to as the seller, and Hayden Hill and Alice Hill, hereinafter sometimes referred to as the purchaser, of and concerning that certain real property consist-

The $3,000 payment due July 1, 1946, was paid on September 30, 1946. No other payments were made during 1946 except receipts from the fruit sold from the grove which were received by plaintiffs and applied toward the purchase price. Plaintiffs made demand on defendants for the $3,000 payment due January 1, 1947, and defendants made a partial payment thereon of $412 on January 27, 1947, and $600 on February 17, 1947. Finally on April 20, 1947, plaintiffs demanded the payment of the balance of the $3,000 due and were told that it was not going to be paid. On April 24, 1947, the present action to quiet title was filed. Defendants filed an answer praying for a judgment that they were the equitable owners of the property, and that plaintiffs be compelled to execute a conveyance and requested an accounting.

The case was tried and a judgment entered in favor of plaintiffs. This judgment was reversed on appeal. (Snidow v. Hill, 87 Cal.App.2d 803, 197 P.2d 801.) Thereafter on March 1, 1949, defendants made a motion for a jury trial which was denied. At the same time the trial judge permitted defendants to file an amended and supplemental answer. By this pleading defendants attempted to allege fraud upon the part of plaintiffs which induced defendants to enter into the contract. Upon the retrial judgment was again entered in favor of plaintiffs and the present appeals have ensued.

[1] *Questions:* First: *Did plaintiff Houston A. Snidow perpetrate a fraud upon defendants or either of them?*

This question must be answered in the negative. The trial court expressly found that defendants' allegations of fraud were untrue. Defendants do not attack the sufficiency of the evidence to sustain such finding. Therefore the finding is binding upon appeal.

ing of approximately 17 acres located at 2020 E. Alosta Boulevard, Glendora, California, being property now owned by the sellers hereunder purchased by them from Anson Lisk, fronting approximately 660 feet on Alosta Boulevard, consisting of oranges, lemons, together with house, outbuildings and personal property located thereon, consisting of heaters and fuel oil located therein.

"The sellers hereunder hereby agree that upon the payment to them of the total sum of $55,000.00, together with interest on the deferred balance at the rate of 6% per annum, they will deliver a deed to the purchasers of said property free and clear of all encumbrances as of the date hereof, save and except taxes for the current year, accrued but not payable, title to said property to remain with said sellers until such time as the purchase price is paid in full.

"Sellers hereunder shall have the right to all proceeds from the fruit or other rents, issues and profits therefrom until said obligation is paid.

"Purchasers agree to pay not less than $3,000.00 on the first day of January and the first day of June of each year.

"Should the sellers hereunder advance any money in connection with the care, operation or maintenance of said property, said sum shall be reimbursed by the purchasers out of the first moneys received by the sellers in connection with said transaction.

"Interest on the deferred balance is to be figured on the average unpaid balance as of the 5th day of January and the 5th day of July of each year and is to be added to the principal on said dates.

"This agreement is not assignable or transferable and shall not be filed for record in the Office of the County Recorder.

"It is understood that this property is now subject to Deed of Trust in favor of Anson Lisk, et ux, and the terms of this agreement are subject to the terms of said Deed of Trust in addition to the terms herein, said Deed of Trust to be recorded in the Office of the County Recorder of Los Angeles County, reference to which is hereby made for particulars.

"It is understood and agreed that moneys withdrawn from L. A. Trailer Service by either Houston A. Snidow or Hayden Hill may be credited against the amount due hereunder, as their interest may appear.

"In Witness Whereof this document has been executed this 5th day of July, 1945, and the parties hereto agree to be bound by the terms thereof.

"(s) Houston A. Snidow
Sellers

(s) Hayden Hill
Purchasers"

[2] Second: *Was the contract uncertain as to the dates and amounts of payments due under it?*

This question must also be answered in the negative. The contract provided, "Purchasers agree to pay not less than $3,000.00 on the 1st day of January and the 1st day of June of each year." This language is clear and unambiguous. The exact dates of payment as well as the minimum amount thereof is clearly stated in the quoted provision of the contract.

[3] Third: *Were the payments of $3,000 twice a year contingent on receipt of monies from the L. A. Trailer Service or the sale of crops?*

This question must likewise be answered in the negative. The contract provided, "Sellers hereunder shall have the right to all proceeds from the fruit or other rents, issues, and profits therefrom, until said obligation is paid." Clearly such provision was for payments to be made in addition to the minimum requirement of $6,000 a year as provided elsewhere in the contract where it said, "It is understood and agreed that moneys withdrawn from L. A. Trailer Service by either Houston A. Snidow or Hayden Hill may be credited against the amount due hereunder, as their interest may appear."

[4] Fourth: *Were defendants in default at the time the present action was filed?*

This question must be answered in the affirmative. The trial court found that defendants were in default at the time the present action was commenced and defendants do not attack the sufficiency of the evidence to sustain such finding. Therefore it is binding upon appeal.

[5] Fifth: *Was there a contract between the parties?*

This question must also be answered in the affirmative. The trial court found that the parties entered into the agreement hereinabove mentioned. The sufficiency of the evidence to sustain this finding is not questioned. Hence it is binding upon this court.

[6] Sixth: *Were defendants entitled to recover the amount paid under the terms of the contract?*

This question must be answered in the negative. Defendants' pleadings are entirely devoid of the necessary allegations upon which to predicate a rescission of their contract with plaintiffs. Neither do they in their answer or amended and supplemental answer seek a rescission. On the contrary, in the prayer of their original answer they ask that the court declare them to be the equitable owners of the property in question and compel plaintiffs to execute a valid conveyance thereof to them, while in the prayer to the amended and supplemental answer they ask that plaintiffs take nothing by their suit, but be required to account for all monies received from the grove. Clearly such relief is entirely inconsistent with that which defendants now seek, to wit, a rescission. (Evans v. Duke, 140 Cal. 22, 26, 73 P. 732; Carpenter v. First Trust etc. Bank, 11 Cal.App.2d 668, 672, 54 P.2d 495.)

[7] Seventh: *Did the court properly deny defendants' motion for a jury trial?*

This point is not available to defendants on this appeal for the reason that no exception was taken or noted by them to the ruling denying a jury trial. Where no exception is taken or noted to the ruling of the trial court in accordance with the provisions of section 646 of the Code of Civil Procedure when a jury trial is denied, such order, not being within the list of orders which are deemed to have been excepted to under the provisions of section 647 of the Code of Civil Procedure, is not reviewable on appeal from the judgment. (In re Estate of Magerl, 201 Cal. 162, 167, 256 P. 204.)

[8] 1. The judgment is affirmed. 2. Since (a) an order denying a motion for a new trial, and (b) an order denying a jury trial are reviewable upon appeal from the judgment but are not appealable orders, the purported appeals from such orders are and each is dismissed.

MOORE, P. J., and WILSON, J., concur.

HILL et al. v. SNIDOW et al.

Civ. 17859.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1950.

Rehearing Denied Nov. 2, 1950.

Hearing Denied Dec. 14, 1950.

Action by Hayden Hill and Alice K. Hill against Houston A. Snidow and Mildred K. Snidow to recover monies alleged due plaintiffs as result of a transaction entered into between parties relative to the purchase by plaintiffs of certain realty. The Superior Court, Los Angeles County, William P. Haughton, J., entered judgment in favor of defendants and plaintiffs appealed. The District Court of Appeal, McComb, J., held that where defendants as an affirmative defense to the action pleaded that there had theretofore been another action between the same parties arising out of the same transaction and that in such action plaintiffs had omitted to set forth facts in the complaint which facts arose out of the transaction set forth in previous complaint, plaintiffs were barred from now alleging a grievance arising out of the transaction.

Judgment affirmed and purported appeal from order denying motion for new trial dismissed and no motion for jury trial having been made purported appeal from nonexistent order dismissed.

1. Judgment ⇐585(4)

Where plaintiffs brought action to recover monies allegedly due them as result of a transaction entered into between parties relative to purchase of certain realty and defendants as an affirmative defense pleaded that there had been another action by and between same parties arising out of same transaction and that in previous action plaintiffs omitted to set forth facts which arose out of transaction set forth in complaint and plaintiffs could have obtained all relief which they sought by way of counterclaim or cross-complaint in previous action, plaintiffs were barred from alleging a grievance arising out of such transaction. Code Civ.Proc. § 439.

2. Action ⇐53(1)
Equity ⇐54

A party cannot by negligence or design withhold issues and litigate them in separate action and he may not split his demands or his defenses since equity will not deal with a case by piece-meal.

3. Appeal and error ⇐685

Where record failed to disclose that plaintiffs ever demanded a jury trial in action, plaintiffs were not entitled to a jury trial.

4. Appeal and error ⇐110

An order denying a motion for a new trial is not an appealable order.

Barry Sullivan and Harry V. Leppek, Los Angeles, for appellants.

Allard, Brownsberger, Shelton & O'Connor and L. A. Shelton, all of Pomona, for respondents.

Houston A. Snidow, Azusa, in pro. per.

McCOMB, Justice.

Plaintiffs appeal from a judgment in favor of defendants in an action to recover monies allegedly due plaintiffs as the result of a transaction entered into between the parties relative to a 17-acre citrus grove which is the subject of litigation between the same parties in Snidow v. Hill, Cal.App., 222 P.2d 958. There are also purported appeals from the order denying their motion for a new trial and from an order denying a motion for a jury trial.

Facts: In June, 1945, Mr. Snidow and Mr. Hill entered into an agreement relative to the purchase and sale of a 17-acre citrus grove owned by defendants. A dispute having arisen relative to the contract between the parties, Mr. Snidow and his wife on April 24, 1947, filed an action to quiet title to the property. In such action Mr. Hill and his wife were named as defendants. On the same date Mr. Hill and his wife filed an action in the superior court entitled, "Complaint for Reformation of Contract, Money Had and Received, and an Accounting," wherein Mr. Snidow and his wife were named as defendants. This action was predicated upon the agreement of the parties relative to the citrus grove which was the subject of

the quiet title action filed by the Snidows. Thereafter Mr. Hill and his wife dismissed the suit which they had filed on April 24, 1947. The Hills filed an answer and an amended and supplemental answer to the quiet title action instituted by Mr. and Mrs. Snidow. The case was tried, and judgment was entered in favor of plaintiffs Snidow and reversed on appeal. (See Snidow v. Hill, 87 Cal.App.2d 803, 197 P. 2d 801.)

On December 16, 1948, plaintiffs filed the present action in the superior court. Defendants as an affirmative defense to this action pleaded, "That there has heretofore been another action by and between the same parties arising out of the same transaction which said action is referred to in plaintiffs' complaint in paragraph XIV thereof and that in said action the plaintiffs herein omit to set forth the facts in the complaint, which facts in truth and in fact arise out of the transaction set forth in the complaint referred to and said plaintiffs are barred from now alleging a grievance arising out of said transaction."

The trial court found that the allegations in the affirmative defense above set forth were true and gave judgment in favor of defendants in the case at bar.

[1] *Questions*: First: *Was the trial court's ruling correct?*

This question must be answered in the affirmative. Section 439 of the Code of Civil Procedure reads as follows: "If the defendant omits to set up a counter-claim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."

[2] This rule is well expressed by Mr. Presiding Justice Moore in Brunswig Drug Co. v. Springer, 55 Cal.App.2d 444, 449, 130 P.2d 758, where it is said, "A party cannot by negligence or design withhold issues and litigate them in separate actions * * *. He may not split his demands or his defenses. * * * Equity will not deal with a case by piece-meal."

In the present case plaintiffs could have obtained all the relief which they now seek by way of a counterclaim or cross-complaint filed in the action to quiet title instituted by Mr. and Mrs. Snidow (defendants herein).

[3] Second: *Should plaintiffs have been permitted a jury trial in the instant case?*

This question must be answered in the negative. The record fails to disclose that plaintiffs ever demanded a jury trial in this action though they did make a motion in the quiet title action for a jury trial which was denied.

[4] 1. The judgment is affirmed. 2. Since the order denying the motion for a new trial is nonappealable, the purported appeal therefrom is dismissed, and (3) no motion for a jury trial having been made in the instant case the purported appeal from the nonexistant order is also dismissed.

MOORE, P. J., and WILSON, J., concur.



99 Cal.App.2d 833

HOOVER et al. v. STRIEGEL et al.
Civ. 17444.

District Court of Appeal, Second District, Division 3, California.
Oct. 16, 1950.

Thomas Fred Hoover and Barbara Marshall, an infant, by Pauline Houston, her guardian ad litem, sued Robert E. Striegel and Cora E. Striegel for injuries resulting when defendant Robert E. Striegel stopped his automobile at intersection and then made left turn and collided with a motorcycle driven by plaintiff Thomas Fred Hoover, which was coming through intersection from direction opposite to that in which automobile was traveling before automobile made left turn. The Superior Court of Los Angeles County, Otto J. Emme, J., entered judgments for the defendants, and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that a given instruction to effect that as a

matter of law the driver of a vehicle which has been brought to a stop before entering an intersection where a left turn is to be made need not, under any circumstances, signify his intentions so to do, was error prejudicial to plaintiffs.

Judgments reversed.

1. Automobiles ⇐171(9, 12)

A motorist may turn to left at intersection only after giving an appropriate signal in event any other vehicle may be affected by such movement, and turning to left in intersection, without warning, and cutting corner to go into intersecting street in front of a vehicle coming in opposite direction, may constitute negligence. Vehicle Code, §§ 544–546.

2. Automobiles ⇐171(9)

A driver of a motor vehicle which has been brought to a stop before entering into an intersection where a left-hand turn is to be made cannot, as a matter of law, proceed after stopping without signifying his intention to turn. Vehicle Code, §§ 544–546.

3. Automobiles ⇐245(16)

In action for injuries resulting when defendant stopped automobile at intersection and then made left turn and collided with plaintiff's motorcycle, which was coming through intersection from direction opposite to that in which defendant was traveling before defendant made left turn, whether motorcycle would be affected by defendant's turning to left, and so whether in exercise of ordinary care defendant should have given appropriate signal to indicate intention to turn left, were for jury. Vehicle Code, §§ 544–546.

4. Automobiles ⇐245(82)
Negligence ⇐93(5)

The mere fact that motorcycle which collided with automobile in intersection was being operated more than half an hour after sundown and that an ordinarily prudent person, placed in position of plaintiff passenger on motorcycle, would or should have known such fact, did not impute to such passenger the negligence of operator of motorcycle and did not constitute negligence on part of passenger as a matter of law.

5. Negligence ⇐93(1)

Negligence of driver of a vehicle in operating vehicle cannot be imputed to a guest who has no control over driver, or supervision or direction as to manner in which vehicle should be operated.

6. Negligence ⇐117

In action for injuries resulting when defendant stopped automobile at intersection and then made left turn and collided with plaintiff's motorcycle which was coming through intersection from direction opposite to that in which defendant was traveling before defendant made left turn, answer alleging in general terms that plaintiff motorcycle operator and his plaintiff passenger were guilty of contributory negligence did not include the defense of imputed negligence as to plaintiff passenger.

7. Appeal and error ⇐1064(1)
Automobiles ⇐246(10)

In action for injuries resulting when defendant stopped automobile at intersection and then made left turn and collided with plaintiff's motorcycle which was coming through intersection from direction opposite to that in which defendant was traveling before defendant made left turn, given instruction to effect that as a matter of law driver of vehicle which has been brought to a stop before entering an intersection where left turn is to be made need not, under any circumstances, signify intention so to do, was error prejudicial to plaintiff where probability was that jury found for defendant as instructed after first determining, because of such erroneous instruction, that defendant was not negligent. Vehicle Code, §§ 544–546.

Albert C. Garber, Los Angeles, Edwin Levin, San Francisco, for appellants.

Jones, Thompson & Kelly, Reginald I. Bauder, Henry F. Walker, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from judgments for defendants entered on verdicts of a jury

in an action for damages for personal injuries.

The accident occurred about 8:00 p. m. on June 25, 1946, at the intersection of Ferndale Avenue and Black Oak Drive in Los Angeles. The sun set at 7:08 p. m. that day. Plaintiff Hoover was driving his motorcycle south on Ferndale Avenue. Plaintiff Marshall was his guest-passenger. Defendant Robert Striegel was driving an automobile with lighted headlights north on Ferndale Avenue. He intended to make a left turn into Black Oak Drive. As he approached the intersection an automobile with lighted headlights was approaching from the north. After this car passed, without giving any signal he made a left turn, straddling the button as he did so. Striegel testified that he did not put out his hand for a left turn but just for a stop. He stopped at the intersection to allow the vehicle from the north to pass through. As Striegel was making the turn, plaintiffs on the motorcycle, without the headlight lighted, came into the intersection. The Striegel car collided with the motorcycle. When the vehicles came to rest, both wheels of the motorcycle were under the front bumper of the automobile.

Hoover testified he first saw the Striegel car when he was about 40 feet north of the north end of the intersection and at that time the car was about 80 feet from the south end of the intersection; that Striegel did not give any indication he was going to make a left turn. A police officer testified the accident occurred at 7:45 p. m. Two officers testified that when they arrived at the scene at 8:05 p. m., it was "near dark" —"in the late evening dusk state."

Appellants' assignments of error are that the court erred in giving two instructions, which we call A and B, and in refusing to give an instruction which we call C. The instructions read:

A. "You are instructed that the provisions of law requiring a motorist who is turning to the left to signify his intention to do so by giving an appropriate signal for a distance of fifty feet, do not apply to a vehicle which has been brought to a stop immediately before entering the intersection where the left turn is made." ("Requested by defendant.")

B. "You are instructed that while ordinarily the negligence of the operator of a vehicle is not imputed to a passenger on or in such vehicle, however, this rule is subject to the exception that should you find from the evidence that the motorcycle in question was being operated on the public highway one-half hour after sundown and one-half hour before sunup without a lighted headlight, and if you further find that an ordinarily prudent person, placed in the same position that Barbara Marshall was as a passenger on the motorcycle, in the light of all the surrounding circumstances would or should have known that the motorcycle was traveling on the public highway without a lighted headlight, and if you further find that the failure to have the lighted headlight contributed to the happening of the accident in any manner, however slight, then, unless you further find that any unusual circumstances were shown in evidence which excused her from negligence, if she was negligent, then neither the operator nor the passenger may recover from the defendants." (The instruction bears the notation "Requested by Judge.")

C. "You are reminded of the fact that the vehicle in which plaintiffs were riding at the time of the accident in question was then being operated by the plaintiff Thomas Fred Hoover. You are instructed that the driver's negligence, if any, may not be imputed to the other plaintiff and that, therefore, you should find that there was no contributory negligence on the part of the plaintiff Barbara Marshall, unless you should find that there was personal negligence on her part—that is, some negligent conduct of her own—which contributed as a proximate cause to her injury." ("Requested by plaintiffs".)

After the jury had deliberated about an hour, they returned to the courtroom. The foreman indicated they desired some instructions reread. The court asked which ones. "The Foreman: Someone stated where there is a left hand turn, the stopping signal was made, that you said it wasn't

necessary to make the left hand signal. That is one." The court then read section 544 of the Vehicle Code to the jury, the instructions set forth in the footnote,[1] and reread instruction A. The following then occurred: "The Foreman: That covers all of that. It also covers part of another question that was asked as to the legality of the motorcycle coming through without the light. I think you instructed us to regard the law in that last there.

"Mr. Bauder: I think Mrs. Anderson has a question.

"Mrs. Anderson: (A juror) if I may ask the Judge this question: That was just the point, that very last statement you made, Judge Emme. When we come to a stop our hand goes down naturally to give the signal. Then when we proceed and we are going to make a left hand turn we do make a signal to signify that we are turning left at that point; even though we have stopped and given the signal our hand goes down; then we do turn and the law says we make a signal this way to make a left turn.

"The Court: All I can do is read you the instructions and the provisions of the law which I have. I think the law I have read to you answers your questions. * * *

"A juror: Is this the law? If I am coming up to an intersection, I have made my stopsign, how does anybody know I am going to turn left unless when I proceed I put my hand out that I am going to turn left?

1. "You are instructed that the failure of a motorist to signal his left turn at an intersection and making such a turn when a motorist approaching from the opposite direction is so close as to constitute an immediate hazard, is negligence per se.

"The driver of a vehicle within an intersection intending to turn to the left should yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard.

"Said driver turning left having so yielded and having given a signal when and as required by this code may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the driver making the left turn.

"Both the approach for a right turn and a right turn shall be made from that portion of the roadway as close as practicable to the right-hand curb or edge of the highway.

"(b) Approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered, unless otherwise directed by markers, buttons or signs.

"(c) Local authorities in their respective jurisdiction may, by placing markers, buttons or signs within or adjacent to intersections, require and direct that a different course from that prescribed in this section be traveled by vehicles turning, and when markers, buttons or signs are so placed no driver of a vehicle shall make a turn other than as directed and required by such markers, buttons or signs.

"The words just quoted from the Vehicle Code namely, that 'no person shall turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety,' do not mean that the driver of a motor vehicle, before making such a turn, must know that there is absolutely no possibility of accident.

"They mean that before starting to turn a vehicle on a public highway, and while making the turn, the driver of the vehicle must use such precaution as would satisfy a reasonably prudent person, acting under similar circumstances, that the turn can be made safely.

"You are instructed that Sections 618, 619 and 620 of the California Vehicle Cole in full force and effect at the time of the happening of this accident provided that every vehicle, including motorcycles, during the period from one-half hour after sunset to one-half hour before sunrise, was required to be equipped with at least one, and not more than two, lighted head lamps while operated upon any public highway.

"In that connection you are further instructed that if you find from the evidence here that the motorcycle operated by the plaintiff Hoover was being operated in violation of this requirement, such conduct constitutes negligence in and of itself and, if such negligence proximately contributed to the happening of the accident, plaintiff Hoover is not entitled to recover and your verdict must be in favor of defendants."

"The Court: I have given you the law on that."

Later the jury again returned to the courtroom and the following occurred:

"The Court: Mr. Foreman, have you arrived at a verdict?

"The Foreman: Your Honor, they still differ on your instructions. I mean, they don't interpret them the same. We would like to have read over the four points of negligence and the last part that you read before in regard to the negligence of the boy running without lights.

"The Court: You mean the issues to be determined, the various forms of issues to be determined?

"The Foreman: The issues to be determined, yes."

The court then read California Jury Instruction Civil No. 113, issues to be determined, and asked: "What was the other question?

"The Foreman: The last part of the question—I mean the last part of what you read to us before about the boy running on a motorcycle without lights."

The court then reread instruction B on the question of imputed negligence.

Vehicle Code section 544, in part, reads: "No person shall turn a vehicle [from a direct course or move right or left upon a roadway] unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein in the event any other vehicle may be affected by such movement." Section 545, in part, reads: "The signals herein required shall be given either by means of the hand and arm or by a signal lamp or mechanical signal device of a type approved by the department". Section 546, in part, reads: "All signals herein required given by hand and arm shall be given from the left side of a vehicle in the following manner and such signals shall indicate as follows: (a) *Left turn*—hand and arm extended horizontally beyond the side of the vehicle."

[1-3] We are of the opinion that instruction A is manifestly not a correct statement of the law. A turn to the left can be made "only after the giving of an appropriate signal in the manner provided herein [hand and arm extended horizontally beyond the side of the vehicle] in the event any other vehicle may be affected by such movement." Turning to the left in an intersection, without warning, and cutting the corner to go into the intersecting street in front of a vehicle coming in the opposite direction may constitute negligence. Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 28 P.2d 932. The effect of the instruction was to tell the jury that, as a matter of law, the driver of a vehicle which has been brought to a stop before entering an intersection where a left turn is to be made, need not, under any circumstances, signify his intention so to do. Whether the motorcycle would be affected by defendant's turning to the left, and hence whether, in the exercise of ordinary care, he should have given the appropriate signal to indicate his intention to make the left turn were questions of fact for the jury. McDevitt v. Rogers, 58 Cal. App.2d 307, 308, 136 P.2d 323; Day v. General Petroleum Corp., 32 Cal.App.2d 220, 89 P.2d 718.

[4] The court erred in giving instruction B. This instruction told the jury that, as a matter of law, the negligence of the operator of the motorcycle was imputed to plaintiff Marshall if the motorcycle was being operated a half hour after sundown, without a lighted headlight, and if an ordinarily prudent person, placed in the position of plaintiff Marshall, "would or should have known that the motorcycle was traveling on the public highway without a lighted headlight," and if the failure to have the lighted headlight contributed to the accident; and that unless some unusual circumstances were shown which excused her from negligence, if she was negligent, neither she nor the operator could recover. The instruction is complex, confusing, and a wholly incorrect statement of the law. The law does not recognize any such exception to the general rule of imputed negligence as stated in the instruction. The mere fact that the motorcycle was being operated more than half

an hour after sundown and that an ordinarily prudent person, placed in the position of plaintiff Marshall, would or should have known such fact, did not impute to her the negligence, if any, of the operator; neither did it constitute negligence on her part as a matter of law. The instruction is a formula instruction and it completely ignores the question of proximate cause.

[5] Negligence of the driver of a vehicle in operating the machine cannot be imputed to a guest on the ride who has no control over him, or supervision or direction as to the manner in which the vehicle should be operated. In Edwards v. Freeman, 34 Cal.2d 589, at page 592, 212 P. 2d 883, at page 884, the rule is stated thus: "In the absence of the essential characteristic of the right of control, there is no true agency and, therefore, no 'imputation' of the driver's negligence to the passenger. [Citations.] * * * And, as said in the Marchetti v. Southern Pac. Co. case, supra (204 Cal. at page 681, 269 P. at page 530): 'The negligence of the driver of a machine * * * cannot be imputed to a passenger therein, in the absence of any evidence showing that the latter exercised some control over the driver or that he possessed the power to supervise or direct the manner in which the automobile should be operated. * * *'" There was no evidence of any relationship between plaintiffs Hoover and Marshall other than that of host and guest. There was no evidence that Marshall had any control over Hoover or any supervision or direction as to the manner in which the motorcycle should be operated. The mere fact that an ordinarily prudent person, placed in the position of Marshall, would or should have known that the motorcycle was being operated without a headlight, did not impute Hoover's negligence, if any, to her. The only evidence on the subject was that she did not know whether the headlight was lighted.

Instruction C is a standard form of instruction (California Jury Instruction Civil No. 210-C), a correct statement of the law applicable to the facts of this case, and upon the record should have been given. There being no evidence that plaintiff Marshall had any control over Hoover or supervision or direction as to the manner in which the motorcycle should be operated, the jury was required to find that there was no contributory negligence on her part unless it found there was negligent conduct of her own which contributed as a proximate cause to her injury.

[6] Further, the answer did not include the defense of imputed negligence. In general terms it was alleged that plaintiffs were guilty of contributory negligence. "Such a plea is not sufficient for one who seeks to charge a person with the negligence of another in the operation of an automobile; a defendant must assert that the injured person controlled, or had the right to control, the vehicle in which he was riding." Campagna v. Market St. Ry. Co., 24 Cal.2d 304, 307, 149 P.2d 281, 283.

[7] The evidence would support a determination that plaintiff Hoover's injuries were proximately caused by the negligence of defendant, or by his own negligence, or by the simultaneous negligence of both defendant and plaintiff Hoover. It would appear from the testimony of Robert Striegel that the jury could have readily found that he was negligent and that his negligence was a proximate cause of the accident. The evidence would support a finding that if he had given a signal for a left turn the accident would not have happened. It is apparent from the questions of the jurors that the jury placed great emphasis on instruction A. It was reread and emphasized. The verdict for defendant and against Hoover may have resulted from the tenable view of the evidence that although Hoover was not negligent he could not recover because under the erroneous view of the law, stated in instruction A, defendant was not negligent. The probability is that the jury did not decide whether Hoover was negligent, for if they followed the instruction as to the issues to be determined (which was reread), and we must presume they did, they first determined whether defendant was negligent, and having determined, because of instruction A, that he was not, they then found, as instructed to do, for defendant. On the evidence, the effect of instruction A was

to direct a verdict for defendant. The error was clearly prejudicial. Edwards v. Freeman, 34 Cal.2d 589, 594, 212 P.2d 883; Huebotter v. Follett, 27 Cal.2d 765, 770, 167 P.2d 193.

All three instructions applied to the case of plaintiff Marshall. Instruction B was not only reread and emphasized, but reread without any request therefor and out of context. If Hoover was negligent, his negligence did not excuse the negligence of Striegel as to plaintiff Marshall. It is doubtful whether the jury would have found against Marshall if erroneous instructions A and B had not been given and instruction C had been given. Everything we have said with respect to the prejudicial character of instruction A as to Hoover, applies to Marshall. It is apparent she suffered serious prejudice. We cannot say that had the errors not occurred, a different result would not have ensued. Plaintiffs are entitled to have their case retried under proper instructions.

The judgments are reversed.

SHINN, P. J., and WOOD, J., concur.



99 Cal.App.2d 808

PEOPLE v. HOWES.
Cr. 2667.

District Court of Appeal, First District, Division 1, California.

Oct. 16, 1950.

Vernon LeRoy Howes was convicted in the Superior Court, Santa Cruz County, James L. Atteridge, J., for grand theft, and he appealed. The District Court of Appeal, Peters, P. J., held that the information properly charged grand theft and that the evidence established defendant's guilt of a single offense of grand theft of money by larceny, not by embezzlement.

Judgment affirmed.

1. Larceny ⇐28(4)

An information based on series of thefts, but charging single offense of grand theft, need not specifically allege date and amount of each theft. Pen. Code, §§ 487, 952.

2. Indictment and information ⇐71

The sufficiency of indictment or information depends on whether it gives accused notice of offense charged. Pen. Code, § 952.

3. Indictment and Information ⇐110(3)

An indictment or information in words of statute defining offense charged is sufficient.

4. Criminal law ⇐1186(4)

Even a defective information or indictment will not result in reversal of conviction, unless a substantial right of defendant on merits is adversely affected. Pen. Code, § 960.

5. Larceny ⇐28(4)

An amended information, charging that defendant, on or about and between specified dates, in named city and county, wilfully and feloniously took more than $200 in money and of personal property of named partners, properly charged grand theft, though exact amount and precise dates of alleged misappropriations were not stated. Pen. Code, § 487.

6. Larceny ⇐60, 65

Evidence that defendant charged with grand theft of money of partnership operating garage with tire department headed by defendant at time of theft, took tires belonging to firm with intent to sell them for himself and keep proceeds, and that he sold tires and received money therefor with intent to keep it, which he did, established his guilt of grand theft of money, not tires, by larceny, not by embezzlement, as he was not in lawful possession of tires. Pen. Code, §§ 487, 503.

7. Trusts ⇐354

The owner of stolen property may impose constructive trust on proceeds of thief's sale thereof, as such proceeds belong to owner of property.

8. Larceny ⇐55

In prosecution for grand theft of money, evidence showed defendant's theft of money received by him as proceeds of his sale of his employer's automobile tires, so as to sustain conviction, regardless of whether evidence also showed theft of tires by defendant. Pen. Code, § 487.

9. Criminal law ⇐29

Where theft is accomplished by false representations, each receipt of stolen money or property by thief is usually held to constitute separate offense though false representations were made but once. Pen. Code, § 487.

10. Criminal law ⇐29

Where several deliveries of stolen goods are made by thief to seller thereof as parts of same general transaction, there is but one offense of larceny. Pen. Code, § 487.

11. Criminal law ⇐29

A series of thefts by employee from same employer as parts of general plan constitutes but one offense. Pen. Code, § 487.

12. Criminal law ⇐29

A series of thefts from same owner by same person with but one general intention or impulse and pursuant to one plan constitutes but one offense, whether accomplished by larceny or embezzlement. Pen. Code, §§ 487, 503.

13. Criminal law ⇐29

A series of thefts of automobile tires and proceeds of sales thereof from dealers by employee thereof, who was motivated generally by one design, purpose and impulse arising from a grievance because of dealers' failure to pay him commissions promised on tire sales, constituted but one offense, as there was but one general intent. Pen.Code, § 487.

14. Criminal law ⇐1170½(1)

Error, if any, in trial court's overruling of defendant's objection to question, asked state's witness on redirect examination by district attorney, concerning subject opened by defendant's counsel on cross-examination of witness, was not prejudicial to defendant.

15. Criminal law ⇐1166½(12)

The trial court's error remarking that defendant's counsel, whose objection to question asked state's witness on redirect examination was made after witness answered, was supposed to speak up loudly and could hear what was said, unless he needed a Sonotone like one of jurors, was rendered nonprejudicial to defendant by judge's apology therefor and statement that he meant no criticism of defendant's counsel.

16. Criminal law ⇐338(1)

In prosecution for grand theft of money received and kept by defendant as proceeds of his sales of automobile tires belonging to his employers while he was in charge of their tire department, defendant's counsel's interrogation of one of employers as witness concerning shortage in another department of employers' business was improper as involving collateral issue. Pen. Code, § 487.

17. Witnesses ⇐383, 392(1)

In prosecution for grand theft of money, received by defendant as proceeds of his sales of his employers' automobile tires as his own while he was in charge of tire department of employers' garage business, a bill, offered in evidence on defendant's cross-examination of state's witness, to rebut his testimony that tire retread shop operated by him did no cash business, was properly excluded as involving collateral matter on which witness could not be impeached, where date of bill was outside time covered by information. Pen.Code, § 487.

18. Witnesses ⇐291

The trial court's refusal to permit further interrogation of prosecution witness by defendant, on recross-examination, as to matters already discussed at length on cross-examination of witness, was not error.

19. Larceny ⇐65

Evidence sustained conviction of grand theft of money received by defendant as proceeds of his sales of his employers' automobile tires. Pen.Code, § 487.

I. B. Padway, San Jose, John R. Golden, San Francisco, of counsel, for appellant.

Fred N. Howser, Attorney General, David K. Lener, Deputy Attorney General, June D. Borina, District Attorney, Santa Cruz County, Santa Cruz, for respondent.

PETERS, Presiding Justice.

Appellant, Vernon LeRoy Howes, was found guilty of grand theft. From the judgment of conviction and from the order denying his motion for a new trial this appeal is prosecuted. Appellant contends that the information was insufficient, that the evidence, at most, shows a series of petty thefts and not grand theft, and that prejudicial error was committed by the trial court in its rulings, instructions and comments. There is no merit in any of these contentions.

Facts.

Crowley and Traulsen, a partnership, operate a general garage business in Watsonville. The garage operated a tire department which was the exclusive distributor of Firestone tires in the area. For three years prior to July of 1949, when his employment was terminated, appellant had been employed in the tire department of the garage, and for a year prior to that date had been in charge of that department. As head of that department he was responsible for the purchase and sale of all tires by the garage. He spent part of his working hours in the country soliciting business and making deliveries, and part of his time at the garage. He was paid for his services on an hourly basis, and also was promised by the partners a commission, but whether on net or gross profits is in dispute. Admittedly, no commissions were ever paid, and this fact was a source of friction between the parties.

The books of the garage were kept by a bookkeeper employed by the partnership. The accounts receivable ledgers showed accounts in the names of James Cantrell, Byers Garage, Charles Manfre, Richard Barnes, Tony Simas and Lloyd Mitchell. The evidence shows that appellant sold to the company and persons above mentioned, and to others, tires belonging to his employers, and pocketed the proceeds. In practically each case he represented to the persons he dealt with that he was engaged in business for himself as well as for his employer, and that the tires, which he sold for less than the usual price, were his tires.

The *modus operandi* of appellant can best be explained by a reference to the testimony of some of the witnesses. Cantrell testified that he operated a fleet of trucks in his produce and hay business; that he bought tires from appellant because he could get them cheaper than elsewhere; that when he first dealt with appellant he did not know that appellant was employed by Crowley and Traulsen; that appellant told him that he was buying tires in Salinas and Los Angeles and selling them for himself; that he made several purchases from appellant; that he paid appellant by checks made out to appellant or to cash; that the checks were for $88.65, $77 and $54; that a couple of months after he had paid for the tires he received a bill from the garage for the same tires; that he immediately went to the garage and talked to appellant who told him: "Don't worry about it, it is just a mistake; it will be all fixed up, cleared up"; that this occurred in June or July of 1949; that during the next month he made another purchase from appellant, and, at the end of that month, received another statement from the garage billing him for all of the tires he had purchased; that he did not know that these tires belonged to the garage.

Byers testified that he operates a garage; that in June or early in July, 1949, he bought two tires from appellant, giving appellant $56.64 in cash; that several weeks later he received a bill from the garage for $476.16, which billed him for the tires he had purchased and for many others that he had not purchased or ordered; that he asked appellant what the bill meant, and was told "it was just more or less routine"; that at his request appellant wrote on the bill "paid Roy."

Mitchell testified that he operates a tire shop; that in September, 1949, he was billed by the garage for $279.71; that included in the bill was a charge of $158.40

for tires and tubes which he had neither ordered nor received; that the spurious charge was on an invoice dated July 26, 1949; that he telephoned to the office girl at the garage and did not pay the $158.40.

Golarte is a truck driver and lettuce loader. He testified that in May, 1949, appellant brought three tires to his home and asked him to deliver them to one Manfre who had purchased them, and to collect $120 from Manfre; that he delivered the tires to Manfre who gave him a check made out to cash for $120; that upon appellant's direction, and in his presence, he cashed the check at a bar and appellant picked up and pocketed the money; that appellant then bought him a drink and left some money at the bar for Golarte to purchase drinks.

Manfre testified that a day or two before Golarte delivered the three tires he had discussed the purchase of tires with appellant; that appellant told him that Golarte had three tires for sale; that when Golarte delivered the tires he believed that the tires belonged to Golarte, and gave him the $120 check.

Simas testified that he made several purchases of tires from appellant and paid for them by checks made out to cash and delivered to appellant, or by checks made out to his employee Pini, who endorsed them to appellant; that he was billed by the garage for $102.23; that after appellant was arrested he discussed this bill with appellant; that appellant gave him a check for $100 on the morning of his preliminary examination; that the witness then called the police in appellant's presence and told them that appellant had paid him and that he was going to take the check to the garage; that the check was not honored by the bank on which it was drawn, appellant having no account there; that he thought appellant owned and operated the tire shop in the garage, and that the garage allowed him to use their billheads.

Pini, an employee of Simas, testified that he bought tires from appellant at the garage and paid for them with checks made out by Simas to himself or to appellant; that one check was for $25, and another for $30.

Barnes, who lived in Hollister and was a general trucker, testified that he purchased six tires from appellant at the garage; that for these he gave appellant two checks payable to cash, one for $112.47 and one for $100, and another check payable to appellant for $162; that later he was billed for these tires by the garage; that the tires were all Firestones and delivery was made in Pajaro.

The Salinas store manager for the Firestone Company, one Fagan by name, was shown a statement on Crowley and Traulsen's billhead dated May 27, 1949, which indicated that the Salinas store had borrowed twelve truck tires from appellant's garage, and testified that the cost of such tires would have been over $900; that he had never received the tires and had never heard of the merchandise invoiced therein; that appellant had never personally bought tires from the Salinas store.

The garage bookkeeper testified that most of the sales tags for the tire department of the garage were made out by appellant, and she identified many such tags as being in the handwriting of appellant. These were the tags that were used as the basis for sending bills to Cantrell and the others.

Crowley, one of the partners, testified that after he discovered that Manfre had three Firestone tires he checked the inventory and found no shortages, because entries had been made to cover up the shortages.

Jacobson, a Watsonville police officer, talked to appellant on July 29, 1949, in the police station. He testified that he confronted appellant with certain canceled checks and asked him to explain them; that appellant stated that he was selling tires on his own, that is, that he would sell "on the side to somebody, make a couple of dollars on it, then I would replace the tires in stock"; that he would keep the inventory straight by buying tires from brokers and thus replace those he had taken; that appellant, at that time, signed a statement, which, in part, stated: "About six months ago I started to sell some new tires at a small margin of profit. I used the money to replace the tires and kept the profit I made on the sale. As

near as I can remember, I made about 30 sales in this period of time which netted me approximately $200. I'm sure it was not over this amount. This is all I ever took from the garage."

Another Watsonville police officer, Dicks by name, testified that on August 5, 1949, appellant was re-arrested when it appeared that the shortage was greater than at first thought, and at that time appellant made to him substantially the same statements made to Jacobson.

Appellant took the stand in his own defense and told a story that was contradicted by other witnesses in almost every respect. He testified that after the garage failed to give him a commission on tire sales, he started to buy and sell tires on his own account. Some of these tires, he said, he purchased for cash at the Salinas Firestone store, that store billing them to a Salinas service station. Fagan, the Salinas manager, positively denied this. Appellant also said that some of the tires were purchased from the Firestone San Jose store. This was denied by the operators of that store. Appellant denied ever selling tires belonging to the garage. He purported to explain the Golarte-Manfre transaction by testifying that the tires belonged to Golarte and that he, the appellant merely told Manfre about Golarte. He denied making one cent on the transaction. This story was directly denied by Golarte. Some of the checks cashed by him he identified as being given by him for tires which he had sold personally to Simas and Cantrell. He admitted making out the memorandum slip indicating that the Salinas store had taken twelve tires. This was denied. He denied receiving any money from Byers, claiming that Byers had dealt with the garage. He denied writing "paid Roy" on Byers' bill. He wrote "Paid in full, Roy" nine times on a sheet of paper. He explained his admissions to the police officers as being simply admissions that he was selling tires for himself, and that his statement that he owed the garage $200 merely meant that was the profit he made on the private sales, and the police officers had told him such profits belonged to the garage. He testified that the Salinas tire purchases were made from Fagan or from Rawley, and the San Jose purchases from Leo Cain or his successor.

O. E. Heinrich, as a handwriting expert, testified that the words "paid Roy" were written by appellant. Also in rebuttal, Ehlert, who runs the retread shop for Firestone in San Jose, and who succeeded Leo Cain, testified that appellant had never been in his San Jose store between January 1 and August 1, 1949; that on August 1, 1949, appellant tried to buy some recapped tires from him, and he told appellant that his store only processed tires and did not sell them or handle money; that appellant asked him to sign a statement certifying that appellant had purchased tires from the retread shop, but he refused to do so; that his shop would pick up, process and return tires to Crowley and Traulsen; that the records of his store show that appellant purchased no tires from that store between January 1 and August 1, 1949. Leo Cain, predecessor of Ehlert, testified that he had had no dealings with appellant personally, and positively denied selling any tires to appellant.

Alston, in charge of the retread shop for Firestone in Salinas, testified that he and Fagan picked up and delivered retreads to Crowley and Traulsen's during the period here involved, and that he had never sold any tires to appellant; that between August 15 and September 1, 1949, appellant asked him to sign a statement that he had sold appellant new tires; that he refused to sign the statement because it was not true; that appellant asked him to get the store manager to sign it; that the witness left the paper on the desk of the manager who was then on vacation; that he knew nothing about the twelve tires charged to the Salinas store; that he had never received them. Fagan likewise denied receiving the tires, and testified that his records showed no such transaction. He denied ever selling tires to appellant personally, and denied that he had covered up such sales by charging the transaction to service stations.

The jury, after fifteen minutes deliberation, found appellant guilty of grand theft as charged.

[1-5] The first contention of appellant is that the amended information is fatally defective. The amended information accuses appellant of a felony, namely: "Violation of Section 487 of the Penal Code of the State of California in that on, or about and between the 14th day of May, 1949, and July 26, 1949 in the City of Watsonville, County of Santa Cruz, State of California, said defendant did wilfully, unlawfully and feloniously take more than $200.-00, in money, lawful money of the United States, and of the personal property of Crowley & Traulsen." It is the thought of appellant that such an information is defective because the exact amount of the defalcation is not stated, nor is the precise date of the misappropriation or misappropriations set forth. He also argues that, since the offense is charged as having occurred between May 14, 1949, and July 26, 1949, it cannot be ascertained whether one theft of "more than" $200 occurred, or a series of thefts totalling "more than" $200 is charged, and that if less than $200 was taken each day, even though the total exceeded $200, he would be guilty of only a series of petty thefts and not of grand theft. It seems to be the thought of appellant that when an information is based on a series of thefts, although but one offense is charged, the date and amount of each theft must be specifically alleged. Undoubtedly, prior to the 1927 amendments to section 952 of the Penal Code, Stats. of 1927, Chap. 612, p. 1043, the contention of appellant would have been sound. The case of People v. Barnard, 63 Cal.App. 562, 219 P. 756, cited by him, and others that could be cited, so held. But many of the old technical rules of pleading in criminal cases, including the rule contended for, were eliminated by the 1927 amendment, and since that time the Barnard case has been specifically overruled. In People v. Chait, 69 Cal.App.2d 503, 512, 159 P.2d 445, 451, the court directly held that the Barnard case was no longer the law because it "was decided before the Legislature in 1927 amended the Penal Code to eliminate many of the frivolous technicalities found in the decisions relating to criminal procedure." After discussing the 1927 amendment the court stated, 69 Cal.App.2d at page 513, 159 P.2d at page 451, that the present rule is that, "the indictment is to be tested in the view of section 952 of the Penal Code—whether it is sufficient to give the accused notice of the offense of which he is charged. * * under that section it is sufficient to charge the accused 'in the words of the enactment describing the offense.'" The rule is now well settled that an indictment or information is sufficient if it follows the wording of the statute defining the offense. It is also the law that even a defective information or indictment will not result in a reversal unless a substantial right of the defendant on the merits is adversely affected. Section 960, Penal Code; People v. Codina, 30 Cal.2d 356, 359, 181 P.2d 881; People v. Schoeller, 96 Cal.App.2d 61, 214 P.2d 565; People v. Macias, 77 Cal.App.2d 71, 78, 174 P.2d 895; People v. Benenato, 77 Cal.App.2d 350, 362, 175 P.2d 296; People v. Gelardi, 77 Cal.App.2d 467, 472, 175 P.2d 855; People v. Israel, 91 Cal.App.2d 773, 778, 206 P.2d 62; People v. Tullos, 57 Cal. App.2d 233, 238, 134 P.2d 280. Tested by these standards, the amended information properly charges grand theft.

Appellant does not seriously attack the sufficiency of the evidence to show that he committed a series of crimes, but contends that the evidence shows that he stole tires and not money, and that, at most, the evidance shows a series of petty thefts and no single theft of over $200 as required by section 487 of the Penal Code to constitute grand theft.

[6] It is the contention of appellant that because he was charged with taking money and not with stealing the tires, it must have been the theory of the prosecution that appellant was lawfully in possession of the tires, but stole the proceeds received on the various sales, and thus committed embezzlement and not larceny. But in either event, so he claims, there were only a series of petty thefts each of less than $200. A proper analysis of the facts and the law demonstrates that these arguments are unsound. Whether or not appellant was in lawful possession of the particular tires is a difficult question to answer, but whether he was or not he was

guilty of the theft of money, although he may also have been guilty of the theft of the tires. It could be argued that, although appellant was in charge of the tire department, and therefore in lawful possession of the tires as agent of the garage, he did not sell the tires as agent and such sales were not made of tires entrusted to him for the purpose of selling them for the garage, but were sales of tires he claimed to own on his own account. Thus, the case is not necessarily one where the trusted agent sells his principal's property and unlawfully pockets the proceeds, but may be one where appellant, intending to sell the tires for himself and to keep the proceeds, took the tires, sold them for a cheap price, and pocketed the proceeds. Thus, after he took the tires with such intent he was not in lawful possession of them, and when he took the money he had a felonious intent. This would constitute larceny and not embezzlement. See discussion 10 Cal. Jur. p. 240, § 4. There can be no doubt that the evidence shows that at the very time he received the money from the purchasers, appellant intended to keep it. The cash paid was paid to and kept by him; some of the checks were made to him or to cash, and cashed by him, and the proceeds retained. All of the evidence indicates that from the time appellant first approached the purchasers he intended to keep the proceeds of such sales for himself. Thus, since the felonious intent existed at the very time the money was taken, the crime is grand theft by larceny and not grand theft by embezzlement.

[7, 8] But, says appellant, such argument proves that he stole tires and not money, and therefore his conviction of stealing money cannot stand. While the evidence may show a theft of the tires, it also shows a theft of the money. A thief does not become the owner of the property that he steals. He gets no title to it, and can pass no title to it. But when he sells stolen property, the owner of the property may impose a constructive trust on the proceeds. Why? Because the proceeds belong to the owner of the property. Where the thief disposes of the proceeds for his own benefit, he has stolen money of the owner of the property. These principles are well settled. See discussion 3 Scott on Trusts, §§ 508, 508.1 and 508.2, pages 2432-2438; 3 Bogert on Trusts and Trustees, (Part 1), § 476, p. 31; see, also, Brodie v. Barnes, 56 Cal.App.2d 315, 322, 132 P.2d 595. Thus, the argument that the evidence may show a theft of the tires, even if sound, does not demonstrate that the evidence does not show a theft of the money. A theft of money was clearly shown by the evidence, and whether the evidence also shows a theft of the tires is a false factor.

But, argues appellant, the evidence demonstrates that although the total value of the tires and the total value of the proceeds of the sales of such tires far exceeded $200, each sale was made to a separate purchaser, and each sale was for less than $200. Based on this premise, which is in accordance with the evidence, appellant claims that he is guilty only of a series of petty thefts and not of grand theft.

[9] This raises a somewhat difficult problem. There are many cases discussing the problem of whether a series of thefts constitute one offense or a series of offenses, and they are not all consistent. The following general rules, however, would seem to be established:

1. Where the theft is accomplished by means of false representations, each receipt of money or property is usually held to constitute a separate offense, although the false representations were made but once. People v. Ellison, 26 Cal.App.2d 496, 79 P.2d 732; People v. Miles, 37 Cal.App.2d 373, 99 P.2d 551; People v. Rabe, 202 Cal. 409, 261 P. 303; People v. Coyle, 134 Cal.App. 612, 25 P.2d 991; People v. Serna, 43 Cal.App.2d 106, 110 P.2d 492.

[10, 11] 2. In larceny cases, where there are several deliveries by the thief to the seller of stolen goods, all part of the same general transaction, it has been held that there is but one offense. People v. Dillon, 1 Cal.App.2d 224, 36 P.2d 416; People v. Mills Sing, 42 Cal.App. 385, 183 P. 865. Likewise, a series of thefts from the same employer by an employee, all part of

a general plan, constitutes but one offense. People v. Yachimowicz, 57 Cal. App.2d 375, 134 P.2d 271.

[12] 3. Theft by way of embezzlement has given rise to some difficulties. It has been held that a series of embezzlements from the same owner constitutes separate offenses. People v. McCann, 96 Cal.App. 664, 274 P. 621; People v. Hatch, 13 Cal.App. 521, 109 P. 1097; People v. Bartnett, 15 Cal.App. 89, 113 P. 879; People v. Stanford, 16 Cal.2d 247, 105 P.2d 969. But it has been held also that where the defrauded person makes a series of payments to the embezzler in connection with the same transaction, each payment is not a separate offense, and there is but one offense. People v. Bratton, 125 Cal. App. 337, 14 P.2d 125; People v. Fleming, 220 Cal. 601, 32 P.2d 593.

From these cases, and others that could be cited, it can be said that the general test as to whether there are separate offenses or one offense is whether the evidence discloses one general intent or discloses separate and distinct intents. The particular facts and circumstances of each case determine this question. If there is but one intention, one general impulse, and one plan, even though there is a series of transactions, there is but one offense, and this is so whether the theft is accomplished by larceny or embezzlement.

Appellant, in his attempt to demonstrate that here there were separate offenses, places his main reliance on People v. Stanford, 16 Cal.2d 247, 105 P.2d 969. In that case an attorney embezzled trust funds belonging to his client. He was indicted on three counts, the first charging that he took $500 from the fund on a certain day; the second that he later took the balance of the fund amounting to over $7,000; and the third, that still later he took over $2,000 that subsequently came into the trust fund. It was held that the defendant's conviction on the three counts of embezzlement should be affirmed. In reaching this result the court, 16 Cal.2d at page 251, 105 P. at page 971, stated:

"* * * The question of whether a series of wrongful acts constitutes a single or multiple offense must in the last analysis be determined by the peculiar facts and circumstances of each individual case. In the present case the evidence showed that the thefts referred to in the first three counts of the indictment were separate and distinct transactions, which occurred on different dates, and involved the taking of different sums of money. Such separate transactions constituted separate offenses. [Citing cases.]

"While transactions in series have frequently been held to constitute but parts of one continuous proceeding, and hence but one offense, this result is more commonly reached in cases of larceny than in those of embezzlement. This follows from the fact that in the crime of larceny the defendant has obtained possession of his victim's property by wrongful means, and completion of the offense is not dependent upon whether he thereafter appropriates the fruits of his theft by a single act or at successive intervals. On the other hand, in the case of an embezzlement, the property is already in the rightful possession of the defendant, and his subsequent fraudulent appropriation is of the essence of the crime. (Pen. Code, sec. 503.) Thus in each of the cases relied upon by appellants [citing such cases], the particular facts and circumstances showed that the exact time of completion of the misappropriation was not controlling and for this reason the court was justified in concluding that the several transactions involved constituted one offense. In the present case, the evidence, as already stated, established clearly the commission of separate offenses by distinct appropriations of different sums of money on separate occasions."

As already pointed out, the present crime is grand theft committed by way of larceny and not by way of embezzlement. The case mainly relied upon by the People to show that here there was but one offense, and the case which, in our opinion, is controlling, is People v. Yachimowicz, 57 Cal. App.2d 375, 134 P.2d 271. There, as here, the defendant was convicted of grand theft. He had been demoted by his employer, who operated a hardware store, and felt that he had been unfairly treated. In the instant

case the appellant felt that he had been unfairly treated because the partners failed to pay him the commission he contended had been promised. It is a reasonable inference from the evidence that appellant was motivated in stealing the money by this grudge in reference to the commissions. In the Yachimowicz case the defendant had been demoted to night watchman. He drove his automobile to work and loaded it with store equipment which he transported to his home. When finally apprehended, he had removed company property, over a considerable length of time, and, of course, on many different occasions, of the total value of $15,000. The information charged him with the theft of five guns of the total value of over $200, but failed to disclose whether the guns were all taken at once or taken on separate days. In reference to this problem the court stated, 57 Cal.App.2d at page 381, 134 P.2d at page 274: "On the point that the evidence in the case is insufficient to sustain the judgment of conviction, it appears that the only matter warranting comment relates to the value of the property which the appellant was convicted of stealing. He argues that if each gun were taken on a separate day there would be no grand theft under any theory known to the law. It must be conceded that there was no direct evidence that all five guns, of the value of more than $200 were taken by the appellant at the same time, nor was there any direct evidence that they were taken one by one at different times. However, it is apparent that the entire plan of stealing resorted to by appellant was in furtherance of his design to secure personal and monetary satisfaction for his treatment at the hands of his employers. Upon the evidence received by the trial court and under the reasoning of People v. Mills Sing, 1919, 42 Cal.App. 385, 183 P. 865, we feel that the defendant was justly convicted of the crime of grand theft. We quote from the language in that opinion, 42 Cal.App. at page 396, 183 P. at page 869, as follows: 'The law is that, if the different asportations from the same owner are prompted by one design, one purpose, one impulse, they are a single act, without regard to time.'" See, also, People v. Dillon, 1 Cal.App.2d 224, 229, 36 P.2d 416; People v. Fleming, 220 Cal. 601, 611, 32 P.2d 593.

[13] In the instant case, it is our opinion that the evidence shows that the various acts of appellant were all motivated, generally, "by one design, one purpose, [and] one impulse," i. e.—the grievance against the partners for failure to pay him the commissions which he contended had been promised. Thus, as in the Yachimowicz case, the appellant was pursuing a general plan of taking property from his employer whom he felt had mistreated him. There was one general impulse, and one general plan that motivated all of the challenged acts. There was but one general intent, and therefore, but one offense.

Appellant objects to certain rulings, comments and instructions of the court. One such objection is that the trial court committed error in its rulings in reference to the amount of the claimed shortage. No inventory was produced. Crowley, one of the partners, testified as a prosecution witness. On cross-examination the defense was apparently trying to show that the garage books were kept in a slipshod manner. Crowley was asked if an inventory had not been taken just before appellant assumed control of the tire department. He replied that such had been done. Then Crowley was asked if appellant had not shown him a $1,500 error in the inventory. He responded that he could recall no such conversation. On redirect he testified that an inventory had been taken before appellant took over the tire shop, and another after the employment of appellant had terminated. As to this last inventory, which he had not taken personally, he testified that it was short $2,500. It took three or four questions to develop this answer, and no objection was made to any of these questions. After the answer had been given, appellant objected on the ground that "this witness not being competent to testify"—apparently because he had not taken the inventory himself. The trial court overruled the objection because it was made too late —after the answer was in.

[14, 15] Under later cross-examination, Crowley testified that Manfre telephoned

him and told him that he had three Firestone tires, whereupon the witness conferred with appellant to see if any tires were missing. No missing tires were found so far as the inventory was concerned, but the witness stated that entries had been made to cover up the shortage. On redirect the prosecution asked the witness if the reason why no shortage was discovered was because he gave credit to appellant for sales and deliveries that had not been made. The witness answered that such was the fact, whereupon appellant's counsel objected that the question was leading. The court then stated: "The question has been asked and answered * * * You are supposed to speak up loudly; you can hear what is being said, unless you need one of those Sonotones like one of the members of the jury * * *." A colloquy ensued and the court apologized for its facetious remark and specifically stated that it had meant no criticism of appellant's counsel. It is quite clear that, even if the objection were timely and should have been sustained to this line of questioning, which is doubtful, the error could not have been prejudicial inasmuch as appellant's counsel had opened the subject on cross-examination and examined the witness at some length. The heavy humor of the court was out of place, but the timely admonition rendered this error non-prejudicial.

[16] After these occurrences a very confused colloquy took place between appellant's counsel, the court and the witness Crowley. Apparently appellant's counsel was trying to extract from Crowley an explanation favorable to his client of the claimed shortages. It is apparent that all concerned were confused between a $400 shortage in another department and the claimed $2,500 shortage in the tire department during the time appellant was in charge. Appellant's counsel kept asking about the $400 shortage, and the court properly refused to permit the interrogation because it involved a collateral issue. The confusion that obviously existed was largely caused by appellant's counsel. If he desired to pursue this inquiry, he should have more clearly indicated the subject matter involved.

[17] Appellant also objects to the refusal of the court to permit the defense to impeach the prosecution witness Ehlert. This witness operated the Firestone retread shop in San Jose. He testified on direct that his retread shop did no cash business at all. On cross-examination the defense sought to introduce a bill made out to a particular company in order to show that the store did occasionally sell for cash. The trial court sustained an objection to the introduction of this bill on general grounds and on the specific ground that the offered bill was dated August 22, 1949, and was therefore outside the time covered by the information. It would appear that the transaction involved a collateral matter upon which the witness could not be impeached. People v. McDaniel, 59 Cal.App. 2d 672, 140 P.2d 88; People v. Pollock, 31 Cal.App.2d 747, 89 P.2d 128. Moreover, later the court did admit the exhibit for the limited purpose of rebutting the testimony that the Firestone Company did not sell at wholesale to any company other than to a Firestone dealer.

[18] Objection is made to the limitation placed by the court on the recross-examination of the prosecution witness Wright. An examination of the record discloses that the questions asked had already been discussed at length on cross-examination. It was not error to refuse to permit further interrogation on the point.

[19] Appellant makes several technical objections to several of the instructions, and to many of the comments of the court. We have examined each such assignment and find that no instruction was erroneous, far less prejudicial. The jury was fairly and correctly instructed. As to the challenged comments, appellant's main objection seems to be that the trial judge was unnecessarily curt, sarcastic and impatient with counsel for appellant, and that, while no one incident alone would cause a reversal, the cumulative effect was to prejudice appellant's defense. It would unduly prolong this already lengthy opinion to con-

sider these numerous assignments in detail. We have read the record. We think that the evidence overwhelmingly demonstrates appellant's guilt. While the trial judge was occasionally unnecessarily curt and sarcastic, and while some of his rulings were unduly strict against appellant, the record demonstrates, on the whole, that appellant had a fair trial. Certainly the record demonstrates that appellant's conviction has not resulted in a miscarriage of justice. No prejudicial error occurred.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



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